

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Extra Ordinary Jurisdiction)

CNR: SKHC010000802023

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No. 26 of 2023

Tulshi Das Subba,
S/o Kul Bahadur Subba,
R/o Upper Thambong,
Sikkim 737121.

..... Petitioner

Versus

1. Man Bir Subba,
S/o Man Bir Limboo,
R/o Upper Thambong-737121.
2. Returning Officer,
District Collector, Soreng District
Government of Sikkim-737121.
3. Assistant Returning Officer,
SDM, Soreng District
Government of Sikkim-737121.
4. Home Department,
Through the Secretary,
Government Tashiling Secretariat-737101.
5. Rural Development Department,
Through the Secretary,
Government of Sikkim-737101.
6. State Election Commission, Sikkim
Through its Commissioner
Assampa Villa, Amdo Golai Tadong-737102.
7. Roads & Bridges Department,
Through Secretary,
Government of Sikkim-737101.
8. Shri Suk Lall Limboo,
S/o Hasta Bir Limboo,
R/o Upper Thambong, Sikkim-737121.
9. Suk Raj Subba,
S/o Jas Bahadur Subba,
R/o Upper Thambong, West Sikkim-737121.

..... Respondents.

Writ petition under Article 226/227 of the Constitution of India.

{Against the Order dated 17.04.2023 and Order dated 03.07.2023 passed by the learned Civil Judge at Soreng and for setting aside the order dated 20.06.2023 passed by the Director-Panchayat, RMDD, Government of Sikkim}.

Appearance:

Mr. Yam Kumar Subba and Mr. Mukkum Hang Limboo, Advocates for the Petitioner.

Mr. Johnson Subba, Advocate for Respondent No.1.

Mr. Zangpo Sherpa, Additional Advocate General with Mr. Mohan Sharma and Mr. Sujan Sunwar, Assistant Government Advocate for Respondent nos. 4, 5 and 7.

Mr. Bhol Nath Sharma, Advocate for Respondent Nos. 2, 3 & 6.

None for Respondent Nos. 8 & 9.

Date of Hearing	:	19.06.2026
Date of Judgment Pronounced	:	02.07.2026
Date on which uploaded	:	02.07.2026

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This petition has been brought before this Court by Tulshi Das Subba challenging impugned order dated 17.04.2023 passed by the learned Civil Judge, Soreng District and the order in reference dated 20.06.2023 passed by the "Prescribed Authority".

2. After the election was held for Ward No.5, Angden Park, under 32-Upper Thambong, GPU, West Sikkim the respondent no.1 was declared elected. The petitioner who also contested filed an election petition under section 119 of the Sikkim Panchayat Act, 1993 (in short the Act of 1993) and the Rules framed there under challenging

the election of respondent no.1 on the ground that he was disqualified under section 16(k) of the Act of 1993 thereof.

3. It transpires that the parties completed their pleadings before the learned Civil Judge.

4. On 23.03.2023 the learned Civil Judge rejected the application filed under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (the CPC) for rejection of the election petition filed by respondent no.6.

5. Thereafter, on 17.04.2023 vide the impugned order the learned Civil Judge framed four issues and referred the issue regarding disqualification of the returned candidate i.e. respondent no.1 to the "Prescribed Authority".

6. The learned Civil Judge, referred the first issue relating to disqualification of respondent no.1 to the "Prescribed Authority" under sections 29 and 120 of the Act of 1993. He did so as he opined that, under section 29 of the Act of 1993 the "Prescribed Authority" has been given the power to decide on disqualification and removal of a member. The learned Civil Judge also opined that under section 120 of the Act of 1993 while trying election petition the question of disqualification is to be referred to the "Prescribed Authority".

7. The "Prescribed Authority" thereafter decided the reference vide the impugned order dated 20.06.2023.

8. Section 16(k) of the Act of 1993 relates to disqualification of members of Gram Panchayat and is part of Chapter III of the Act of 1993 relating to Gram Panchayat. It reads as under:-

"16. Disqualification of members of Gram Panchayat.

A person shall be disqualified for being chosen as and for being, a member of a Gram Panchayat:-

.....
 (k) *if he has directly or indirectly by himself or by his partner or employer or an employee, hold any share or interest in any contract with, by or on behalf of a Zilla Panchayat or a Gram Panchayat.*

Provided that a person shall not be deemed to have incurred disqualification by reason of his having a share or interest in any public company or registered co-operative society which has a contract with or is employed by a Gram Panchayat or a Zilla Panchayat of the district."

[Emphasis supplied]

9. Section 16 of the Act of 1993 therefore contemplates two scenarios. The first is when a person is disqualified "*for being chosen as*" a member of a Gram Panchayat. This would contemplate a situation in which the person has not yet been chosen as a member of a Gram Panchayat, as in the present case, and he is found to have been disqualified. The second scenario is "*for being a member*" of a Gram Panchayat. This would contemplate a situation in which the person has been chosen as a member and it was found that he was in fact disqualified for being a member during the period of membership.

