

A.F.R

IN THE HIGH COURT OF ORISSA CUTTACK

W.P.(C) No.23622 of 2022

(In the matter of an application under Articles 226 & 227 of
the Constitution of India.)

Jayaram Nayak

....

Petitioner

Versus

Balaram Swain & Ors.

....

Opposite Parties

For Petitioner

...

Mr.K.K.Mishra, Advocate

For Opposite Party
No.1

...

Mr. S. Palit, Senior Advocate

For Opposite Party
Nos.2 & 3

...

Mr. S. Ghose,
Additional Government Advocate

J U D G M E N T

PRESENT:

THE HONOURABLE JUSTICE BISWANATH RATH

Date of Hearing and Judgment: 27.09.2022

Biswanath Rath, J. This Writ Petition involves a challenge to the order of the Election Tribunal dated 05.04.2022 in unilaterally allowing the application for condonation of delay involving an Election Dispute raised under Section 30 & 31 of the Odisha Gram Panchayat Act, 1964

as appearing at running page-26 of the brief i.e. a part of Annexure-3 involving Election Petition No.4 of 2022.

2. Mr. Mishra, learned counsel appearing for the return candidate-Petitioner taking this Court to the aspect of limitation disclosed in the Election Dispute, reading together with the provision at Section 31 of the Odisha Grama Panchayats Act, 1964 hereinafter in short be reflected as “the Act, 1964”, contended that once there is delay in institution of an Election Dispute under the provision of Section 31 of the Act, 1964, the return candidate should have been involved prior to final decision in the condonation of delay and dependent on the outcome, the matter could have been considered for admission and not otherwise and that too abruptly closing the issue on limitation for all time to come.

3. Reading through the provision at second proviso of Section 31 of the Act, 1964 and further referring to a decision of this Court in the case of **Maina Tandia vs. Election Officer-Cum-B.D.O., Kantamal and Others** as reported in (2008) 105 CLT 407, Mr. Mishra, learned counsel for the Petitioner brings to the notice of this Court that through this decision the Division Bench of this Court has come to hold that once there is delay involving Election Dispute, the same should not have been decided *ex parte*.

4. It is, in this view of the matter, Mr. Mishra, learned counsel appearing for the return candidate-Petitioner seeks intervention of this Court in the order dated 05.04.2022 and setting aside of the same thereby passing appropriate direction.

5. Mr. Palit, learned Senior Counsel appearing for the defeated candidate i.e. the Election Petitioner, however, reading again through the provision at Section 31 of the Act, 1964 contended that for the prescription therein even involving the delay aspect and for the power

provided to the Tribunal through the provision in second proviso at Section 31 of the Act, 1964 for taking a decision in such matter, the learned Civil Judge (Junior Division), Aska-the Tribunal exercised its discretion on the condonation of delay aspect. Mr.Palit, learned Senior Counsel thus submits, there is no illegal exercise of power by the trial court requiring to interfere therein.

6. Mr.Palit, learned Senior Advocate appearing on behalf of the defeated candidate further taking this Court to the provision at Section 38 of the Act, 1964 submitted that there is an attempt by the Petitioner in bringing such dispute to the High Court in a way to linger the proceeding in absence of availing of statutory remedy available through the above provision. This Court here considering the applicability of the provision at Section 38 of the Act, 1964, if any, to the case at hand finds, the provision at Section 38 provides opportunity to a losing party in Election Dispute to have a review mechanism before the same authority and before availing appeal mechanism under the provision of Sub-Section (4) of Section 38 of the Act, 1964. This Court finds, the provision at Section 38 of the Act, 1964 has no application to the case at hand at all and thus finds there is no force in such submission.

7. Mr. Palit, learned Senior Advocate appearing for the defeated candidate / losing candidate however on the issue involved and raised by the successful candidate relied on a decision of this Court in the case of ***Sri. Mangal Charan Behera vrs. Sri. Banamali Biswal and Others*** as reported in ***(2005) Sup Ori.Law Rev. 668***. Taking this Court to the fact available in para-1, the observation of the Court in para-6 and plethora of direction contained in para-8 therein, Mr. Palit, learned Senior Advocate submitted that for the ruling of the Division Bench of this Court, the question of maintainability of Election Petition on the ground of

limitation is very much available even after admission of the Election Dispute, subject to framing of issues therein and dealing with such issues in the final adjudication of the dispute, contended there is no room to challenge such orders at this stage. In the circumstance Mr. Palit, learned Senior Advocate submitted that the Petitioner-the return candidate has a scope of agitating such dispute by making specific pleadings through his written statement, requesting for framing appropriate issue and getting it adjudicated at appropriate time in the ultimate trial of the suit and in no circumstance, the Writ Petition in the present form is entertainable.

