

B.N.MAHAPATRA, J.

W.P.(C) NO.20659 OF 2009 (Decided on 26.10.2010)

**ASIAN SCHOOL OF BUSINESS MANAGEMENT,
TRUST, BBSR.**

..... Petitioner.

.Vrs.

**ORISSA POWER TRANSMISSION
CORPORATION LTD.(OPTCL) BBSR & ORS.**

..... Opp.Parties.

Electricity (Supply) Act, 1948 (ACT NO. 54 OF 1948) – SEC.29.

For Petitioner - M/s. L.Panigrahi, S.R.Pani, A.K.Das, S.K.Mishra &
B.Jena.

For Opp.Parties – Mr. N.C.Panigrahi, Sr. Advocate
M/s. S.R.Panigrahi, N.K.Tripathy, D.Dhal
(for O.Ps.1 to 3)
M/s. S.Mohanty, H.N.Parida, P.R.Sutar
(for intervenor)

B.N.MAHAPATRA, J. This writ petition has been filed seeking directions to O.P. No.1-Orissa Power Transmission Corporation Ltd., represented through its Managing Director, O.P. No.2-Superintending Engineer [E.H.T.(C) Circle] and O.P. No.3-Asst. General Manager, EHT (C) Division of Orissa Power Transmission Corporation Ltd., not to make any construction of transmission tower/line within the premises of the petitioner and to take a final decision regarding re-routing/re-alignment of the 220/132 KV Mendhasaal-Bidanasi over-head line within a stipulated time after completion of the profile survey by the petitioner.

2. Bereft of unnecessary details, the short facts leading to the present writ petition are that on 30.01.1996 the Orissa State Electricity Board prepared and notified a Scheme for strengthening the transmission network in and around Chandaka (Bhubaneswar) command area and Bidanasi (Cuttack) command area. The Scheme was publicized and gazetted in terms of Section 29 of the Electricity (Supply) Act, 1948 (for short, 'the Act, 1948') inviting objections from any person interested regarding execution of the Scheme within two months from the date of publication. The Scheme was duly concurred by CEA under Section 31 of the Act, 1948. Petitioner purchased the land in question by a sale deed dated 30.12.2005. Thereafter, the petitioner filed Civil Suit No.72/06 before the Civil Judge (Junior Division), Bhubaneswar and got an order of injunction on 26.04.2006 restraining O.P.No.1-the Orissa Power Transmission Corporation Limited (for short, 'OPTCL') from making any construction in its premises. In F.A.O. No.40/23 of 2006, the learned Ad hoc Addl. District Judge (FTC) No.3, Bhubaneswar allowed the appeal filed by the OPTCL and set-aside the order of injunction against which the present petitioner had filed writ petition bearing W.P.(C) No.14806 of 2008. In the said writ petition, this Court vide its order dated 21.11.2008 confirmed the aforesaid order of

Ad hoc Addl. District Judge (FTC) No.3, Bhubaneswar. Thereafter, the present writ petition has been filed by the petitioner with aforesaid prayers. In Misc. Case No.17732 of 2009, this Court by an ex-parte interim order dated 31.12.2009 restrained the OPTCL from constructing over-head line on the relevant portion of the suit land. Further, this Court on 04.01.2010 directed that the order of status quo dated 31.12.2009 would remain operative till appearance of the opp. parties.

The intervention petition filed by Orissa Electricity Regulatory Commission (for short, 'OERC') was allowed and the intervenor-petitioner has been added as opp. party No.6 vide this Court's order dated 04.10.2010.

