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HOME (ELECTIONS) DEPARTMENT

NOTIFICATION

The 7th November, 2017

No. 4565--(1)-VE (A)-47/2017 /Elec.– The following Notification dated 7th November, 2017 of Election Commission of India, New Delhi is hereby published in the Extraordinary issue of *Odisha Gazette* for general information.

By order

Sd/-

(D.N. Gupta)

Chief Electoral Officer, Odisha

ELECTION COMMISSION OF INDIA
Nirvachan Sadan, Ashoka Road, New Delhi – 110001

Dated: 7th November, 2017
16 Kartika, 1939 (Saka)

NOTIFICATION

No. 82 / ECI / LET / TERR / ES-II /OR-LA / (12 / 2014) / 2017:- In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby published the Judgement and Order of the Hon'ble High Court of Orissa, Cuttack, dated 16.10.2017 in Election Petition No. 12 of 2014 (Shri Prasanna Acharya Versus Subala Sahoo) related to the 2–Bijepur Assembly Constituency.

In the High Court of Orissa
Prasanna Acharya- Petitioner
Vrs
Subala Sahoo-Opposite Party

ELEPT No. 12 of 2014

Sl. No. of Order 30. Date of Order 16.10.2017

Learned Senior Counsel Mr. B.D. Mishra who was appearing for the sole respondent whose election is under challenge in the present proceeding initiated at the behest of the petitioner inviting attention of this Court to the memo dated 20.09.2017 as well as its annexure i.e. the certificate of the Medical Superintendent, AMRI Hospitals Ltd., Bhubaneswar which have been taken on record by order dated 09.10.2017, placed that the sole respondent has died on 22.08.2017. In view of that, he urged for passing appropriate order in the matter of abatement.

2. Mr. Pitamber Acharya, learned Senior Counsel for the petitioner did not dispute the factum of death of sole respondent as on 22.08.2017.

He however, contended that the proceeding is not to abate for the said death of the sole respondent and the procedures prescribed under the provision of section 116 of the Representation of the People Act, 1951 now are required to be adhered to for further progress of the proceeding in hand. He further submitted with vehemence that once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does no more rest with the petitioner alone.

In support of his contention that the present proceeding would continue and meet its logical end after completion of the trial, he placed reliance upon the decisions in the case of **Sheo Sadan Singh vrs. Mohan Lal Gautam**, (1969) 1 SCC-408, and **S. Baldev Singh vrs. Teja Singh Swatantar (dead) and others**, (1975) 4 SCC-406. Taking much of pain he has placed the relevant paragraphs in great detail.

3. In view of above submission, the matter now requires to be addressed as regards the fate of the present election petition filed under section 80 of the Representation of People Act, 1961, at this stage of its pendency.

This election petition has been filed challenging the election of the sole respondent to the Odisha Legislative Assembly from 2-Bijepur (General) Assembly Constituency. The election was held on 10.04.2014 and the result has been declared on 16.05.2014. The deceased-respondent has been declared elected therein as the Member of the Orissa Legislative Assembly representing the said constituency.

4. The election of the respondent has been challenged indicating relevant provisions of law on the top of the petition as its label. Those refer to the provisions concerning the grounds for declaration of election void and also to some procedural provisions which are not necessary for being taken note of. The provision of law as culled out therefrom, looking at the averments as well as the reliefs prayed for by the

petitioner and as have been referred to in the grounds of challenge are:- Sections 100 (1) (b); 100 (1) (d) (ii) (iii) (iv); 101, 123 of the Representation of People Act.

Those concerns with-

- (i) corrupt practice committed by the respondent (returned candidate) or his election agent or by any other person with the consent of the respondent or his election agent,
 - (ii) corrupt practice committed in the interests of respondent (returned candidate) by an agent other than the election agent,
 - (iii) improper reception, refusal or rejection of vote, and reception of void votes contrary to and without compliance of the provision of the Constitution, Act, rules and orders made under the Act.
5. I have carefully gone through the averments of the election petition. The important aspect of the case of the petitioner is that though he had secured more valid votes and was sure to be elected, the respondent in connivance of the Government and the officers who were associated in the process of counting the votes, has been able to manage the counting in an illegal manner as to secure more votes than actually polled in his favour and get those accordingly recorded so as to come out successful in the election. It is further stated that the respondent in connivance of the Presiding Officers, Returning Officers, Counting Supervisors and other Officials in a calculated manner has adopted corrupt practice by way of improper reception of votes in order to ensure the defeat of the petitioner and thus further his winning prospect. The other narrations of the petition refer mostly to the irregularities and non-compliance of the provisions of the Conduct of Election Rules 1961, in the process of polling and counting of votes in support of the above allegation.

