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JOSHNA GOUDA

v.

BRUNDABAN GOUDA & ANR.
(Civil Appeal No. 1191 of 2012)

JANUARY 31, 2012

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[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Orissa Gram Panchayat Act, 1964: s.31 r/w s.34 – Gram Panchayat elections – Election to the post of Sarpanch – Election petition filed u/s.31 r/w s.34 on the ground that the returning candidate was not qualified to contest the election – Election petitioner prayed for setting aside the election of the returning candidate and also prayed that petitioner be declared duly elected – According to petitioner, the returning candidate had not attained the age of 21 years on the relevant date since the date of birth of the appellant was 20.6.1986 and not 7.7.1985 – Courts below held that date of birth of returning candidate was 20.6.1986 – On appeal, held: The fact that returning candidate failed to prove her date of birth to be 7.7.1985 would not automatically lead to conclusion that the assertion of election petitioner that the actual date of birth of returning candidate was 20.6.1986 was proved – Burden to prove that returning candidate was born on 20.6.1986 rested on the election petitioner which he failed to discharge – Although there was inconsistency in the evidence of returning candidate regarding her age, however her statement that she was 10 years old on 10.1.1996 could not be treated as an admission that her date of birth was 20.6.1986 – An admission must be clear and unambiguous in order that such an admission should relieve the opponent of burden of proof of the fact said to have been admitted – Prayer for declaration in favour of election petitioner, therefore did not survive – Evidence – Election laws.

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The election to the post of Sarpanch was held in

2007. The appellant and the first respondent contested and the appellant was declared elected. The first respondent filed election petition under Section 31 read with Section 34 of the Orissa Gram Panchayat Act, 1964 on the ground that the appellant was not qualified to contest the election. The first respondent prayed for setting aside the election of the appellant and also prayed that he be declared duly elected. According to the respondent, the appellant had not attained the age of 21 years on the relevant date since the date of birth of the appellant was 20.6.1986 and not 7.7.1985. The election petition was allowed and on appeal upheld by the District Court. The appellant filed a writ petition before the High Court. The High Court dismissed the writ petition on the ground that the trial court had held that date of birth of the appellant was 20.6.1986 mainly on the basis of School Admission Register, Ext.5, the relevant entry of which was Ext.5/A, the Admission Form Ext.6 and the Transfer Certificate of the appellant Ext.7; that although the said documents were admitted in evidence without any objection before the trial court, however, mere proof of the exhibits did not mean that the content of the said exhibits was also proved and that it was the duty of the opposite party to prove the contents of those documents. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The High Court did not record any conclusive finding regarding the probative value of the contents of exhibits 5, 5A or exhibit 7, but went on to examine the evidence adduced by the appellant and found that the said material did not lend support to the case of the appellant and therefore the entry E.5/A made in Ext. 5 was true. Exts. A to H were documents produced by the appellant in support of her claim that her

A actual date of birth was 7.7.1985 but not 20.6.1986, as
contended by the first respondent. Exts. A and H were
voters lists of the year 2007 and 2008 respectively. The
High Court had observed that both the documents were
prepared later in point of time to the filing of the
B nomination papers in the election in question and also
they did not reflect the date of birth of the appellant.
Similarly, Ext. D was a horoscope alleged to be that of the
appellant. The High Court opined that the said document
was rightly not relied upon. Ext. E was a certificate of date
C of birth issued under the provisions of the Registration
of Births and Deaths Act showing the date of birth of the
appellant as 7.7.1985 but such an entry came to be made
pursuant to an application made by the appellant
subsequent to the nominations in the election in
D question. The High Court had refused to place any
reliance on the said document on the ground that it was
issued by an executive magistrate, who according to the
High Court did not have the jurisdiction to issue the same.
The High Court rightly refused to believe those
E documents and, therefore, the appellant failed to prove
her date of birth to be 7.7.1985. But that would not
automatically lead to the conclusion that the assertion of
the respondent No.1 that the actual date of birth of the
appellant was 20.6.1986 was proved. Even according to
the High Court, the content of the Exs. 5, 5/A and 7 had
F no probative value. Ex. 5 was proved by PW.2, an
assistant teacher of the Basudev High School. Ex. 6 and
7 were proved by PW.2, the headmaster of Basudev High
School. PW.2 stated that Exhibit 5/A entry showing the
date of birth of the appellant as 20.6.1986 was made on
G the basis of Ex. 7 which was a transfer certificate issued
by the headmaster of Panchayat Upper Primary School
where the appellant studied before joining Basudev High
School. Ext.6 was an application dated 11.7.1998 for
admission of the appellant in Basudev High School made
H by a cousin of the appellant's father who was admittedly

not examined. There was nothing in the said evidence to indicate that the date of birth of the appellant was 20th June, 1986. At the worst, the said evidence failed to establish that the appellant's date of birth was 7.7.1985. [Paras 8, 12-14] [470-G-H; 472-A-H; 473-A-B, F]

