

ORISSA HIGH COURT : CUTTACK
W.P.(C) NO.14930 OF 2006

In the matter of an:

Application under Articles 226 and 227 of the constitution of India.

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Smt. Sabita Majhi

... Petitioner

Versus

State Election Commission & Ors.

... Opp. Parties

For Petitioner

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M/s J. Patnaik, A. Ch. Mohanty
 G.N. Rout, B. Pradhan and
 S. Bhagat.

For Opp. Parties

M/s S.K. Das, S.B. Jena
 S. Soren and P. Chuli
 (for O.P. No.1)

PRESENT:

THE HONOURABLE MR. JUSTICE P.K. TRIPATHY
AND

THE HONOURABLE MR. JUSTICE R.N. BISWAL

Date of Judgment- 23.02.2007

P.K. Tripathy, J. Petitioner challenges the order dated 3.11.2006 of opposite party no.3 in deleting her name from the Electoral Roll Annexure-5, with prayer to quash that order with a direction to maintain her name in the Electoral Roll for Ward No. 10 of Rahania Grama Panchayat.

2. Petitioner's case is that as a housewife her permanent residence is at village Rahania and accordingly in the Assembly Electoral Roll her name finds place as a voter in 18 Bhandari Pokhari Assembly Constituency. On the basis of direction of the State Election Commissioner (in short 'Commissioner') as per Notification dated 18.08.2006, Annexure-6, the process of preparation and scrutiny of the Electoral Roll for the Grama Panchayat was undertaken. On 21.09.2006 Ward-wise preliminary electoral roll was published. Objection to the entry of the name of petitioner in the Electoral Roll was filed on 28.09.2006. The S.I. of Schools, Bhandari Pokhari Block as the Panchayat Election Returning Officer (in short 'E.R.O.') considered and rejected that objection after hearing the parties and accordingly order was passed not to delete the name of the petitioner, but again from 16.10.2006 to 20.10.2006 time was allowed for filing

of objection and objection was filed opposing to petitioner's entry in the Electoral Roll. Petitioner filed her written statement asserting her position as a permanent resident of Rahania village notwithstanding the fact that her husband is serving at Bhubaneswar with whom she spends some time there and because of that her name finds place in the Electoral Roll of 50 Bhubaneswar Assembly Constituency. Petitioner also filed the nativity Certificate obtained on 02.11.2006 from the local Tahsildar, Bhandari Pokhari to substantiate her bonafide as a permanent resident of Rahania, but on 03.11.2006 opposite party no.3 directed deletion of her name from the Electoral Roll and accordingly the same was carried out in Annexure-5 (Electoral Roll), vide serial no. 169 of Ward No. 10. Because of the aforesaid conduct of the opposite party no.3, the petitioner would be deprived to exercise her franchise in the ensuing Panchayat election. She has further stated that the aforesaid conduct of the opposite party no.3 is not in conformity with the orders and instruction contained in the notification of the State Election Commission. Annexure-6 is a copy of that notification. Ventilating her grievance in that manner and also stating that the provision in the Orissa Grama Panchayats Election Rules, 1965 (in short 'the Rules, 1965) and the provisions in Representation of People's Act, 1950 (in short the Act, 1950) were not properly followed, petitioner has sought for the relief already indicated above.

3. In a Misc. case, contention was raised by the petitioner stating that her name has been omitted from 50 Bhubaneswar Assembly Constituency Electoral Roll. In that respect opposite party no.1 has stated that such order was passed on 08.12.2006 only on the representation of the petitioner.

4. Two separate counter affidavits have been filed, one by opposite party no.1 and the other jointly by opposite party nos.2 and 3. In a nutshell, in both the counter affidavits they reiterate correctness in the decision taken by opposite party no.3 in deleting the name of the petitioner from the Electoral Roll, inter-alia, on the ground that after her marriage she has been staying with her husband at Bhubaneswar since last 17 to 18 years and at times she along with her husband visits village Rahania and under such circumstance it cannot be said that their ordinary place of residence is village Rahania.

5. Mr. Jagannath Pattnaik, learned Senior Advocate argue that objection filed on 19.10.2006 opposing to petitioner's entry in the Electoral Roll could not have been entertained by the E.R.O. in view of the provision in Rules 5(5) and 6(5) of the Rules, 1965 together with the provision in Section 9(2) of the Orissa Grama Panchayat Act, 1964 (in short "the G.P. Act"), because Annexure-6 is not a notification under sub-section (2) of Section 9. His second contention is that a person is disqualified to be in the Electoral Roll, if any of the disqualification clauses provided in Section 16 of the Representation of the People Act, 1950 (in short "the Act 1950") is attracted. Since no such disqualification clause is applicable to the case of the petitioner, she could not have been disqualified and consequentially the impugned order should not have been passed by opposite party no.3. On factual side, he argued that the Nativity Certificate and Land Pass Book, Annexure-9 series indicate that the statement relating to ordinary residence of the petitioner which was made available to opposite party no.3 is not reliable and should not have been acted upon.