8. Considering the rival contentions of the parties, this Court finds, short questions involved herein to be decided is; even assuming that the provision at Section 31(1) of the Act, 1964 involves only a composite Election Dispute even inclusive of delay condonation aspect and for the protection on such issues with the Election Tribunal under the second proviso of Section 31 of the Act, 1964, if the Election Tribunal is justified in taking a decision on the question of condonation of delay *ex parte* ? and when the decision is taken *ex parte* in condonation of delay, whether the prospect of adjudicating such issues in the ultimate trial of the suit is available or not?

9. Taking into account the provision applicable to the case at hand and as relied by both the parties, this Court finds, the provision at Section 31(1) of the Act, 1964 reads as follows:-

31. Presentation of petitions- (1) The Petition shall be presented on one or more of the grounds specified in Section 39 before the Civil Judge (Junior Division) having jurisdiction over the place at which the office of the Grama Sasan is situated together with a deposit of such amount, if any, as may be prescribed in that behalf as security for costs within fifteen days after the date on which the name of the person elected is published under Section 15:

Provided that if the office of the Civil Judge (Junior Division) is closed on the last day of the period of limitation as aforesaid the petition may be presented on the next day on which such office is open:

Provided further that if the petitioner satisfies the Civil Judge (Junior Division) that sufficient cause existed for the failure to present the petition within the period aforesaid the Civil Judge (Junior Division) may in his discretion condone such failure.”

10. Looking to the safeguard under the provision at second proviso of Section 31 of the Act, 1964 this Court finds, undisputedly there is no need of separate filing of delay condonation application and such an attempt can be made in the Election Dispute itself. Looking to the cardinal principle of law on limitation, this Court finds, the position of law has been settled through number of decisions even through the Hon’ble Apex Court, on involvement of issue on condonation of delay the normal rule is, a party likely to be affected should be provided with an opportunity of hearing before there is condonation of delay.

11. It is, at this stage of the matter, this Court looking to the plea taken in the condonation of delay application, finds, the averments made in para-14 of the Election Dispute specifically dealing with delay in bringing the Election Dispute reads as follows:-

“That in view of publication of the result of election of Sarpanch of Pailipada Gram Panchayat by the Election Officer under Section 15 of the Orissa Grama Panchayat Act, 1964 read with Rule 52 of Orissa Gram Panchayat (Election) Rules, 1965, on 02/03/2022, the election petition ought to have been filed within 15 days thereof i.e. on or before 17/03/2022. But as the petitioner fell sick having suffered from E. fever & P. Neuritis since 10/03/2022 and was under treatment in CHC, Belaguntha as a patient vide OPD Regn. No.8340 dtd.10/03/2022 till 17/03/2022 and his treating Doctor advised him to take bed rest for 2 weeks from 17/03/2022 i.e. till

31/03/2022, he could not file the election petition within prescribed period by attending the Court in person. After recovery from illness to some extent, the Petitioner obtained the RTI information on 31/03/2022 relating to the nomination and election of the Opposite Party No.3 as Sarpanch of Pailipada Grama Panchayat and instructed his Advocate to prepare the election petition and accordingly the same was prepared and since 01/04/2022 to 03/04/2022 the court was closed on account of holiday, the election petition is filed today i.e. on 04/04/2022 after reopening of the Court. Since due to aforementioned sufficient cause, the Petitioner could not file the election petition within stipulated time, he files a separate petition as per proviso to Section 31(1) of Orissa Grama Panchayat Act, 1964, along with this election petition praying to condone the delay/failure in filing the election petition within prescribed period.”