2. The burden to prove the fact that the appellant was born on 20.6.1986 rested squarely on the first respondent. Since the first respondent failed to discharge the burden cast upon him, the election petition must fail. It can be seen from the evidence of the appellant that the appellant stated that she was 13 year old when she took admission in the High School (obviously Basudev High School) and the admission from the evidence of PW.2, was on 11.7.1998. Deducting 13 years from that date would place the year of birth of the appellant in 1985. It is not clear as to the material on the basis of which the High Court recorded that the admission of the appellant in the Panchayat Upper Primary School was on 10.1.1996. There was some basis on record for the finding that the appellant took admission in the Upper Primary School on 10.1.1996. On her own admission she was 10 years old on that date. Then there is an inconsistency in her evidence regarding her age with reference to her admission into the Upper Primary School and Basudev High School. In such a case, her statement that she was 10 year old on 10.1.1996 cannot be treated as an admission that her date of birth is 20th June, 1986. An admission must be clear and unambiguous in order that such an admission should relieve the opponent of the burden of proof of the fact said to have been admitted. Thus, the second question regarding the declaration in favour of the first respondent did not survive. [Paras 15, 16, 18, 19] [473-H; 474-A, E; 475-E-H; 476-A-B]

Robins v. National Trust & Co. Ltd., 1927 A.C. 515 – referred to.

A Case Law Reference:

1927 A.C. 515 referred to Para 16

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1191 of 2012.

B From the & Order dated 25.03.2011 of the High Court of Orrisa at Cuttack in Writ Appeal No. 114 of 2011.

Raj Kumar Mehta for the Appellant.

C Debasis Misra for the Respondenys.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

D 2. This appeal arises out of a judgment dated 25.03.2011 of the High Court of Orissa in Writ Appeal No.114 of 2011.

3. The factual background of the litigation is as follows:-

E (A) Election to the post of Sarpanch of Kulagada Gram Panchayat in the District of Ganjam, Orissa were held in the year 2007. The appellant, the first respondent and two others filed their nominations. The scrutiny of the nominations took place on 16th January, 2007. The returning officer held all the four nominations valid.

F (B) Subsequently, except the appellant and the first respondent, the other two candidates withdrew from contest. Election took place on 17th February, 2007, wherein the appellant herein was declared elected.

G (C) The first respondent, filed an Election Petition under Section 31 read with Section 34 of the Orissa Gram Panchayat Act, 1964 (for the sake of convenience it is called "the Act"), on the ground that the appellant herein was not eligible to

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contest the election in view of Section 11(b) of the Act which declares that no member of 'Gram Sasan' (a defined expression under Section 2(h) of the Act) shall be eligible to contest for the post of Sarpanch if he has not attained the age of 21 years. It is the specific case of the first respondent that the appellant herein was born on 20.06.1986 and had not attained the age of 21 years by the relevant date. The 1st respondent, therefore, sought two reliefs in the election petition that the election of the appellant herein be set aside and also that the 1st respondent be declared to have been duly elected. The appellant contested the election petition. By the judgment dated 29.11.2008 the election petition was allowed. Aggrieved by the decision of the trial Court, the appellant herein carried the matter in an appeal under Section 38(4) of the Act to the District Court, Ganjam. The appeal was dismissed by a judgment dated 14th September, 2009.

(D) Aggrieved by the same, the appellant herein carried the matter by way of a Writ Petition (Civil) No. 14356 of 2009 to the High Court of Orissa which was also dismissed by a Judgment dated 18.2.2011, and the same was challenged in an Intra Court appeal in appeal No. 114 of 2011 without any success. By the Judgment under appeal, the writ appeal was dismissed.

4. It is argued by learned counsel for the appellant that the judgment under appeal cannot be sustained as there is no legally admissible evidence on record to enable the Courts below to reach the conclusion that the appellant was born on 20th June, 1986.

5. It is recorded in the judgment rendered in the writ petition:-

"The trial court held that the date of birth of the petitioner was 20.6.1986 mainly on the basis of School Admission

1. "Gram Sasan" means a Grama Sasan established under Section 4'.

A Register, Ext.5, the relevant entry of which is Ext.5/A, the Admission Form Ext.6 and the Transfer Certificate of the petitioner Ext.7, P.W.2, one Asst. Teacher of Basudev High School, Dhaugaon produced the School Admission Register and proved, it which was marked as Ext.5.”

