

**IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT
BHUBANESWAR.**

Present:

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 04th Feb. '15.

Election Appeal No.166 of 2012.

[Arising out of the order dated 03.12.2012 passed by the learned Civil Judge (Jr. Division), Bhubaneswar in Election Petition No.1/101 of 2012.]

Muralidhar Behera, aged about 52 years, S/o. Nilakantha Behera of Village - Simulipatana, P.O./P.S. - Chandaka, Dist. - Khurda.

... **Appellant**

-V e r s u s-

1. Ranjan Naik, aged about 25 years, S/o. Narayan Naik of Village - Simulipatana, P.O./P.S. - Chandaka, Dist. - Khurda.
2. Election Officer, Chandaka Gram Panchayat Election, At present B.D.O., Bhubaneswar, Dist. - Khurda.

... **Respondents.**

Counsel :

For Appellant	--	Mr. J. Mohanty & Associates.
For Respondent No.1	--	Mr. J. Rehman & Associates.
For Respondent No.2	--	Mr. R.P. Nanda (G.P.).

Date of arguments : 15.01.2015.

Date of judgment : 04.02.2015.

J U D G M E N T

Challenge in this appeal under section 38(4) of the Orissa Grama Panchayat Act, 1964 (hereinafter called “the Act”) is to the order dated 03.12.2012 passed by the learned Civil Judge (Jr. Division), Bhubaneswar in Election Petition No.1/101 of 2012, dismissing the election petition filed by the appellant under sections 30 & 31 of the Act. Appellant was the petitioner and respondent Nos.1 & 2 were the opposite party Nos.1 & 2 respectively before the Court below.

2. The parties hereinafter have been referred to as they have been arrayed in the Court below for the sake of convenience and proper appreciation.

3. The factual matrix leading to the case of the petitioner is that he being a permanent resident of village - Simulipatna under Chandaka Grama Panchayat contested the election for the post of Sarpanch of the said Grama Panchayat. Opposite party No.1 along with other seven persons also contested in the said election for the post of Sarpanch. Election was held on 17.02.2012 and on 21.02.2012 opposite party No.1 was declared elected having secured 925 votes as against 923 votes secured by the petitioner. It is alleged, inter alia, that opposite party No.1 engaged his supporters to cast

votes in the name of four dead persons of their Grama Panchayat in his favour and, as such, by corrupt practice and illegal means, got two votes more to win the election. During counting of votes, the petitioner raised objection before opposite party No.2 while the votes cast against dead persons were subject to counting. Such objection of the petitioner was not taken into consideration and, finally, opposite party No.2 declared opposite party No.1 elected. After declaration of the result, the petitioner made representation for recounting of votes without taking into account the invalid votes and for declaring him elected, but his request was not acceded to by opposite party No.2. So, he filed the election petition before the Court below with prayer to declare that the counting of votes by opposite party No.2 is improper and to direct for recounting of ballot papers. It was further prayed to declare the election of opposite party No.1 as Sarpanch of Chandaka Grama Panchayat invalid and to declare the petitioner duly elected to the post of Sarpanch of the said Grama Panchayat. Hence the petition.

4. Opposite party No.1 filed objection stating that the petition is not maintainable and there is no cause of action to file the case. The entire allegations in the petition has been repudiated by opposite party No.1 in the objection. According

to him, there is no corrupt practice or illegal means adopted in the election process. As per Rule 44 of the Grama Panchayat Election Rules, any contesting candidate or his authorised Polling Agent may object to the identity of the voter on the ground of his identity and for every such objection a fee of Rs.2/- shall be deposited with the Presiding Officer. In this case, neither the petitioner nor his Agent made any objection about casting of votes in the name of dead persons, who are voters of polling booth No.03. That apart, the Agent of the petitioner was present there whereas no Agent was appointed by opposite party No.1. So, the allegation made by the petitioner of casting votes by dead persons is afterthought having no basis. There is no objection raised by the petitioner or his Agent during counting of votes. After counting of votes, opposite party No.1 was duly elected as he had received two numbers of votes more than the petitioner. The present opposite party has made averments in the objection that the petitioner had raised objection for recounting, but not on the question of casting of votes in the name of dead persons. Recounting was held in Block Office at Bhubaneswar and, after recounting, excess two numbers of votes were found in favour of opposite party No.1. The question of recounting of votes does not arise now when the petitioner has not taken resort to

Rule 44 of the Orissa Grama Panchayat Election Rules. According to opposite party No.1, the allegation being false and frivolous the petition is liable to be rejected.

