

HIGH COURT OF ORISSA : CUTTACK
W.P.(C) No.12860 of 2004

In the matter of:

An applications under Articles 226 and 227 of the Constitution of India.

AND

In the matter of:

Dhirendra Pandua ... Petitioner

Versus

The Election Tribunal-cum-District
Judge, Balasore & others

Opp.Parties

For petitioner

M/s D.Nayak, U.R. Jena,
A. Mishra, G.K. Rath,
R. Rout & G. Dash

For Opp. Parties.

M/s Asim Amitav Dash,
Radhakanta Nayak & Aparesh Bhoi.

PRESENT :

THE HONOURABLE MR. JUSTICE P.K.MOHANTY

AND

THE HONOURABLE MR. JUSTICE J.P. MISHRA

Date of Judgment : 07.10.2005

P. Mishra, J. The petitioner calls in question the order / judgment (Annexure-2) dated 16.11.2004 of the Election Tribunal-cum-District Judge, Balasore (O.P. No.1) passed in Election Misc. Case No.7 of 2003.

2. The present writ petitioner Dharendra Pandua (O.P. No.1 before the Election Tribunal) contested from Ward No.5, Basudevapur N.A.C. on 19.9.2003 so also Opp Party No.5-Surendra Chandra Mohanty from Ward No. 15. Both of them were elected from their respective wards as Councillors as per the election result dated 20.9.2003. The writ petitioner contested and was also elected as the Chairman of the N.A.C. on 30.9.2003. The present Opp.Party No.5 filed an Election Petition dated 15.10.2003 under section 38 of the Orissa Municipal Act, 1950 (hereinafter referred to as the "Act") alleging disqualification of the writ petitioner under Sections 16 (1) (iv) and 17 (1) (b) of the Act.

3. In the said petition before the Election Tribunal, the Opp. Party No.5 pleaded inter alia that the writ petitioner filed cases before the Apex Court claiming himself to be a Leprosy Patient and requiring fitness certificate to get employment and to avail all other eligibility to contract marriage, contest election etc. In the said case, the writ petitioner took several steps alleging Government for not providing adequate treatment including periodical checkups, It is the case of the Opp. Party No. 5 before the court below that the writ petitioner is still suffering from Leprosy and therefore is disqualified to continue as the Councillor as well as the Chairman of Basudevpur N.A.C.

4. The writ petitioner contested the case denying the allegation and claimed himself to have been cured on the date of election for Councillor as well as the Chairman of the N.A.C. Both the parties examined two witnesses each and also placed reliance on documents i.e. Exts.1 to 12 on behalf of Opp. Party No.5 and Exts. A and B on behalf of the writ petitioner.

5. The Election Tribunal framed as many as five issues and came to the conclusion that the present petitioner is still suffering from Hansen's disease and directed dis-continuance of the petitioner from the Chairmanship of the N.A.C as well as Councillor.

6. The aforesaid conclusion is under challenge in this writ application on the ground that the Election Tribunal failed to interpret section 19 of the Act and committed error in concluding absence of limitation for an application U/s. 38 of the Act. The other ground taken by the petitioner is that the order of the Tribunal is based only on presumption that he (petitioner) is still suffering from Leprosy. Reliance has been placed under Annexure-3 (Ext. B) dated 30.7.1994 filed in the court below. None of the Opp. Parties have filed counter. Only Opp. party No.5 has argued while supporting the order of the Election Tribunal and has taken us to various exhibits in the L.C.R. Mr. D. Nayak, learned counsel for the petitioner has assailed the order of the Tribunal on the following grounds :-

i. that the election petition filed by present Opp. Party No.5 before the Tribunal is barred by time as it was not filed within fifteen days from the date of declaration of the result of the election on 20.9.2003; and

ii. that the petitioner though was suffering from Leprosy was fully cured much prior to the election for the Councillor and Chairman of the Basudevpur N.A.C. With the above submissions, the learned counsel prays to intervene by exercising the extra-ordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution.

7. Mr. A. A. Das, learned counsel for the Opp. Parties while supporting the order of the court below submits that there is no limitation to file an election petition in case of Councillor/Chairman of Municipality / N.A.C. infected by the disease subsequent to the election. According to the learned counsel, the writ petitioner is still suffering from the same disease and he has pointed out to the exhibits in the L.C.R. to substantiate his case.