B 6. The question of admissibility of the exhibits 5, 5A and 7 was raised in the writ petition but rejected on the ground that the said documents were admitted in evidence without any objection before the Trial Court. However, the learned judge opined that mere proof of the above-mentioned exhibits does not mean that the content of the said exhibits was also proved.

C “Of course, only because those documents were admitted without objection, it cannot be said that the contents thereof were also admitted. It was the duty of the opp.party to prove the contents of those documents particularly, the date of birth of the petitioner entered in Ext.5 and the transfer certificate Ext.7.”

D 7. However at para 7, it was held:)

E “In the present case the entry as per Ex.5/A was made on the basis of transfer certificate Ext.7, and the application made by Maheswar Gouda, cousin brother of petitioner’s father. The trial court held that Maheswar Gouda, being the cousin brother of petitioner’s father had special means of knowledge of the date of birth of the petitioner. Admittedly, said Maheswar Gouda has not been examined”.

F 8. Unfortunately, the learned judge did not record any conclusive finding regarding the probative value of the contents of exhibits 5, 5A or exhibit 7, but went on to examine the evidence adduced by the appellant herein and found that the said material does not lend support to the case of the appellant herein and therefore the entry E.5/A made in Ext. 5 is true. A strange procedure indeed! Only matched by the strange decision of the appellant to adduce evidence.

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"But father of the petitioner has been examined as O.P.W. No.3. As per the affidavit evidence the date of birth of the petitioner was incorrectly recorded in the school register and school certificate by the teachers, which appears improbable. Furthermore, it transpires from the evidence of the petitioner herself, that when she took admission in Panchayat U.P. School she was 10 years old. She took admission in the said school on 10.1.96. If 10 years is deducted from that date it would come to 9.7.1986. So, the evidence of the petitioner almost allies with the case of opp. party No.1 that the date of birth of the petitioner was 20.6.1986."

9. Thereafter the learned judge elaborately discussed the evidence of the appellant herein and concluded that:- "It would not improve the case of the petitioner as discussed earlier"

10. The Division Bench noted the objection to the admissibility in evidence of the exhibits 5, 5A and 7 in the following words:-

"The ground of attack of the impugned order is that the learned Single Judge having held that the documents relied upon by respondent No.1, namely Exts.5,5/A and 7, which are the only documents from the side of respondent no.1 to establish the date of birth of the appellant are not admissible in evidence under section 35 of the Evidence Act, the learned Single Judge erred in further probing into the matter and dismissing the writ petition. The aforesaid documents on the basis of which the respondent no.1 sought to establish that the appellant was not qualified to file nomination having been found inadmissible, the only alternative was to allow the writ petition."

11. The Division Bench did not record any clear finding either on the admissibility or the probative value of the content of the above-mentioned exhibits but suddenly switched over to the examination of the evidence of the appellant.

A 12. Exts. A to H are documents produced by the appellant
 herein in support of her claim that her actual date of birth is
 7.7.1985 but not 20.6.1986, as contended by the first
 respondent. Exts. A and H are voters lists of the year 2007 and
 2008 respectively. The Division Bench observed that both the
 B documents were prepared later in point of time to the filing of
 the nomination papers in the election in question and also they
 do not reflect the date of birth of the appellant herein. Similarly,
 Ext. D is a horoscope alleged to be that of the appellant herein.
 The Division Bench opined that the said document was rightly
 C not relied upon. Ext. E is a certificate of date of birth issued
 under the provisions of the Registration of Births and Deaths
 Act showing the date of birth of the appellant as 7.7.1985 but
 such an entry came to be made pursuant to an application
 made by the appellant herein subsequent to the nominations
 D in the election in question. The High Court refused to place any
 reliance on the said document on the ground that it was issued
 by an executive magistrate, who according to the High Court
 did not have the jurisdiction to issue the same.

E 13. We do not propose to examine the correctness of the
 reasoning adopted by the High Court for refusing to place any
 reliance on the above-mentioned documents produced by the
 appellant herein in her bid to prove her actual date of birth as
 7.7.1985. For the purpose of the present appeal, we will
 F proceed on the basis that the High Court rightly refused to
 believe those documents and, therefore, the appellant herein
 failed to prove her date of birth to be 7.7.1985. But that does
 not automatically lead to the conclusion that the assertion of the
 respondent No.1 that the actual date of birth of the appellant
 G herein is 20.6.1986 is proved. Even according to the High
 Court, the content of the Exs. 5, 5/A and 7 has no probative
 value. Ex. 5 was proved by PW.2, an assistant teacher of the
 Basudev High School. Ex. 6 and 7 were proved by PW.2, the
 headmaster of Basudev High School. It appears from the
 H record that PW.2 stated that Exhibit 5/A entry showing the date

of birth of the appellant herein as 20.6.1986 was made on the basis of Ex. 7 which is a transfer certificate issued by the headmaster of Panchayat Upper Primary School where the appellant herein studied before joining Basudev High School. Ext.6 is an application dated 11.7.1998 for admission of the appellant in Basudev High School made by one Maheswar Gouda, who is said to be a cousin of the appellant's father. The said Maheswar Gouda was admittedly not examined. By the judgment under appeal, the Division Bench rightly held -