5. Opposite party No.2 filed separate objection, stating that the petition is not maintainable in the eye of law and there is no cause of action to file the case. According to him, the election was conducted fairly in accordance with the Act and Rules made thereunder. No illegality during election was made. No objection was raised by any candidate or their Agent before the Presiding Officer or Polling Officer during the period of election regarding corrupt practice or about the plea taken by the petitioner. According to opposite party No.2, no challenge was made to the identity of voters by the petitioner or his Agent. After election, counting of votes was made properly in presence of candidates. As many as 259 votes were found rejected. After declaration of the result, the petitioner made representation before opposite party No.2 for recounting of rejected ballot papers and the same was allowed. After recounting, it was found that opposite party No.1 had secured 925 votes whereas the petitioner had secured 923 votes for which the former was rightly declared elected. Since no corrupt practice or illegal means was adopted, it was prayed that the petition of the petitioner should be rejected.

6. Basing on the pleadings of the parties, the following issues emerged for decision :

- i) Whether the election petition is maintainable in the present form ?
- ii) Whether there is any cause of action to file the present case ?
- iii) Whether there is improper counting of votes by the election officer in the election of Sarpanch of Chandaka Grama Panchayat and the recounting of the same is required ?
- iv) Whether the election of opposite party No.1 as Sarpanch of Chandaka Grama Panchayat be declared as invalid and void and the petitioner be declared as elected Sarpanch of the said Grama Panchayat ?
- v) To what other relief/reliefs, the parties are entitled ?

7. The petitioner examined himself as P.W.1 and adduced documentary evidence. On the other hand, the opposite parties have also adduced both oral and documentary evidence. O.P.W.1 is opposite party No.1 and O.P.W.2 is opposite party No.2. On going through the pleadings of the parties, evidence adduced by them and the materials on record, the learned Court below decided issue Nos.(iii) & (iv) in favour of opposite party No.1 by holding that his election can never be declared invalid and the petitioner cannot be declared elected as Sarpanch of Chandaka Grama Panchayat. The

learned Court below answered the other issues in negative against the petitioner. So, ultimately, the election petition was dismissed by the learned trial Court against the opposite parties without cost.

8. Learned counsel appearing for the appellant submitted that the learned trial Court has not appreciated the evidence of the petitioner in proper perspective. The learned trial Court has erred in law by not appreciating the evidence adduced by opposite party No.1, who admitted in cross-examination about casting of votes in the name of dead persons. The learned trial Court has also erred in law by not declaring the election void on the ground that votes have been cast in the name of dead persons. According to him, the learned trial Court should have allowed the recounting of votes when there is a margin of only two votes between the ballots counted in favour of opposite party No.1 and the petitioner. The learned Court below ought to have asked to produce all the election documents to ascertain the improper admission of votes. He further submitted that the learned Court below has misdirected itself by relying upon the decision reported in **2008 (II) OLR - 82 (*Bhagyadhar Khatei Vs. Kubera Pradhan and others*)**. It was submitted by learned counsel for the appellant that the learned Court below being the Election Tribunal under

the Act should also accept for recounting of votes even if no complaint is filed before the Polling Officer or Presiding Officer. The learned Court below has passed the order illegally by not appreciating the evidence on record in proper manner for which the same should be set aside. Hence, he submitted to allow the appeal.