6. Almost similar contention was raised by R.N.Acharya,

learned Addl. Govt. Advocate and Mr.S.K. Das, learned counsel respectively, appearing for the State and Election Commission. It is their contention that the Notification Annexure-J/3 is in consonance with the direction of the State Election Commission contained in Annexure-6 and also Section 9(2) of the GP Act and Rule 4 of the Rules, 1965. According to them, the instruction contained in Annexure- 6 and J/3 provide for preparation of preliminary Electoral Roll, hearing objections on the entries thereof and thereafter to prepare draft Electoral Roll and to provide opportunity of filing objection, hearing on the objection and thereafter to pass order and on that basis to publish the final Electoral Roll. Accordingly, the Draft Electoral Roll having been prepared-and published on 16.10.2006, it was notified that objection to any entry should be filed by 20.10.2006 (in Form Nos.16 and 17). On 19.10.2006 objection was filed by Sudhakar Majhi as against the entry of petitioner's name in the Draft Electoral Roll. Petitioner filed her counter, the matter was enquired into providing opportunity of hearing and on due consideration of the same together with the recommendation of the Inspector of Schools who had made the enquiry after preparation of the preliminary Electoral Roll, opposite party no.3 found the petitioner not to continue in the Electoral Roll of 18 Bhandari Pokhari Assembly Constituency and consequentially in the Voter List of Rahania Grama Panchayat Electoral Roll and accordingly on 03.11.2006 such decision was taken. Opposite party members have stated that contention of the writ petitioner that the Inspector of Schools rejected the objection raised by Sudhakar Majhi is false in as much as the Inspector of Schools, on enquiry, found substance in that objection, but being not the Electoral Registration Officer, he submitted his report to opposite party no.3. Annexure-H/3 is a copy of that report and Annexure-E/3 to G/3 series are the statements of witnesses in course of enquiry on the objection to the Draft Electoral Roll.

7. According to the opposite party members, by the date the impugned decision was taken, petitioner was a voter in the Electoral Roll for the 50 Bhubaneswar Assembly Constituency and 18 Bhandari Pokhari Assembly Constituency so also a voter in the Electoral Roll prepared for the Bhubaneswar Municipal Corporation. Annexures-A/3, B/3 and C/3 are the respective relevant Electoral Rolls. Learned counsel for the opposite parties submitted that the Electoral Roll prepared in conformity with Annexure-6 and the enquiry conducted for that purpose being not challenged on the ground of malice or otherwise, the fact finding decision of opposite party no.3 may not be disturbed. At the same time they take shelter of Article 243 (O) of the Constitution of India and the ratio in the case of Boddula Krishnaiah and another v. State Election Commissioner, A.P. and others, A.I.R. 1996 S.C. 1595 and Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, A.I.R. 1978 S.C.851, in support of the contention that when the process of election starts, Court is not to interfere with the election process so as to put hindrance in that process.

8. We may note here that the last noted submission of the opposite party members though advanced at the time of reply to the argument of the petitioner was termed as a preliminary objection. We accept the same as a contention challenging to maintainability of the writ petition inasmuch as

the writ petition was heard for final disposal and no preliminary point was left to be considered exclusively at that stage.

7. Article 243(O) reads as hereunder:- "Notwithstanding anything in this Constitution:-

- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-K, shall not be called in question in any Court:
- (b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

9. In the case of Mohinder Singh Gill (supra), their Lordships have said that election process starts with issue of the notification under Section 14 of the Representation of People's Act, 1951 (in short the Act 1951) when notification for general elections is made and it ends with declaration of the result under Section 66 of the Act, 1951. It appears from Annexure J/3 that Notification was made by the State Election Commission on December 26th 2006 for holding the election as per the programme. In the order under challenge or in the order Annexure-6, nothing is indicated regarding notification on election to any Panchayat and in this writ petition election to any Panchayat is not called in question. Admittedly no law relating to delimitation of any constituency or allotment of seat to such constituency is challenged in this writ petition. Under such circumstances, the prohibition under Article 243(O) is not applicable to adjudicate the dispute before us. To that extent we reject the objection of the opposite party members.

10. As noted earlier, one of the grounds on which petitioner challenges the order of deletion of her name from the electoral Roll is that objection was entertained beyond the time prescribed under Rules 5(5) and 6(5) of the Rules, 1965. It appears from the said Rules that the Electoral Roll for the relevant assembly constituency is the base document for preparation of Electoral Roll for the Panchayat Constituency. Combined reading of the relevant provisions viz Section 9(2) of the GP Act and Rules 4, 5, 6 and 8 of the Rules 1965 it is clear that unless the State Election Commission directs otherwise, the Electoral Roll of the Assembly Constituency be borrowed and distributed ward-wise and a draft Electoral Roll be prepared and notified inviting objection in Form Nos 16 and 17. Form no. 16 relates to application for addition of name in the Electoral Roll and Form no. 17 relates to deletion of any name from the Electoral Roll. Objections, if any, be filed within a period of seven days from the date of publication of the draft Roll and no objection filed beyond that period be entertained.