10. In the first situation i.e. "*for being chosen as*" a member of a Gram Panchayat, section 119 of the Act of 1993 would be relevant. Section 119 of the Act of 1993 pertains to "*Application for questioning the election*" and provides as follows:

"119. (1) *The election of a person as a member of a Gram Panchayat or Zilla Pachayat shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that-*

- (a)
- (b) *that the result of the election has been materially effected-*
- (i)
- (ii) *by gross failure to comply with the provisions of this Act or rules framed thereunder.*
- (2)
- (3)
- (4) *The authority to whom the application under sub-section (i) is made shall, in the matter of –*
- (a) *hearing of the application and the procedure; to be followed at such hearing;*
- (b) *setting aside the election or declaring the election to be void or declaring applicant to be duly elected or any other relief that may be granted to the petitioner, have such powers and authority as may be prescribed.*
- (5)”
[Emphasis supplied]

11. As per the provision of section 119(1) quoted above, the election of a person as a member of a Gram Panchayat *“shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed.....”* Although the Act of 1993 specifically defines who is the “Prescribed Authority” in section 2(i)(j), it does not define the word “Authority” as used in section 119(1). However, a reading of section 130(2) (xx) makes it clear that the Authority mentioned in section 119(1) is the “Civil Judge”.

12. Section 119(1) of the Act of 1993 is similarly worded with Article 329(b) of the Constitution of India, 1950 which reads as under:

“329. *Notwithstanding anything in the Constitution*

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

13. The Supreme Court in **Ashok Shankarrao Chavan vs. Madhavrao Kinhalkar**¹ has interpreted Article 329(b) thus:

"35. Apart from the above provisions, under Article 329(b), it is specified that an election to either House of Parliament or either House of the Legislature of a State, cannot be called in question except by an election petition presented to such authority in such manner as may be provided for by or under any law made by the appropriate legislature. While Articles 101 to 103 and 191 to 192 deal with the disqualification of an elected member either to Parliament or to the State Legislature, Article 329(b) relates to the validity of a member elected to any constituency in an election held in accordance with law and such validity can be examined only by a prescribed authority under the law made by the appropriate legislature. Reading Article 329(b) and Sections 80 to 116 of the Act together, the position emerges that the status of a validly elected candidate in an election can be called in question only before the Election Tribunal (the High Court) by way of an election petition and such election petition to be decided by the Election Tribunal (the High Court) in the manner prescribed under the above referred provisions by following the procedures laid down therein. It further emerges that the validity of an election to either of the House of Parliament or the State Legislature cannot be called in question in any other manner other than what has been prescribed under the provisions of the Act, as has been set out in Sections 80 to 116 of the Act."

14. Under section 130(2) (xx) of the Act of 1993, the State Government in exercise of the power thereof framed the Sikkim Panchayat (Conduct of Election) Rules, 1997 (in short the Rules of 1997). Chapter X of the Rules of 1997 deals with disputes regarding elections.

¹ (2014) 7 SCC 99

15. The election petition filed by the petitioner relates to a dispute regarding election and therefore Chapter X of the Rules of 1997 ought to have been followed. Chapter X begins with Rule 86 and ends with Rule 119. Rule 87 relates to election petitions and it provides that *"no election shall be called in question except by an election petition presented in accordance with the provisions of Chapter X."* Rule 88 mandates that such an election petition may be presented to the "Civil Judge" having jurisdiction over the Panchayat Ward/Territorial constituency in respect of which the election is being challenged, by any candidate at such election or by any elector within the time frame provided. Rule 89 to 98 deals with parties, contents reliefs, trial, procedure, documentary evidence, secrecy of voting not to be infringed, answering of incriminating questions and certificate of indemnity expenses of witnesses, and recrimination when seat claimed.

16. Rule 99 provides that at the conclusion of the trial of an election petition the "Civil Judge shall make an order" dismissing the election petition; or declaring the election of all or any of the returned candidate to be void; or declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. Rule 100 relates to other orders, which may be made by the Civil Judge.

17. The prayers in the election petition filed by the petitioner were precisely those as contemplated under Rule 99 of the Rules of 1997. Chapter X of the Rules of 1997 does not contemplate a reference by the Civil Judge to the "Prescribed Authority".

18. The apparent confusion in the mind of the learned Civil Judge was the interpretation of section 29 and section 120 of the Act of 1993. Section 29 relates to removal of a member of a Gram Panchayat by the "Prescribed Authority". The "Prescribed Authority" is defined in section 2(1) (j) of the Act of 1993. "Prescribed Authority" means an authority appointed by the State Government, by notification, for all or any of the purpose of the Act of 1993. The State Government vide Notification No. 204/26/RM&DD/P/03-04/05 dated 24.05.2005 has appointed the Director, Panchayat in the Rural Management and Development Department (RMDD) as the Prescribed Authority.

19. The situation contemplated by section 29(1), wherein the "Prescribed Authority" may, after giving an opportunity, "*to a member of a Gram Panchayat*" to show cause against the action to be taken by him, by order remove him from office if he was disqualified as provided in sub-section 1(a), 1(b), 1(c) and 1(d) is a situation that relates to the second scenario envisaged under section 16 of the Act of 1993 as discussed above.

