

Surubali Deep Vs. Jamuna Naik

Surubali Deep Vs. Jamuna Naik

SooperKanoon Citation : sooperkanoon.com/1084368

Court : Orissa

Decided On : Oct-19-2012

Appellant : Surubali Deep

Respondent : Jamuna Naik

Advocate for Pet/Ap. : Mr. Mishra, Mr. Himansu Sekhar Mishra

Judgement :

HIGH COURT OF ORISSA: CUTTACK W.P.(C) No.18186 of 2012 In the matter of an application under Articles 226 & 227 of the Constitution of India. -----Surubali Deep, Wife of Kamal Lochan Deep, Vill/PO: Khatjhura, PS: Bolangir Sadar, Dist: Bolangir. Petitioner Opp. Parties -VersusJamuna Naik, Wife of Purna Chandra Naik, Vill/PO: Bubel, PS: Bolangir Sadar, Dist: Bolangir. For Petitioner : M/s. H.S.Mishra, A.K.Mishra, A.S.Behera & R.Dash For Opp. Parties : Mr. Jagabandhu Sahu (for Caveator-O.P. NO.1) -----P R E S E N T: THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA Date of Order:

19. 10.2012 B.N.Mahapatra,J.Challenge has been made to the order dated 12.09.2012 passed under Annexure-6 by the Civil Judge (Senior Division), Bolangir (hereinafter referred to as Election Tribunal) in ELP No.21 of 2012 in which the Election Tribunal has allowed the petition dated 06.09.2012 filed by the Election Petitioner with a prayer to direct the Headmaster of Government High School, Bahaler and Headmaster of Panchayat High 2 School, Bandhapada to produce the admission register of Prasanna Deep, Panchanana Deep and

Brajaswari Deep.

2. Mr. Mishra, learned counsel for the petitioner files further affidavit in Court inter alia stating therein that opp. party no.1 has filed petition dated 24.8.2012 on 6.9.2012 in I.A. (Elec. Misc.) Case No.21 of 2012 in the Court of Civil Judge (Sr. Division), Bolangir. The learned Court below has decided Annexure-3 taking into consideration of filing of petition on 6.9.2012. The opp. party no.1 has not filed any petition other than the Annexure-3 with the prayer to direct the Headmaster to produce the Admission Register of the persons concerned. Mr. Sahoo, learned counsel for opp. party no.1 files a Memo enclosing the certified copy of the petition dated 24.8.2012 filed before the learned Civil Judge (Sr. Division), Bolangir on 6.9.2012. In view of the above, the petition dated 24.8.2012 filed by the election petitioner is the same petition which the Election Tribunal describes as petition dated 6.9.2012 in its order, as the petition dated 24.8.2012 was filed before it on 6.9.2012.

3. Petitioners case in a nutshell is that opposite party No.1 filed Election Petition under Section 44-B of the Panchayat Samiti Act before the Election Tribunal bearing Election Misc. Case No.21/2012 to declare the election of the petitioner void/invalid and to declare the election petitioner as elected Panchayat Samiti member of the Village Bhubel, Puintala Block on the ground that the petitioner has got more than two children in 3 violation of Section 45-V of Panchayat Samiti Act after the cut off date with other grounds. On receiving the notice, the petitioner appeared and filed objection in detail and prayed to dismiss the Election case. However, the Trial Court while proceeding with hearing of the case the election petitioner filed a petition on 24.08.2012 (Annexure-3) with a prayer to direct the Headmaster of Government High School, Bhaler and Headmaster of Panchayat High School, Bandhpada to produce admission register in respect of persons mentioned in the petition on the ground that she has to prove her case on the basis of the certificate granted by the Headmaster of two Schools. The election-petitioner filed her objection under Annexure-4 stating that the petition under Annexure-3 is not legally maintainable; the petitioner does not disclose the month and year of admission; petition is vague and the same cannot be entertained. Despite the same, the Election Tribunal illegally passed the impugned order dated

12.09.2012 and allowed the petition dated 24.08.2012 filed by the election-petitioner and rejected the objection petition filed by the present petitioner.