8. Before delving into the submission, we would like to say that a writ of certiorari can be issued for correcting errors of jurisdiction. It can also be issued when the Court or Tribunal acts illegally in exercising of its

undoubted jurisdiction, when it decides without giving an opportunity to the parties violating principles of natural justice. The Court issuing the writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. The consequence being that the court will not review finding of facts reached by the inferior court or Tribunal even if they be erroneous. An error in the decision may be amenable to a writ of certiorari if it is a manifest error apparent on the face of the proceedings. This Court is vested with the powers of superintendence over all courts and Tribunals through out the territories in relation to which it exercises jurisdiction excepting any court or Tribunal under any law relating to the Armed Forces.

9. There are catena of decisions of the apex Court on the afore-mentioned views of which we may quote the conclusion reached by the Apex Court in, paragraph 38 (Suryadev Ray v. Ram Chandra Ray) : A.I.R 2003, S.C. 3044

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(1) Amendment by Act No.46 of 1999 with effect from 1.7.2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court against which remedy of revision has been excluded by the CPC Amendment Act No.46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Articles 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e. when a subordinate court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts the within the bounds of their jurisdiction. When the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long drawn process of reasoning. Where two inferences are reasonably possible and

the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The Court may feel inclined to intervene where the error is such as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in super session or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

The relevant provisions of the Act in regard to the disqualification, limitation and the jurisdiction of the District Judge for enquiry are quoted below:-

"Section 16- Disqualification of Candidates for election- (1) No person shall be qualified for election 34[*** as a Councillor of a Municipality if such person-

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(iv) has been adjudged by a competent Court to be of unsound mind or is 36[.***] a leprosy or a tuberculosis patient; or

Section 17- Disqualification of 43[*] Councillor-** (1) Subject the provisions of Section 38, 43[***] a Councillor shall cease to hold his office, if he -

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(b) becomes of unsound mind 44[***] a leprosy or a tuberculosis patient; or

Section 19 - Form and presentation of petition -

(1) The petition shall be presented before the District Judge together with a deposit of two hundred rupees as security for cost within fifteen days, after the day on which the result of the election was announced and shall specify the ground or grounds on which the election for the opposite party is questioned and shall contain a summary-of the circumstances alleged to justify the Election being questioned on such grounds.

(2) The petition may be presented by any candidate in whose favour votes have been recorded and who claims to be declared elected in place of the person whose election is questioned, or by twenty-five or more elected of the Ward.

(3) A person whose election is questioned and when the petition state that any other candidate shall be declared elected in place of such person, every successfully candidate, who has polled more votes than such candidate, shall made opposite party to the petition.

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Section 38: District judge to decide question of disqualification of Councillor -

(1) Whenever it is alleged that any person, who has been elected as 59[***] Councillor is disqualified under Section 16 or 17 and such person does not admit the allegation or whenever any 59[***] Councillor himself is in doubt, whether or not he has become disqualified for office under Section 16 or 17, such 59[***] Councillor or any other Councillor may, and the Chairperson at request of the Municipality shall apply to District Judge of the district in which the Municipality area is situated.

(2) The said Judge after making such inquiry as he deems necessary shall determine whether or no such person is disqualified under Section 16 or 17 and his decision shall be final.

(3) Pending such decision, the Councillor shall be entitled to act as if he were not disqualified." There is no doubt that Section 38 confers jurisdiction on the District Judge to enquire into the allegation, as he deems necessary to determine the disqualification under Sections 16 or 17. We do not exactly approve the reasoning mentioned in Issue No,2 by the Tribunal but would like to place the reason for non-applicability of Section 19 of the Act to the election petition filed by present Opp. Party No.5 in the court below. Section 16 (1) (iv) of the Act envisages that no one shall be qualified for election as a Councillor of a Municipality if he has been adjudged by a competent court to be of unsound mind or is a Leprosy or a Tuberculosis patient. Section 17 (1) (b) provides even if the Councillor elected with normal health becomes of unsound mind, a Leprosy or a Tuberculosis patient shall cease to hold his office. It

means a person elected as a Councillor either holding' the post of Councillor or Chairman shall cease to hold his office if he is infected with the aforesaid diseases subsequent to the election while holding office. In the present case, the case of Opp. Party No.5 is that the writ petitioner was suffering from Leprosy and is still continuing as such. It is admitted by the petitioner that he was a Leprosy but has been fully cured and not within the purview of any disqualification clause. Section 19 of the Act provides form of presentation of petition allowing fifteen days time from the date of announcement of result of the election mentioning the grounds of challenge along with the, security deposit. In the present case, the opp. party no. 5 brought the allegation of a continuing disease (Leprosy) from which the writ petitioner was/is suffering due to want of treatment, A Councillor/Chairman may be infected by the disease (Leprosy) while holding office though elected with a normal health. Therefore, limitation provided U/S 19 of the Act has no application to the present case.