3. At the outset, Mr.N.C.Panigrahi, learned Senior Advocate appearing for opp. parties 1 to 3 and Mr. S.Mohanty, learned counsel appearing for the intervenor-petitioner raised preliminary objection regarding maintainability of the writ petition. It is submitted that the present writ petition is not maintainable on the ground that Civil Suit No.72/06 filed before the Civil Judge (Junior Division), Bhubaneswar seeking self-same relief is pending, and the petitioner cannot take recourse to the present position. Further, this Court has already considered the issue relating to petitioner's right to oppose construction of transmission line in W.P.(C) No.14806 of 2008, which was dismissed on 21.11.2008. Therefore, the petitioner cannot agitate the same issue in the present writ petition. It was also submitted that the petitioner cannot acquire a better right than that of its vendor possessed at the time of transfer of ownership of the land in question. It cannot be said that while purchasing the land in question, the petitioner was not aware of the Scheme and OPTCL's right. The OPTCL has completed almost whole of the work under the Scheme by 26.04.2006 except for two towers and over-head lines to be laid on a small portion of the land in question. OPTCL has already invested rupees nine crores. If it is prevented from making the aforesaid remaining construction of the transmission line, the power supply to entire Bhubaneswar, Khurda, Puri, Nimapara, Fulnakhara and Jagatsinghpur will be in jeopardy since such supply is now managed through one Circuit resulting not only low voltage but also precarious dependence on one Circuit. Mr. Panigrahi emphatically submitted that though after delivery of the judgment on 21.11.2008 there were no further negotiation/efforts between the parties to reach any settlement, yet the petitioner has filed the present writ petition with the very same prayer which was claimed in the earlier writ petition and obtained interim injunction on 31.12.2009 in Misc. Case No.17732 of 2009. The petitioner relies on a joint verification of the parties made on 10.11.2008 (Annexure-11) which could not be fruitful and after that joint verification this Court dismissed the writ petition on 21.11.2008. After the order dated 21.11.2008, there is not a single scrap of paper to show that the opp. parties have ever taken any step for resolution beyond the order. Relying on the decisions of this Court rendered in Rabindra Bhoi vs. Chief Executive Officer, Central Electricity Supply Utility and another, 2010 (1) O.J.R. 478, Sanwarmal Ram @ Agarwal vs. Executive Engineer, E.H.T., GRIDCO, Berhampur, W.P.(C) No.1000 of 2002 disposed of on 10.10.2002, Sanghamitra Biswal vs. Orissa Power Transmission Corporation Ltd. & Others, W.P.(C) No.11408 of 2007 disposed of on 12.11.2007, Sri R. Ramudu Reddy vs. State of Orissa & Another, OJC No.12732 of 2000 disposed of on 28.01.2002, Bairagi Charan Nayak vs. State of Orissa & Others, OJC No.2868 of 1998 disposed of on 29.08.2000, Mr. Panigrahi vehemently argued that when a transmission line is to be drawn up under a Scheme and no objection has been filed by the concerned owner of the land at the appropriate time opposing the

Scheme, the same cannot be stopped and at the most petitioner is entitled to compensation as payable under the law.

4. Per contra, Mr. L.Pangari, learned counsel appearing for the petitioner submitted that the earlier writ petition was filed against the order of the District Judge vacating the injunction granted by the Civil Judge (Jr. Division), Bhubaneswar whereas the present writ petition has been filed on a different cause of action and in the interest of parties. The dispute can be resolved only by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution which power is much wider. The pending civil suit shall be subject to the order to be passed in the present writ petition and the same shall ultimately become infructuous. The earlier writ petition was dismissed on account of false representation made by the opp. parties. Pursuant to orders dated 15.10.2008 and 27.10.2008 of this Court in earlier writ petition, the parties with a view to work out a solution, made a joint verification. Several correspondences have also been made between the petitioner and the officers of the opp. parties to find out solution. The petitioner negotiated consultants who have made detailed survey and submitted their report to the effect that re-routing / re-alignment is possible only by addition of one transmission tower. The petitioner has forwarded to the opp. parties a detailed profile survey report, topo map indicating that rerouting realignment is possible in two ways just by adding one extra tower. The petitioner is ready and willing to bear the cost of extra tower and for re-routing the tower line by addition of one extra tower. After dismissal of the earlier writ petition, the opp. parties falsely represented to the Police and the Collector, Khurda to provide them police force to break the boundary wall for entering into the campus of the petitioner. In these circumstances, the petitioner constrained to file the writ petition. Mr.Pangari further submitted that since the opp. parties have not filed any document to indicate that construction of the 220 KV Mendhasal - Bidanasi tower line is part of any sanctioned Scheme, Section 12 of the Electricity Act, 2003 (for short, Act 2003) is applicable. It is further submitted that in the case of the petitioner no order in terms of Sub-section (3) of Section 12 of the Act 2003 has been submitted indicating that compensation has been fixed. Even if it is decided to make payment of any compensation no amount of compensation will help the petitioner as it will be impossible to break the campus having five fully residential postgraduate programmes with 488 students (3 years duration) and eight hostels without affecting the career of more than twelve hundred students. To meet such situation, second proviso to Section 12(2) provides that the tower location can be removed or altered by the authorities. Opp. parties are not able to show any document indicating that the petitioner has at any time cause any obstruction to the construction work. On the other hand, opp. parties realized that it will be impossible to break upon the campus forcibly where more than twelve hundred students are studying and about eight hundred students are residing in eight hostels. If the opposite parties are permitted to forcefully enter into the campus for installation of the tower line there may be serious law and order problem as there are 800 students residing in the campus including 500 girls' students. None of the judgments cited by the opp. parties goes to show that any High Court has passed orders directing joint survey to explore the possibility of rerouting / realignment of the line in better interest of the parties. In all the judgments cited by the opp. parties, the Court has dealt with the case / interest of private individuals and not the case of a premier established educational institution where more than twelve hundred students are prosecuting their