9. Supporting the order passed by the learned trial Court, learned counsel appearing for opposite party No.1 submitted that the learned Court below has rightly appreciated the evidence on record as the petitioner failed to produce the evidence to prove the allegation, as in election disputes it is the duty of the petitioner to prove any sort of allegations made. He further submitted that margin of victory by two numbers of ballots is not a ground for recounting of votes because for undertaking such process necessary provisions of law have to be gone through. Since there was no circumstances for recounting of votes proved by the petitioner, the learned Court below has rightly rejected the prayer for recounting of votes and opposite party No.2 has properly assessed the materials for which the order of the learned Court below by not setting aside the election of opposite party No.1 is correct and legal. Hence, he prayed to dismiss the appeal.

10. Learned Government Pleader appearing for

opposite party No.2 submitted that there is no corrupt practice or illegal means adopted during the election process. According to him, as the petitioner has not proved the case to the hilt, the learned trial court has rightly dismissed the petition. He also supported the entire order passed by the learned Court below and submitted to dismiss the appeal.

11. It is well settled law that the first Appellate Court being the Court of finding of facts and law has to answer in every issue decided by the learned trial Court. It is also well settled law that the evidence adduced in the lower Court has to be reappreciated by the first Appellate Court while deciding the appeal. Bearing in mind the settled principles, let me find out if the finding of the learned trial Court is liable to be interfered with.

12. I went through the lower Court record, impugned order, evidence adduced by both parties and the documents on record. Before proceeding further, let me elucidate the decision on election law. In the case of ***V.S. Achutanandan Vs. P.J. Francis*** (supra), Their Lordships of the Hon'ble Apex Court have been pleased to observe as under :

“(1) The secrecy of the ballot is sacrosanct and shall not be permitted to be violated on merely for asking or on vague and indefinite allegations or averments of general nature. At the same time purity of election process has to be

preserved and therefore, inspection and re-count shall be permitted but only on a case being properly made out in that regard.

(2) A petition seeking inspection and recount of ballot papers must contain averments adequate, clear and specific making out a case of improper acceptance or rejection of votes or non-compliance with statutory provisions in counting. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted would not serve the purpose.

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(4) The election petitioner must produce trustworthy material in support of the allegations made for a recount enabling the Court to record a satisfaction of a prima facie case having been made out for grant of the prayer. The Court must come to the conclusion that it was necessary and imperative to grant the prayer for inspection to do full justice between the parties so as to completely and effectually adjudicate upon the dispute.

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13. With due respect to the above decision, I find onus lies on the petitioner to prove that there was corrupt practice and illegal means adopted by opposite party No.2 to declare opposite party No.1 elected.

14. Since issue Nos.(iii) & (iv) are interlinked and important in this case, let me delve into the core issues first. The ground taken by the petitioner is that the supporters of opposite party No.1 were allowed by opposite party No.2 to

cast votes in the name of dead persons, namely, Iswar Behera, S/o. Late Satyabadi Behera; Sauri Charan Behera, S/o. Late Natha Charan Behera; Bholanath Behera, S/o. Bhajamana Behera; & Ishor Behera, S/o. Domanath Behera. On the other hand, the opposite parties have averred in their pleadings that for the first time, such plea has been taken although there was no such plea taken by the petitioner before or after counting of votes. So, it is for the petitioner to prove that the above-named four persons being dead were impersonated by the supporters of opposite party No.1 to cast votes resulting in excess of two numbers of votes in favour of opposite party No.1. P.W.1, who is the petitioner, has filed evidence affidavit solely on the line of the contents of the petition filed by him. He proved the Death Certificates of Iswar Behera, S/o. Late Satyabadi Behera; Sauri Charan Behera, S/o. Late Natha Charan Behera; Bholanath Behera, S/o. Bhajamana Behera; & Ishor Behera, S/o. Domanath Behera vide Exts.1, 2, 3, & 4 respectively. All the said certificates disclose that they are all dead by 17.02.2012 i.e. the date of election. He has not proved any other document to show that these four persons figured in the voter list. Moreover, he has not proved any Voter I. Card of these persons to indicate that they were enrolled as voters in Chandaka Grama Panchayat. In cross-