4. Mr. Himansu Sekhar Mishra, learned counsel for the petitioner submitted that the Court can only consider a petition under a particular law and whether within the scope and ambit of said provisions of law any order can be passed. The election-petitioner in the petition under Annexure-3 having not mentioned the provisions of law under which application has been filed the said petition is not maintainable. Opposite party No.1, the election-petitioner deposed in her evidence while examined 4 herself as PW-1 that the alleged certificates relate to the date of birth of her children. The Election Tribunal in a most illegal manner without applying judicial mind mechanically allowed the petition filed by the electionpetitioner under Annexure-3 and directed the Headmaster of Government High School, Bhaler and Headmaster of Panchayat High School, Bandhapara to produce admission register. Opposite Party No.1 having not disclosed the year of admission register required to be produced by mentioning the names of the students the Election Tribunal should not have directed to produce certain register connecting some exhibits which is not mentioned by the election petitioner in its application. Learned Tribunal should have considered that Order 16, Rule 6, CPC provides for issuance of summons to any person to produce document. Therefore, the learned Tribunal should not have examined any person under Order 16 Rule 7 without issuing summons. Concluding his argument Mr.Mishra, prayed to quash Annexure-6 by issuing an appropriate writ/order.

5. Mr. Jagabandhu Sahu, learned counsel for the opposite party submitted that the petition under Annexure-3 was filed by the electionpetitioner to prove her case with a prayer to issue direction to Headmaster of Government High School, Bhaler and Headmaster of Panchayat High School, Bandhpada to produce the admission register in respect of persons named in that petition. Election petitioner in her evidence stated that Ext.2 is birth certificate of Prasanta Deep, Ext. 3 is birth certificate of Panchanana Deep and Ext.4 is date of birth of Brajeswari Deep issued by 5 the concerned two Headmasters. In Annexure-3, the Election Petitioner has given details of the name of the children of the petitioner and the certificates issued by the respective Headmasters. Pursuant to the impugned

order, the Headmaster of Government High School, Bhaler has already been examined. Therefore, Mr. Sahoo, prayed for dismissal of the writ petition.

6. On the rival contentions of the parties, the question that arises for consideration by this Court is as to whether there is any infirmity or illegality in the order passed by the Election Tribunal on 12.09.2012 in ELP No.21 of 2012 issuing summons to the Headmasters to produce the admission register bearing No.40/868 dated 20.07.2009 containing the entry regarding the admission of student Prasanta Deep and to produce admission register bearing No.79/669 dated 27.04.2006 regarding admission of student Brajeswari Deep and also to issue summons to Headmaster, Panchayat High School, Bandhpada to produce admission register for the year 2005-06 containing the fact of admission of student Panchanan Deep with reference to certificate issued by them under Annexures- 2, 3 and 4; 7. The first ground of challenge to the petition filed by election petitioner under Annexure-3 praying for a direction to two concerned Headmasters for production of the admission register of the respective Schools is that there is no mention of any provision of law under which 6 said petition (Annexure-3) has been filed and therefore the said petition is liable to be rejected.

8. Undisputedly, no provision of law has been mentioned in the petition made under Annexure-3 seeking the relief claimed therein. not the question arises as to whether for non-mention of the provisions of law in the petition, the same is liable to be rejected and consequently the Election Tribunal is not justified to hold that non-mention of relevant section in a petition cannot be a ground to reject the said petition because whenever a petition is filed the same has to be considered as per law.

9. Needless to say that non-quoting of provisions of law will not disentitle a party to the relief which he is entitled to on the basis of pleadings made in a petition.

10. Erroneous mention of legal provision in a petition does not deprive an applicant of his right. (See Prabhakara Rao H. Mawle V. Hyderabad State Bank, AIR 196.Andhra Pradesh 101).

11. Appellants application though labelled to be one under Section 33 of Act prayer made therein was to set aside award. Such wrong or inappropriate mention of provision of law would not affect contents stated in the application. (See Union of India vs. Sagarmull Agarwal, AIR 200.Sikkim

33) 12. At this juncture, it is felt necessary to refer the decision of the Honble Supreme Court and Delhi High Court. The Honble Supreme Court in the case of the Vice-Chancellor, Jamu University and another V. 7 Dushinant Kumar Rampal, AIR 197.SC 114.held that when an authority makes an order which is otherwise within its competence, it cannot fail merely because it purports to be made under a wrong provision of law, if it can under any other provision; a wrong label cannot vitiate an order which is otherwise within the power of the authority to make.