The petitioner has then specifically alleged regarding the irregularities and non-compliance of Rules 49(E), 49(S) and 56(C) of the Conduct of Election Rules, 1961.

6. The relevant provision of Representation of People Act, 1951 coming into play for the present purpose is contained in section 116 of the Act. It reads as under:-

“116. Abatement or substitution on death of respondent- If before the conclusion of the trial of an election petition, the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is opposing the petition, the High Court shall cause notice of such event to be published in the Official Gazette, and thereupon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, and shall be entitled to continue the proceedings upon such terms as the High Court may think fit”.

The heading of the section is “Abatement or substitution on death of respondent”. Although the word ‘abate’ does not find, so expressly used therein, the provision however is clearly indicative of the abatement of election petition on the death of the respondent. It is meant for abatement of the proceeding on account of the death of respondent or its continuance upon the substitution of the person / persons consequent upon on the death of the respondent (emphasis supplied). In the instant case, the death of the sole respondent has taken place at the stage when issues have not been framed. Furthermore, as on record there is none to oppose the election petition.

7. The petitioner has prayed for the following reliefs in the election petition.
- (a) Let the election of sole respondent Subala Sahoo, elected MLA of 2-Bijepur Assembly Constituency of Odisha Legislative Assembly be declared void and be set aside;
 - (b) Let a declaration be made that a casual vacancy has been made so far as it relates to 2-Bijepur Assembly Constituency;
 - (c) Let a direction be issued to the appropriate authority to conduct election with respect to 2-Bijepur Assembly Constituency within the time specified under law;

The relief under item no. (d) refers to the calling for the relevant records so as to be taken into consideration and decision for grant of the other reliefs. This in fact was not necessary to be stated as one of the reliefs in the prayer portion of the petition and that is also not the requirement of law to be so mentioned in the election petition. Thus the same has nothing to do for the present purpose.

The first prayer is for declaration of the election of the respondent as void and to set it aside.

This declaration would have lead for casual vacancy.

In case the election petition would successfully end in the long run after trial, only upon a declaration to the above effect, casual vacancy would have to occur.

The casual vacancy however in view of the death of the sole respondent who was the elected member of the 2-Bijepur Assembly Constituency having already taken place, there arises no need for any order to that effect now in the present election petition and for that it is needless to say that the appropriate authority is free to proceed as provided under law in the matter of conducting the election afresh. In that view of the matter, in the instant case the reliefs as prayed for by the petitioner though not stand allowed being based upon and backed by the findings on the factual aspects or the allegations leveled which could have only been reached at conclusion of the trial, yet all those stand granted consequent upon the untimely death of the sole respondent at this stage of the proceeding.

8. In the cited case of Sheo Sadan Singh (supra), the Apex court in seisin of an appeal preferred by the unsuccessful election-petitioner being aggrieved by the order of dismissal of the election petition has refused to accept the contention that in view of the dissolution of the Assembly in the meantime, the appeal has been rendered infructuous. The Apex court has gone to decide the appeal on merit by examining the acceptability of the finding of the trial court on the issues framed. While repelling the contention of the respondent therein that the appeal has been rendered infructuous in view of the dissolution of Assembly and accordingly to meet its end, the Apex court however has dismissed the appeal on merit finding no justifiable reason to differ with the findings returned by the High Court. In that connection, it

has been observed that once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely rest with him. The reason for all those elaborate provisions has been said to be, in order to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds. From the facts of the cited case and on a careful reading of the said judgment, it is clearly seen that the court refused to abruptly curtail the legal right of the petitioner-appellant by depriving him from questioning the findings already recorded by the High Court against his case and the grounds set forth therein as beyond the purview of being tested as regards their sustainability in view of said dissolution of Assembly and thus put an end to the appeal for that reason. There the election petitioner had not received the favourable result in the election petition and so he was challenging the findings by exercising his right of appeal as provided in law. The findings having already been returned by the High Court, those were before the Apex court for examination as regards their correctness on appreciation of evidence in the touch stone of the legal principles governing the field. The Apex court in that connection has also relied upon the decision in the case of **Ghasi Ram v. Dal Singh**, AIR 1968 SC-1191 that the dissolution of the Assembly does not put to end to the election petition so as to hold that the election petition has abated in view of dissolution of the Assembly.