12. Since the application for condonation of delay is decided *ex parte*, there is no possibility of objection by the party likely to be affected. Undisputedly Petitioner has so many pleas requesting condonation of delay more particularly involving his suffering at the particular point of time in one of the Government Hospital and the Petitioner also files documents in support of his claim of illness. From the observation of the trial court made in deciding the petition under order 7 Rule 11 of CPC, this Court finds, there is availability of document to establish the claim of delay made by the Petitioner. Keeping the cardinal principle of law on condonation of delay aspect in view, this Court finds, there has been attending to such issues also by at least two Division Benches of this Court. From the earlier decision in ***Sri Mangal Charan Behera*** (supra) this Court finds, the paragraph no.1 therein remains as follows:-

“The Petitioner in this writ application has sought for quashing the order under Annexure-1 and for directing disposal of Election Misc. Case No.1 of 2003 pending before the Civil Judge (Junior Division), Balasore within a stipulated period.

The Petitioner was the returned candidate being elected as a Sarpanch of Markona Gram Panchayat situated under Simulia Block in the district of Balasore. The opp. Party No.1 filed Election Misc. Case No.1 of 2003 before the Civil Judge (Junior Division), Balasore under the provisions of the Orissa Gram Panchayat Act. The admitted case of the parties is that the election was held on 19.02.2002 and the results were declared on 21.2.2002. The election petition was filed by opp. Party no.1 on 15.04.003 along with an application u/s 5 of the Indian Limitation Act, 1963. It appears that after filing of election petition along with the application for condonation of delay, the learned Civil Judge (Junior Division), Balasore condoned the delay by exercising power under the second proviso to Section 31(1) of the Orissa Gram Panchayat Act and issued notice to the present petitioner and other opposite parties therein. It further transpires that the present Petitioner appeared in the said election case on 1.8.2003 and subsequently filed his objection/ written statement to the Election Misc. Case. It also further transpired that the writ Petitioner took a stand in his objection that the Election Misc. Case is barred by time. Thereafter, the Petitioner filed an application under Order 14 Rule 2(2) of the Code of Civil Procedure, to decide the question of maintainability of the Election Misc. Case on the ground of limitation, as a preliminary issue. The said application having been rejected by the Civil Judge (Junior Division), Balasore, by this order dated 15.03.2004 (Annexure-1), the Petitioner has preferred the present writ petition.”

The observation of the Division Bench in para-6 reads as follows:-

“In this view of the matter, we are of the view that the issue regarding non-maintainability of the election petition on the ground of limitation has to be gone into by the Election Tribunal and while deciding the said issue, the Election Tribunal has to reconsider the order dated 9.5.2003 by which the delay in filing the election petition was condoned ex parte before issuance of notice to the opp. Parties in the said election petition.”

Keeping in view the above observation in para-8 the Division Bench has given a plethora of directions. The direction in paragraph No.8 therein reads as follows:-

- (i) “The Learned Civil Judge (Junior Division), Balasore shall frame a specific issue with regard to the maintainability of the election petition on the ground of limitation along with other issues that may be framed.
- (ii) The Learned Civil Judge (Jr. Divn.) while pronouncing his judgment on the election petition after trial of the same, shall first address itself, in the judgement, to the issue regarding maintainability of the application on the question of limitation.
- (iii) During trial of the Election Misc. case, the writ Petitioner who is the Opp. Party No.1 in the Election Misc. case, shall be given opportunity to rebut the grounds set-forth by the election petitioner explaining the delay in filing the Election Misc. case, as stated in his application for condoning the delay.
- (iv) If the learned Civil Judge (Jr. Divn.) while deciding the issue on the question of maintainability of the election petition on the ground of limitation, comes to a finding that the delay in filing the Election Misc. case has been sufficiently explained, he may, by exercising the power conferred on him under the second proviso to Section 31(1) of the Orissa Gram Panchayat Act, hold that the delay has been sufficiently explained and then proceed to decide the other issues in the Election Misc. case, in the judgement.
- (v) In the event the learned Civil Judge (Jr. Divn.) comes to a finding that the election Petitioner has failed to show that there is sufficient cause for condoling the delay in filing the Election Misc. case, he on finding that the Election Misc. case is barred by time, will not be required to give findings on other issues.”

13. Reading the above, this Court finds, the Division Bench of this Court has taken note of *ex parte* disposal of the delay condonation application and while deprecating such consideration held, this will not

affect the issue on limitation being considered in the ultimate trial of the dispute, thus kept the issue open to be adjudicated in the ultimate decision of the suit after framing of particular issues.