13. If power to do an act or pass an order can be traced to an enabling statutory provision even if that provision is not specifically referred to the act or such order shall be deemed to have been done or made under the enabling provision [See Pine Chemicals Ltd. & Ors. V. Assessing Authority, (1992) 2 SCC 683]..

14. The High Court cannot refuse to decide an appeal on merits by treating an order of the District Judge as void merely because of erroneous mention of the Hindu Marriage Act in it as no order could be rendered bad only because the provision of power was wrongly mentioned (See Osborne Lewis Jordan vs. Phylis Sylvia Jordan and another, AIR 198.Delhi 72).

15. In view of the above legal proposition, this Court is of the view that non-mention of relevant provision of law in a petition or mention of a wrong provision of law in a petition cannot be a ground to reject the petition. It is the duty of the Court which dispenses justice has to apply the correct provisions of law so as to deliver the relief to the party who is entitled to it. Therefore, the Election Tribunal is perfectly justified to hold that non-mention of relevant provision in the petition cannot be a ground to reject the petition

16. The second ground of attack on the impugned order is that the election petitioner in her evidence while examined herself as PW-1 stated that the certificates relate to the date of birth of her children. Therefore, the Election

Tribunal is not justified directing issue of summons to the concerned Headmasters of the two Schools to produce the admission register pertaining to three children named in the petition filed by the election petitioner under Annexure-3.

17. Undisputedly, learned Tribunal passed the impugned order on the basis of the petition filed under Annexure-3 and the evidence of the election petitioner under Annexure-5 wherein the certificates issued by the concerned Headmasters in respect of three children of the writ petitioner (opposite party No.1 in the election petition) and pleadings in the election petition.

18. The election petitioner in her cross-examination stated as follows:I have two sons and two daughters. I cannot say the date of birth of my four children. I have filed their School certificates in the Court. Said certificates have been marked. I cannot say the date mentioned in the said certificates.

. In the deposition of election-petitioner under Annexure-5, no where she stated that Exts. 2, 3, and 4 relate to birth certificates of children of the Election petitioner. On the other hand, the election petitioner in her deposition stated as follows:- 9

9. Ext.1 is the copy of result sheet of election of Panchayat Samiti Member of village- Bubel supplied to me by B.D.O.-cum-Election Officer, Puintala Block. Ext.2 is birth certificate of Prasanta Deep issued by Headmaster, Government High School, Bhaler regarding date of his birth (with objection). Ext.3 is the certificate issued regarding date of birth of Panchanan Deep issued by Headmaster, Panchayat High School, Bandhapara (with objection). Ext.4 is the certificate issued regarding date of birth of Brajeswari Deep issued by Headmaster, Government High School, Bhaler (with objection.).

19. Surubali Deep is opposite party No.1 in the Election Petition. It is nobodys case that Exts. 2, 3 and 4 relate to birth certificate of the children of the election petitioner.

20. Further, the election-petitioner in her petition under Annexure- 3 has stated as follows:1. That, the petitioner in order to prove her case has relied three certificates of Panchanan Dip, Ku. Brajeswari Dip and Prasanta Dip which was

gratned by the Headmaster of the Govt. High School, Bhaler and Headmaster of Panchayat High School, Bandhpada respectively. In order to substantiate the age of three children, the Headmasters concerned have given the date of birth from the Admission Register, which are in their respective custody.

2. That, admission Registers of both the Schools are in the custody of the Headmasters concerned, for which, Headmaster of Govt. High School, Bhaler be directed to produce the Admission Register with respect to the admission of Prasanta Dip and Kumari Brajeswari Dip, so, also the Headmaster, Panchayat High School, Bandhpada be directed to produce the Admission Register with respect to the Admission of Panchanan Dip. Hence prayed that, the Headmasters of the respective High School be directed to produce the Admission Register for the persons concerned mentioned above

21. Conjoint reading of Annexure 3 and objection of election- petitioner under Annexure-4 and deposition of Election Petitioner in paragraph 9 quoted above makes it clear that the petition under Annexure-3 has been filed for a direction to the Headmasters of the respective High Schools to produce admission register in respect of three children, namely, Panchanan Deep, Brajeswari Deep and Prasanta Deep to prove their date of birth with reference to certificate issued by the Headmasters of the two Schools. In view of the above, part of the statement of the Election Petitioner in cross-examination relied upon by Mr. Mishra has no consequence.