9. In the cited case of *S. Baldev Singh (supra)*, the Apex court was again in seisin of appeal carried by the unsuccessful election-petitioner impeaching the order of dismissal of the election petition passed by the High Court refusing to pass an order of declaration of invalidation of the first respondent's election therein and most importantly, consequent upon the refusal of the first prayer for declaration, there had flowed the refusal to declare the petitioner-appellant as the successful candidate in the very said election. The election petition had been dismissed and therefore the election-petitioner carrying an appeal had questioned the findings recorded against his case disentitling him of both the above reliefs. There while claiming declaration of invalidation of the election of the respondent, the petitioner had very much sought for a declaration that he be declared as the elected candidate and thus is to represent the constituency. When the appeal came up for hearing, the first respondent, i.e. the returned candidate had passed away. In that eventuality, submission was advanced and the question came up as to whether the appeal would proceed further for disposal on merit or would get a decent burial. That appeal was heard in spite of death of the sole respondent and ultimately it stood dismissed. The reason is very clear that in that appeal the person questioning the election had prayed for a declaration that consequent upon the declaration of the election of the elected candidate void, he be so declared elected. So in order to decide whether the appellant-petitioner would be declared as elected or not, the need was very much surviving to decide as regards the invalidation of the election of the deceased respondent. In that view of the matter, the Apex court said that since electoral can oppose the election petition as also the appeal, the said appeal has to proceed for disposal in accordance with law and the death of the returned candidate would have no impact over the progress of appeal and its decision on merit.
10. On going through the provision of section 116 of the Act and other analogous provisions, those have been elaborately made, it appears that those have been with an intent to meet one such the important objectives that a person questioning an election should not be allowed at a later stage to foil the said proceeding by resorting to collusion. Similarly, the respondent even being the returned candidate

is also not permitted in getting the result of the election upset either by collusion or for some ulterior gain by maintaining silence in the proceeding and thereby heavily costing upon the public exchequer and unnecessary wastage of public fund as well as time and energy of all concerned. It has been provided in section 116 of the Act that if a notice is given upon death of the respondent, any person who might have been a petitioner may, within a period of fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, in other words to assert that there is no reason to declare the election of the returned candidate void and declare someone as elected. If there is a prayer for declaring the election-petitioner as the elected candidate, the same survives for decision even in case of death of the elected respondent and for that the prayer to declare the election of the deceased respondent also survives for decision as the fate of the subsequent prayer squarely hinges upon the decision on the above first prayer.

Adverting to the present case as already stated, the petitioner has not advanced any such prayer for declaring him to be elected. In view of that all the reliefs prayed for by the petitioner are standing allowed consequent upon the untimely death of the sole respondent. The mere difference here is that said reliefs are not flowing from the finding on the factual and legal aspects as pleaded by holding the grounds for the same to be existing in the case but those are getting flowed because of the untimely death of the respondent.

The purpose that the person who has corrupted the course of an election should not be allowed to get away with it and he must in that event be visited with the legal consequences does not also remain to be served in the case, as the respondent being dead, the question of his incurring any such electoral disqualification /s at any future point of time does not arise. In that view of the matter, no purpose whatsoever would be served in the present case in holding a trial to find out whether there exists the grounds to declare the election of the respondent as void. Therefore the first prayer of declaring election of the respondent (since dead) as void does no more survive in the facts and circumstance of the case and thus to proceed further in this proceeding in my considered view would merely be an exercise in futility.

In the wake of aforesaid, the submissions of the learned counsel for the petitioner stand repelled.

11. The aforesaid discussion and reasons, lead to hold that the present proceeding should stand culminated in view of abatement on account of death of the sole respondent.

The election petition stands accordingly disposed of.

Sd/-

D. Dash. J.

By order,
Sd/-

(R. K. SRIVASTAVA)
Sr. PRINCIPAL SECRETARY

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