studies and residing in eight hostels inside the campus. Concluding the argument Mr. Pangari submitted that the opp. parties should be directed to divert the proposed 220 KV Mendhasal-Bidanasi tower line as indicated in Annexure-21 to the rejoinder.

5. On the rival contentions, the following questions fall for consideration.

- (i) Whether the writ petition is maintainable?
- (ii) Whether correspondence of the petitioner with the Officers of the opp. parties gives any right to the petitioner?
- (iii) Whether the subsequent purchaser of a land can oppose construction of a transmission line over his land which was approved and notified under a Scheme particularly when no objection was raised by the original owner ?
- (iv) Whether public interest has preference over the petitioner's interest ?

6. Question no.1 is with regard to maintainability of the writ petition.

According to the opposite parties, the writ petition is not maintainable on the following grounds :

(i) The petitioner having resorted to the alternative remedy by filing Civil Suit No. 72/2006 before the Civil Judge (Jr. Divn.), Bhubaneswar seeking self-same relief, which is now pending, cannot invoke extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

(ii) Since this Court has already considered the issues as to the petitioner's right to oppose the construction of transmission line over its land while disposing of W.P.(C) No.14806 of 2008 on 21.11.2008 and the same having attained finality the petitioner is estopped from raising the same issue again in the present writ petition.

7. It is not in dispute that the petitioner filed C.S. No.72/2006 in the Court of the Civil Judge (Jr. Divn.), Bhubaneswar seeking permanent injunction against opposite parties 1 to 3 restraining them from entering upon the land in question and erecting/constructing any transmission tower/line over the same. The present writ petition has been filed virtually for self-same relief.

Law is well settled that Writ Court should not interfere in the matter where suit or any other proceeding is pending before the lower forum seeking self-same relief. The apex Court in ***Bombay Metropolitan Region Development Authority, Bombay Vs. Gokak Patel Volkart Ltd. & Ors.***, (1995) 1 SCC 642, held as follows :

"We are of the view that the point taken by the appellant is of substance. This is a case, where there is not only the existence of an alternative remedy but the writ petitioner actually had availed of that remedy. The writ petitioner's appeal before the statutory authority was pending. In that view of the matter this writ petition should not have been entertained."

In ***Jai Singh v. Union of India and others***, AIR 1977 SC 898, the apex held that the appellant cannot pursue two parallel remedies in respect of the same matter at the same time.

The apex Court in ***K.S. Rashid and Son v. Income Tax Investigation Commission and others***, AIR. 1954 SC 207, held as follows:

"For the purpose of this case it is enough to state that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has

always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. So far as the present case is concerned, it has been brought to our notice that the appellants before us have already availed themselves of the remedy provided for in section 8(5) of the Investigation Commission Act and that a reference has been made to the High Court of Allahabad in terms of that provision which is awaiting decision. In these circumstances, we think that it would not be proper to allow the appellants to invoke the discretionary jurisdiction under Article 226 of the Constitution at the present stage, and on this ground alone, we would refuse to interfere with the orders made by the High Court.