11. Section 9(2) of the Act vests authority on the State Election Commission to direct otherwise in the matter of preparation of electoral rolls. Annexure-6 is the instruction of the State Election Commission, as admitted by both the parties, duly notified in the matter relating to instruction and direction imparted for preparation of the Electoral roll in whole of the State for different Grama Panchayat Constituencies relating to the ensuing Grama Panchayat Election. The instructions therein clearly stipulate that the last Electoral Roll of the Assembly Constituencies be the basis for

preparation of the ward-wise preliminary Electoral Rolls. For this purpose the Electoral Roll of Assembly Constituency relatable to the Ward shall have to be obtained and split up into separate Electoral Rolls for every Ward of respective Grama Panchayats. The copy of the preliminary Electoral Roll be kept open at Grama Panchayat Office for inspection by the Public for the entire period fixed for filing claims and objections. After disposal of claims and objections filed before the Electoral Registration Officer, he will compile the same and make necessary amendment to the preliminary Electoral Roll and prepare Draft Electoral Roll and that be kept open for inspection in the office of Grama Panchayat as well as in the office of Panchayat Samiti for the period notified by the Commission. Any person aggrieved on the decision of the Electoral Registration Officer can make an application to the Block Development Officer-cum-Electoral Registration Officer within the date given in schedule-II. Applications in that respect received in Block Offices be acknowledged by granting receipt. The Block Development Officer-cum-Electoral Registration Officer shall conduct further enquiry under Rule 7(2) of the Rules 1965. He shall peruse the record of the concerned Electoral Registration Officer, consider the claims or objections and dispose of the applications in accordance with the instructions in Annexure-6 and thereafter the Draft Electoral Roll be made final.

12. The aforesaid instructions of the Commissioner, as argued by the petitioner, is not in conformity with Section 9(2) of the Act and departs from the provisions in Rules 5(5) and 6(5) of the Rules, 1965. On a bare perusal of the instruction of the State Election Commission, we find that the instructions contained therein, as noted above, speak of scrutiny at the level of preparation of preliminary Electoral Roll and also draft Electoral Roll, whereas provisions in Rules 5 and 6 speak of making of scrutiny at the level of preparation of preliminary Electoral Roll only. But that departure from Rules 5 and 6 is protected by provision in Section 9 (2) of the Act which authorizes the State Election Commission to notify the procedure for preparation of the Electoral Roll. Since Annexure-6 has been notified accordingly and in the writ petition there is no whisper that the 'notification is a departure from Section 9(2) and in course of hearing of this case nothing positive could be submitted before us, except raising the aforesaid contention, we find that the above noted objection taken by the petitioner on Annexure-6 is not sustainable.

13. It appears from the Notification, Annexure-6 that a period of four days was provided for filing objection to the draft Electoral Roll, Objection against inclusion of petitioner's name in the Electoral Roll was filed in time on 28.09.2006. That was enquired into by the S.I of Schools, Bhandari Pokhari Block, as Panchayat Election Returning Officer. Annexure H/3 is the report of that Officer. Petitioner has stated in the writ petition and also submitted before us that due to non-filing of voter list of Bhubaneswar Assembly constituency showing petitioner's name therein the objection filed by Sudhakar Majhi was rejected. Report of the School Inspector, Annexure H/3 falsifies that assertion. It appears from that report that after the enquiry, the said Officer reported that petitioner does not ordinarily reside in village Rahania and therefore appropriate action should be taken. When the matter stood thus, as against the entry in the Draft Electoral Roll objection was filed by said Sudhakar Majhi on 19.10.2006, the last date being 22.10.2006. That was again enquired into by the B.D.O., and he took the decision and passed order that petitioner being in the Electoral Roll of Bhubaneswar Assembly Constituency, her name and her husband's name should be deleted from the Electoral Roll of Ward no.

10 of Rahania Grama Panchayat. On a careful perusal of all the documents and on examination of the contention of the parties together with the provision in Section 9 (2) of the G.P. Act and Rules 5 (5) and 6 (5) of the Rules, 1965 and the notification of the State Election Commission, Annexure-6, we do not find the aforesaid objection of Sudhakar Majhi being barred by time. On the other hand, the decision of the Electoral Registration Officer is based on materials, which was collected in course of enquiry. For, the reasons indicated above, the decision of the Electoral Registration Officer cannot be termed as illegal or perverse and therefore, we are not to interfere with the same.

14. As noted earlier, in the meantime, name of petitioner was deleted from the electoral roll of 50-Bhubanswar Assembly Constituency. It was stated by the Opposite party members that such deletion was made in view of the application in Form no. 16 filed by the petitioner. That decision having been taken subsequent to the order of the Electoral Registration Officer for deleting her name from Electoral Roll, Annexure-5, therefore that changed circumstance does not improve the case of the petitioner.

15. For the foregoing reasons, petitioner is not entitled to any relief in this writ petition and accordingly it stands dismissed. However, it does not debar the petitioner to pursue for inclusion of her name in the Electoral Roll in appropriate place in accordance with the provision of law. Under the given facts and circumstance we award no cost.

Sd/- P.K. Tripathy, J
Sd/- R.N. Biswal, J

R.N. Biswal, J.

I agree.

Orissa High Court, Cuttack
The 23th February, 2007/ Parida.