".....it was the duty of the opposite party (the first respondent herein) to prove the contents of those documents, particularly the date of birth of the petitioner (the appellant herein) entered in Ext.5 and the transfer certificate Ext.7"

[Parenthesis supplied]

Having held so, the Division Bench reached the conclusion -

"the evidence of the petitioner (the appellant herein) almost allies with the case of the opposite party No.1 (the first respondent) that the date of birth of the petitioner was 20.6.1986."

14. We have already examined the evidence of the appellant herein. There is nothing in the said evidence to indicate that the date of birth of the appellant was 20th June, 1986. At the worst, the said evidence failed to establish that the appellant's date of birth was 7.7.1985.

15. The election of the appellant was challenged on the ground that the appellant was not eligible to contest the election on the ground that the appellant was not 21 years of age on the relevant date because according to the election petition, the appellant was born on 20.6.1986. The burden to prove the fact that the appellant was born on 20.6.1986 rests squarely on the

A first respondent. Section 101 of the Indian Evidence Act makes it abundantly clear.

B **"S.101. Burden of proof –** Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

C When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

16. It was held in *Robins Vs. National Trust & Co. Ltd.*, 1927 A.C. 515 –

D "To assert that a man who is alive was born requires no proof. The onus is not on the person making an assertion, because it is self-evident that he had been born. But to assert that he had been born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion."

E Since the first respondent failed to discharge the burden cast upon him, the election petition must fail.

F 17. However, the learned counsel for the first respondent, Shri Debasis Misra, very vehemently submitted that facts admitted need not be proved and the appellant had admitted the fact that the appellant, on her own admission, was 10 years old when she took admission in the Panchayat Upper Primary School on 10.1.1996. Learned counsel relied upon para 7 of the judgment under appeal (which is already extracted in para 8 of this judgment but for the sake of convenience, we reproduce the same):

H ".....it transpires from the evidence of the petitioner herself, that when she took admission in Panchayat U.P. School she was 10 years old. She took admission in the

said school on 10.1.96. If 10 years is deducted from that date it would come to 9.7.1986." A

18. Learned counsel for the appellant, on the other hand, submitted that such a conclusion came to be recorded on incorrect reading of the evidence of the appellant. A copy of the deposition made by the appellant is placed before us. In the cross examination, the appellant stated as follows: B

"When I was five years of old, I joined in the school for the 1st time when I took admission in Dhougan U.P. school, I was ten yeas of old. I left that school in the year 1998. My father Apurba Gouda is an educated man. I can not recollect who had taken me to Dhougan School for admission. C

One outsider brought my T.C. from the Dhougan U.P. School and get me admitted in Dhougan High School. I cannot say his name. I was thirteen years of old, when I took admission in Dhougan High School in Class VIII." D

It can be seen from the above-extracted portion of the evidence of the appellant that the appellant stated that she was 13 year old when she took admission in the High School (obviously Basudev High School) and the admission, as we have already noticed from the evidence of PW.2, was on 11.7.1998. Deducting 13 years from that date would place the year of birth of the appellant in 1985. It is not clear as to the material on the basis of which the Division Bench recorded that the admission of the appellant in the Panchayat Upper Primary School was on 10.1.1996. We assume for the sake of argument that there is some basis on record for the finding that the appellant took admission in the Upper Primary School on 10.1.1996. On her own admission she was 10 years old on that date. Then there is an inconsistency in her evidence regarding her age with reference to her admission into the Upper Primary School and Basudev High School. In such a case, her statement that she was 10 year old on 10.1.1996, in our opinion, cannot be treated E
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A as an admission that her date of birth is 20th June, 1986. An admission must be clear and unambiguous in order that such an admission should relieve the opponent of the burden of proof of the fact said to have been admitted.

B 19. For all the above mentioned reasons, we are of the opinion that the judgment under appeal cannot be sustained and the same is set aside. In view of our conclusion, the second question regarding the declaration in favour of the first respondent does not survive.

C 20. Appeal is allowed.

D.G.

Appeal allowed.