examination, he revealed that prior to election, he knew that all these four persons are dead. He further revealed at para-15 that all these persons, except Ishor Behera, belong to their village and they are voters of ward No.03. He is also a voter of the said ward. In para-16, he admitted that he has not verified the voter list. When he has not verified the voter list, it is not possible to rely on his statement that these three persons figured in the voter list of ward No.03. According to him, he gave in writing to the Presiding Officer by alleging that the dead persons cast votes, but the same was not accepted, rather the Presiding Officer advised him to file the same in the Court. No copy of such complaint is filed in the Court to prove his conduct. In cross-examination, he stated that on the date of counting, he gave a written complaint to the Presiding Officer for recounting; but he did not accept it. Copy of such written complaint is also not filed in the Court to prove his bonafideness. In para-23, he could not state categorically which person caste vote for which dead person. Moreover, he stated that he did not make complaint before the police in-charge to the above effect. Thus, he has admitted to have no clue who cast votes against the dead persons. In para-27, he revealed that he made complaint before the Election Officer for total recounting, but he did not prove the said complaint

before the Court. Rather, the opposite parties have filed such document showing the complaint of P.W.1 before the Election Officer vide Ext.A. On going through Ext.A, it appears that no such allegation of exercising franchise by some persons impersonating the aforesaid dead persons has been made therein. Simply, it is mentioned in Ext.A for recounting the invalid votes on the ground that he was defeated by a margin of two votes from the return candidates. There is fruitful cross-examination made to this witness. Thus, it is revealed from the evidence of the petitioner (P.W.1) that he has no personal knowledge as to who cast votes against the dead persons. He has neither proved the voter list nor Voter I. Card to prove that they being the voters have cast votes. Moreover, the evidence of P.W.1 shows that one Damodar Sahoo was his Agent and he could not explain why Sri Sahoo did not object when the four dead persons being impersonated by some supporters of opposite party No.1 cast votes in favour of opposite party No.1. Thus, the evidence of P.W.1 coupled with the documents did not prove by positive evidence and preponderance of probability that the supporters of opposite party No.1 cast votes by impersonating four dead persons in favour of opposite party No.1.

15. Opposite party No.1 while being examined as

O.P.W.1 revealed that there is no wrong in the election process and the petitioner has never raised any objection about false voting in the name of dead persons till filing of the election petition. In cross-examination of O.P.W.1, P.W.1 has tried to elicit that these dead persons also cast votes; but in paragraphs 16, 17 & 18 of his cross-examination, he could not say how he came to know that Iswar Behera cast vote in favour of the petitioner and he also could not say whether Iswar Behera is alive or not. Similarly, in para-18, he has stated that Sauri Behera cast vote to the petitioner, which is within his knowledge, and the said Sauri Behera is no more since one to two years. It has been brought out from his cross-examination that Bholanath Behera also cast vote in favour of the petitioner and the said Bholanath Behera is no more. In the same para, during cross-examination, O.P.W.1 also could not say whether Ishor Behera is alive and to whom he cast vote. Thus, the statement of O.P.W.1 in cross-examination is not clear and cogent to prove whether these four persons cast votes and whether they are alive or not. So, the argument of learned counsel for the petitioner that opposite party No.1 being examined as O.P.W.1 has admitted about casting of votes by these four persons is not elicited by clear evidence during his cross-examination. Even if assuming for argument's sake that

opposite party No.1 has admitted that aforesaid four persons cast votes, the same cannot be taken to discharge the onus by the petitioner inasmuch as weakness in the evidence of the opponent cannot be used as proof for the petitioner to discharge.

16. The evidence of O.P.W.2 (opposite party No.2), who is none other than the B.D.O., Bhubaneswar Panchayat Samiti, revealed that Ext.A is the application of the petitioner for recounting of votes and the same has been dealt with. He has also proved the tabulation-sheet vide Ext.B, which shows that after counting of votes, opposite party No.1 was declared elected. In cross-examination, it is elicited that the tabulation-sheet filed by him is the document after recounting. There is nothing revealed from his cross-examination that the tabulation-sheet vide Ext.B is false and forged. The petitioner has tried to elicit from O.P.W.2 that votes were cast on behalf of dead persons, but failed to elicit the same as he expressed his ignorance about such fact. Be that as it may, the evidence of O.P.W.2 also remains consistent to show that the election was held peacefully for the post of Sarpanch, counting of votes was made and after declaration of the result, written complaint was filed for recounting of votes at the instance of the petitioner. In the said petition, there was no ground taken