22. The third ground of challenge to the impugned order is that opposite party No.1 having not disclosed the year of admission register required to be produced by mentioning the name of the students, the Election Tribunal should not have directed to produce certain register connecting some exhibits which is not mentioned in the Election Petition. In paragraph 3 of the Election Petition No.21 of 2012 under Annexure-1, the election-petitioner stated that opposite party No.1 had got three children out of which two are male and one is female. One Prasanta Deep is the last son of opposite party No.1, who was born on 23 rd March, 1997 as per the register bearing No.40/868 dated 20.07.2009 issued by the Headmaster, Government High School, Bhaler, Dist: Bolangir which presupposes

that after the cut off date the last child, namely, Prasanta Deep was born. So, opposite party No.1 had got more than three children at 11 the time of the filing of the nomination paper. Thus, it was pleaded that opposite party No.1 is disqualified to contest the election in terms of Section 45-V of Panchayat Samiti Act, 1959 as she has more than two children after the cut off date. Thus, it is found that in the election petition, the election-petitioner has categorically pleaded with regard to disqualification of the writ petitioner in terms of Section 45-V of the Act. In her petition under Annexure-3 the petitioner has also given the names of three children. The election petitioner in order to prove her case has examined herself and filed birth certificates issued by the Headmasters of the Schools which have been marked by the Election Tribunal as Exts. 2, 3 and 4 respectively. The learned Tribunal also held that the petition of the election petitioner cannot be rejected on the ground that the month and year of the admission register has not been mentioned in the petition because in Exts. 2, 3, and 4 there is clear mention of the year of the registers for which the said certificates have been issued. Therefore, it cannot be said that the Election Tribunal is not justified in allowing the petition dated 24.08.2012 filed by the petitioner and issuing summons to the Headmasters of Government High School, Bhaler to produce admission register No.40/868 dated 20.07.2009 containing entry of admission of Prasanta Deep to produce admission register bearing Sl. No.79/669, dated 27.04.2006 regarding admission of student Brajeswari Deep and in issuing summons to the Headmaster, Panchayat High School, Bandhapada to produce the admission register of 12 the year 2005-06 which contains the fact of admission of student Panchanan Deep.

23. Otherwise also, the power exercised by the Election Tribunal directing production of admission register of the respective schools and examination of the Headmasters of the said Schools are within the competence of the Election Tribunal in view of the statutory provision contained in Section 44-H of the Act.

24. The fourth ground of attack of Mr. Mishra to the impugned order is that Order 16, Rule 6, CPC provides for issuance of summons to any person to produce any document. It does not say for examination of witness which the Tribunal has done in the present case. In order to examine a witness as provided under Order 16, Rule 7, CPC separate summons should have been issued. Order 16, Rule 6, CPC

postulates that any person may be summoned to produce the document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. Order 16, Rule 7, CPC postulates that any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power. Therefore, if a person is present in the Court pursuant to the summons issued under Order 16, Rule 6, CPC to produce document, the Court may require such person to adduce evidence or to produce any document then and there in his possession or power. In that event, no separate summons is necessary to examine such person as contended by Mr.Mishra.

25. Apart from the above, the Honble Supreme Court in the case of Kailash Vs. Nunkhu and others, AIR 2000 SC 2441, held that the trial of election petition is entirely different from the trial in a Civil Suit. Therefore, the procedure provided for trial of Civil Suit under CPC is not applicable in its entirety to the trial of the election petition. The applicability of the procedure in Election Tribunal has been circumscribed by two riders. Firstly, procedure prescribed in CPC is applicable as nearly as may be. Secondly, CPC would give way to any provisions of the Act or any Rules made thereunder. Therefore, the procedure prescribed in CPC applies to election trial with flexibility and only as guideline.

26. In view of the above, the Election Tribunal is justified to allow the petition dated 24.08.2012 (Annexure-3) (which the Election Tribunal in the impugned order has referred to as petition dated 06.09.2012) filed by the election-petitioner and also justified in rejecting the objection dated 11.09.2012 (Annexure-4) filed by the writ petitioner.

27. In the result, the writ petition is devoid of merit and accordingly dismissed at the admission stage. ... B.N.Mahapatra, J.Orissa High Court, Cuttack Dated 19TH October, 2012/ss