10. It is contended by Mr. D. Nayak, learned counsel for the petitioner that the Tribunal should have accepted Annexure-3, which was issued in the year 1994. He also contends that Leprosy is a curable disease and the petitioner was/is free from any germs. The argument advanced by the learned counsel Mr. Nayak has been dealt with by the Tribunal while deciding Issue Nos. 1,3 & 5. Since it has been admitted by the learned counsel Mr. Nayak during the course of argument that the writ petitioner was a Leprosy and he had moved the Apex Court in Civil Appeal No. 1749/87 including all contempt applications filed by the petitioner, it is no more necessary to deal in detail with the orders passed by the Apex Court excepting the most relevant portions and documents.

11. It is admitted that Contempt Petition No.246 of 2002 in C.M.P. No. 437 Of 1998 in Civil Appeal No. 1749 of 1987 was filed by the present writ petitioner Dharendra Pandua before the Apex Court. Consequent to the filing of the contempt application, in I.A. 175 (Ext. 12) dated 10.2.2003 (in CMP 437/88) the Apex Court observed that Leprosy patients of Balasore district were not being taken for periodical investigation in terms of O.M. dated 25.6.1980 of the Ministry of Health and directed the concerned persons including the petitioner to approach the State Government in particular the Department of Health Services in Leprosy Cell of Orissa State and West Bengal. The follow up action of the order (Ext. 12) of the Supreme Court was taken. Moreover, the writ petitioner Mr. Dharendra Pandua himself also filed an application to the Chief District Medical Officer, Balasore praying early implementation of the order dated 10.2.2003 of the Apex Court supported by an affidavit which is not at dispute. The said affidavit (Ext.4) is of 7.4.2003. In the said affidavit, it has been clearly mentioned that the petitioner is a risk prone Leprosy case with reversal reaction for nerve damage. He has also admitted that he is undergoing severe nerve pains and acute nerve palsy and undergoing severe joint pains. Further, it has been stated therein that he was not supplied with life saving drugs by the competent authority. So, all these averments in Ext.4 clearly depicts that the writ petitioner was suffering from risk prone Leprosy on 7.4.2003. On 31.3.2004, the Apex Court observed that "according to the applications for want of proper treatments they have not been cured of Leprosy and resultantly requisite certificates are not being issued for the purpose of employment". The Apex Court further observed that "the State Government did not submit any report with regard to the follow up action which are nerve function Impairment Test, Sensory

Test and Voluntary Muscle Test. On 20.3.2004 the State Government filed the affidavit before the Apex Court showing that complete investigation, tests or treatment were not provided to the applicant patients (including writ petitioner). So, it was not possible on their part to say the patients to have fully cured of Leprosy. So, the writ petitioner was not given treatment till 20.3.2004 and had not undergone the tests".

12. Learned counsel has placed reliance on Ext.3 which is Ext.B in the court below. The certificate was issued by the Medical Officers of Regional Leprosy Training & Research Institute, Bankuda in the state of West Bengal on if the contention and the book is accepted, the petitioner has to show that he had undergone all treatments/tests subsequent to swearing the affidavit dated 7.4.2003 (Ext.4). Admittedly, Leprosy patient has to be treated for years together and in this case the election for Councillor took place on 19.9.2003 and election for Chairman took place on 30.9.2003, which indicate that the petitioner was still suffering from Leprosy.

Therefore, we do not find any patent error on the face of records to interfere in the order of the Tribunal exercising supervisory jurisdiction and dismiss the writ application being devoid of merit. Parties to bear their respective costs. The interim order dated 9.12.2004 passed in Misc. Case No: 12539 of 2004 stands vacated.

P.K. Mohanty, J.

I agree

Sd/- J.P. Mishra, J.
Sd/- P.K. Mohanty, J.

Orissa High Court, Cuttack.
Dated 7th October, 2005 / HKD/PCP