that dead persons' votes were cast. On the whole, the opposite parties have clearly proved by both oral and documentary evidence that after counting of votes, it was found that opposite party No.1 has secured more votes than the petitioner. They have also proved that after declaration of the result, written complaint was filed for recounting of votes at the instance of the petitioner and, on recounting of votes by opposite party No.2, opposite party No.1 was found to have secured 925 votes as against 923 votes secured by the petitioner. But, it is not brought out from the evidence of the opposite parties that any hint was given or any objection was filed by the petitioner, either at the time of casting of votes or at the time of counting or recounting of votes, that votes were cast in the name of aforesaid dead persons by impersonation. From the aforesaid discussions, it is clear that the petitioner has not discharged onus by proving that in the name of four dead persons, votes were cast at the instance of opposite party No.1 and, as such, corrupt practice or illegal means was adopted by the opposite parties which rendered the election to the post of Sarpanch void. It is also not proved by the petitioner that recounting of votes is further required, as the said process has not been done by opposite party No.2 on the application of the petitioner on some other ground than the

ground taken in his petition.

17. Learned counsel for the petitioner submitted that in view of the decision reported in **2014 (II) OLR - 916** (*Smt. Bibhuti Nayak* Vs. *Smt. Basanta Manjari Nayak*), recounting of votes should be ordered. In the said decision, Their Lordships of our Hon'ble High Court have been pleased to observe at para-23 as under :

“23. That adequate statement of all material facts on which the allegation of irregularity or illegality in counting is founded and the evidence in support thereof for generating prima facie satisfaction of the Election Tribunal to do complete and effective justice between the parties in the process of deciding dispute though has been ordained to be of imperative necessity, their Lordships did observe that what can be said to be material facts would depend on the facts of each case and no rule of universal application can be laid down. Notwithstanding the emphasis on the secrecy of ballot being sacrosanct has been stressed upon, an exception to the insulation thereto from scrutiny has been carved out, if strong prima facie circumstances to suspect the purity, propriety and legality in the counting of votes are made out. Thus, if sacrosanctity of ballot papers is pitted against solemnity, purity and authenticity of an election process, recount of ballot papers, if a prima facie case so justifies, ought to be permitted to resolve the dispute and ensure complete justice between the parties”.

18. With due respect to the said decision, I find that in the instant case adequate statement of all material facts, as

discussed above, on which the allegation of illegality and irregularity in counting of votes is founded and the evidence in support thereof do not generate prima facie satisfaction of the Election Tribunal for which recounting of ballots for effective justice between the parties in the process of deciding the dispute is felt necessary. On the other hand, the facts and circumstances in the cited case are different from that of the facts and circumstances of the present case. So, the question of thin margin of votes between the petitioner and the return candidate is not the deciding factor in the context of the case at hand. As such, I find that the findings of learned lower Court, which is the Election Tribunal, on issue Nos.(iii) & (iv) are sound in law and do not warrant interference and, therefore, the view taken by the learned trial Court on both the issues is concurred herewith.

19. As mentioned herein-above, there is no corrupt practice or illegal means proved by the petitioner and, as such, the election to the post of Sarpanch by declaring opposite party No.1 cannot be whittled down. So, there is no cause of action to file the case, the petition is not maintainable and, accordingly, no reliefs can be granted to the petitioner. Therefore, I am in complete agreement with the findings of the learned trial Court on the rest of the issues. Hence ordered :

O R D E R

The Election Appeal is found to be devoid of merit and, accordingly, stands dismissed on contest against the opposite parties. The impugned order dated 03.12.2012 passed by the learned Civil Judge (Jr. Division), Bhubaneswar in Election Petition No.1/101 of 2012 is hereby confirmed. No cost.

**District Judge, Khurda
at Bhubaneswar.**

04.02.2015.

Dictated, corrected by me and pronounced in the open Court this day the 04th February, 2015.

**District Judge, Khurda
at Bhubaneswar.**

04.02.2015.