20. When after being a member of a Gram Panchayat it is learned by the "Prescribed Authority" that the member of a Gram Panchayat was disqualified, the "Prescribed Authority" could take recourse to section 29 and take action against the member of the Gram Panchayat.

21. The confusion in the mind of the learned Judge was due to the language used in section 120 of the Act of 1993 as well. It reads:

"120. *If any question arises as to whether a person has become subject to any disqualification, the question shall be referred to the Prescribed Authority for his decision and his decision shall, subject to the result of any appeal as may be prescribed, be final.*

Provided that no order shall be passed under this section unless the person so disqualified is given an opportunity of being heard."

[Emphasis supplied]

22. The language of section 120 quoted above seems to have given an impression to the learned Civil Judge that all questions relating to disqualification must be referred to the "Prescribed Authority". However, on a scrutiny of the use of the language in section 120 of the Act of 1993 the impression of the learned Civil Judge may not be correct. Section 120 of the Act of 1993 provides that if any question arises as to "*whether a person has become subject to any disqualification, the question shall be referred to the Prescribed Authority for its decision.*" The words used in section 120 underlined above i.e. "*has become*" is used in the present tense and not in the past tense. This would be important. When used in the present tense it would relate to a person who is a member of a Gram Panchayat who has become subject to disqualification falling under the second scenario.

23. Under the scheme of the Act of 1993 and the Rules of 1997, it is clear that if a challenge is to be made to an election of the Gram Panchayat the route contemplated is the one provided in Chapter X of the Rules of 1997. All questions relating to the challenge to an election including whether the returned candidate was disqualified or not has to be examined in the election petition, which is to be

necessarily filed before the learned Civil Judge. However, once a returned candidate becomes a member of a Gram Panchayat and during his tenure as such he has become subject to the disqualifications contemplated by the Act of 1993 then it is the "Prescribed Authority" who has to make the decision as contemplated in section 29 thereof.

24. The election petition filed by the petitioner did not relate to such a scenario i.e. the second scenario and therefore, the route taken by the learned Civil Judge was not correct. What the learned Civil Judge ought to have done was to follow the procedure prescribed in Chapter X of the Rules of 1997, try it and decide it as is required to be done when election petitions are filed calling in question the election of a returned candidate. This interpretation perhaps would be more logical, otherwise, in case like the present one, the Civil Judge would only be an authority tasked with fulfilling procedural formalities leaving the sole question regarding disqualification of an elected candidate entirely to the judgment of the "Prescribed Authority".

25. I am therefore of the considered view that the election petition could not have been decided by the "Prescribed Authority" and it ought to have been tried and decided by the Civil Judge as mandated by Chapter X of the Rules of 1997. Consequently, it is held that the Prescribed Authority also did not have the jurisdiction to decide the reference and pass the impugned order dated 20.05.2023.

26. The petition is allowed. The impugned order dated 17.04.2023 passed by the learned Civil Judge and the reference order passed by the "Prescribed Authority" dated 20.06.2023 are therefore, set aside.

27. The election petition filed by the petitioner is reverted to the files of the learned Civil Judge to decide it as prescribed under Chapter X of the Rules of 1997.

28. There is yet another issue raised by the learned counsel for the respondent no.1. For the purpose of the present writ petition it is not necessary to examine it. However, it may be necessary for the State respondents to do so. The issue relates to the language used in 119A inserted in the Act of 1993 by the Sikkim Panchayat (Amendment) Act, 1995. It reads:

"119A. *Any person aggrieved by an order of the Prescribed Authority under section 119 may appeal to the Appellate Authority to be appointed by the State Government within such time and in such manner as may be prescribed."*

29. Section 119 however does not talk about any order to be passed by the "Prescribed Authority". As held above section 119(1) contemplates an application presented to "such authority" as may be prescribed. That authority is the competent authority i.e. the Civil Judge under Chapter X of the Rules of 1997, framed under section 130 (2) (xx) of the Act of 1993. A perusal of the Sikkim Panchayat (Amendment) Bill, 1995 and the Statement of Object and Reasons reflects no reason as to why section 119A used the words "*Prescribed Authority under section 119*" when section 119 did not relate to "Prescribed Authority" but only to the "Authority". The Statement of Object and Reasons specifies that "*Section 119 of the Principal Act*

made provision for prescribing an authority to hear matters relating to election. It is deemed expedient to make provision for appointment of an Appellate Authority, whose decision shall be final, which has been incorporated by inserting a new section being section 119A in the Principal Act.” Therefore, it is apparent that either the words “under section 119” in section 119A of the Act of 1993 was not necessary or the word “Prescribed” before the word “Authority” was surplusage. However, as this issue is not directly connected to the present case I deem it unnecessary to say any further and leave it to the State respondents to examine it and take necessary action.

30. Before I conclude, I would be wanting if I did not put on record my deep sense of appreciation for the able assistance rendered by the learned counsel for the parties. Although the parties filed their respective pleadings contesting the issues, on the question of law answered by this Court, all the learned counsel as Officers of the Court rendered their invaluable assistance to enable this Court to come to the present interpretation.

**(Bhaskar Raj Pradhan)
Judge**

Approved for reporting : **Yes**

to/