This Court first of all observes, there is no question of judgment being passed by the Division Bench and then binding on Single Bench in the peculiar circumstance stated hereunder. In the nature of allotment/assignment at the relevant point of time involving the Gram Panchayat Act used to be allotted two Judges Bench. In a subsequent development, same assignment got into the Single Judge Bench. Therefore, the decision taken note here can be maximum construed to be a Bench decision. Further looking to the discussion by the Bench decision above on having a scope for framing issue on the question of limitation in the ultimate trial and decision thereon, this Court finds, the analysis of the Court may not be justified as for the opinion of this Court, the Bench deciding such matter appears to have failed in making a distinction between a plaint under the Code of Civil Procedure and a Petition in an Election Dispute under the Orissa Grama Panchayat Act when the provision in filing suit under the Code of Civil Procedure not only has any scope to file suit belatedly at the same time does not also give power to the Civil Court to condone delay in filing suit whereas for the provision at Section 31 of the Orissa Grama Panchayat Act, there is clear prescription in case Election Dispute is filed belatedly and the Election Tribunal has the discretion for condonation of delay. Therefore, this Court finds, in the above circumstance the decision above can be distinguished not being a proper law.

14. This Court finds, this aspect has again been gone into by another two Judges Bench through the decision vide (2008) 105 CLT 407 as per roster available therein. The Division Bench here while deprecating the

ex parte disposal of delay condonation application, in paragraph-9 therein has come to observe as follows:-

“Therefore, it is a fact that the application for condonation of delay was decided *ex parte* without providing an opportunity of hearing to the other side and that too without a speaking order. In an election petition delay of more than six months of the time limit prescribed by the Statute was not liable to be condoned in this manner. The parties should have been given an opportunity of hearing and the application should have been decided by a reasoned order. It is noticed that while deciding issue No.3, the learned trial Judge has made an observation that the Petitioner was ill but no such observation was made while accepting the application for condonation of delay, more particularly when the order condoning the delay was passed *ex parte* without any notice to the other side.”

In addition to above observation in para-10 therein the two Judges Bench even though finds, the case is to be remitted back to the trial court for first deciding the delay condonation application after providing opportunity of hearing to the parties, but restrained itself in doing so for there is already involvement of next Election making the attempt through the Election Dispute finally infructuous.

15. Looking to the cardinal principle of law, this Court finds, the crux in the Election Dispute has nothing to do with the condonation of delay aspect and there is no doubt unless the Election Petitioner gets out of limitation aspect, there may not be any point in going into other aspects. Trial of all such issues together with other issues on merit of case may not be beneficial to either of the parties and keeping in view that there is hardly seventeen days delay in filing the Election Dispute and looking to the disclosures in paragraph-12 therein, this Court finds, the defeated candidate has sufficient explanation on the delay approach to the Election Tribunal. To avoid any conflict at a later stage this Court likes

to adopt the observation made in the decision vide (2008) 105 CLT 407 and accordingly, while interfering in the impugned order dated 05.04.2022, sets aside the same and remits the matter back to the Election Tribunal i.e. the learned Civil Judge (Junior Division) Aska for re-adjudication on the question of delay after providing opportunity of hearing to the Petitioner herein. Upon taking a fresh decision on the condonation of delay aspect, the trial Court if finds appropriate shall proceed for admission of the matter and then to trial.

16. For the remand of the proceeding, this Court directs the Petitioner herein and the contesting Opposite Party to appear before the trial court along with a certified copy of this order on 11th October, 2022.

17. If the Petitioner is so advised, he may file objection to the delay condonation aspect before the trial court on the date of appearance itself, with service of copy thereof on the other side.

18. For there is requirement of fresh adjudication of the condonation of delay aspect, neither the observation of this Court made hereinabove nor any observation and findings of the trial court made in the impugned order or in the rejection of application under Order 7 Rule 11 CPC shall have anything to do with the fresh disposal of the condonation of delay aspect. Appropriate steps for fresh disposal of the application for condonation of delay shall be undertaken within a period of fifteen days from the date of appearance of the parties.

19. The Writ Petition succeeds. However, there is no order as to the costs.

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BISWANATH RATH, J.