The apex Court in ***Tilokchand Motichand & Ors. V. H.B. Munshi, Commissioner of Sales Tax, Bombay & Anr.***, AIR 1970 SC 898, held this Court refrains from acting under Article 32 if the party has already moved the High Court under Article 226 with a similar complaint and for the same relief and failed. This Court insists on an appeal to it and does not allow fresh proceeding. In this case the principle of res judicata is applied although the expression is some of the inapt and unfortunate. The rule is based on public policy but the motivating factor is the existence of another parallel jurisdiction in another court.

8. In the case at hand, since Civil Suit is pending in the Court of Civil Judge (Jr. Division), Bhubaneswar the present writ petition seeking self-same relief, is not maintainable.

9. Challenging the second contention of the opposite parties that the issue involved in the present writ petition having been decided in the earlier writ petition, the present writ petition is not maintainable, Mr Pangari, learned counsel appearing on behalf of the petitioner submitted that the earlier writ petition No.14806 of 2008 was disposed of by this Court exercising jurisdiction under Article 227 of the Constitution of India and the present writ petition has been filed invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution which power is much wider.

Repudiating such stand of Mr Pangari, Mr Panigrahi, learned Senior Advocate for the opposite parties submitted that the earlier writ petition and the present writ petition both are filed by the petitioner under Articles 226 and 227 of the Constitution. The earlier writ petition was dismissed and the same having not been challenged in Appeal that attained finality. Even assuming the previous writ petition was one under Article 227, it makes no difference because the relief claimed in both the writ petitions is one and the same and the cause of action is also the same.

10. Undisputedly the relief claimed in the earlier writ petition, i.e., W.P.(C) No.14806 of 2008 and in the present writ petition is one and the same and the cause of action is also the same. The earlier writ petition W.P.(C) No.14806 of 2008 was filed praying *inter alia* for a direction to restrain opposite parties from entering upon the suit schedule land of the petitioner and from erecting/constructing any transmission tower on the same. This Court dismissed the said writ petition vide its order dated 21.11.2008 and that order was not challenged in Appeal. Thus, the said order attained finality. During pendency of the said writ petition there was negotiation and even possibility of alternative solution was explored but failed.

11. Law is well settled that correctness of the judicial order which has attained finality cannot be examined in writ jurisdiction.

In ***Naresh Shridhar Mirajkar vs. State of Maharashtra & Anr.***, AIR 1967 SC 1, nine Judges' Bench held that the judicial order is not liable to be questioned in a writ petition. The same view was reiterated by another Seven Judges' Bench in ***A.R. Antulay v. R.S. Nayak & Anr.***, AIR 1988 SC 1531.

12. Maintainability of the present writ petition can be looked at on the ground of res judicata. The apex Court in ***State of Karnataka & Anr. Vs. All India Manufacturers Organization & Ors.***, (2006) 4 SCC 683, held as under:-

“Res Judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim nemo debet bis vexari pro una et eadem causa (no one ought to be twice vexed for one and the same cause) and second, public policy that there ought to be an end to the same litigation. It is well settled that Section 11 of the Civil Procedure Code, 1908 (hereinafter “CPC”) is not the foundation of the principle of res judicata, but merely statutory recognition thereof and hence, the section is not to be considered exhaustive of the general principle of law. The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to reagitate the matter again and again. Section 11 CPC recognizes this principle and forbids a court from trying any suit or issue, which is res judicata, recognizing both “cause of action estoppel” and “issue estoppel”.

The Constitution bench of the apex Court in ***Direct Recruit Class-II Engineering Officers' Association Vs. State of Maharashtra & Ors.***, (1990) 2 SCC 715 held as under:-

“..... An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata”

In ***Forward Construction Co. & Ors Vs. Prabhat Mandal (Regd.), Andheri & Ors.***, AIR 1986 SC 391, the apex Court held that in view of Section 11, Explan. IV it could not be said that the earlier judgment would not operate as res judicata as one of the grounds taken in the subsequent petition was conspicuous by its absence in the earlier petition. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of litigation and every matter coming within the legitimate purview of the original action both in respect of the matter of claim or defence.

13. Mr. Pangari has tried to make a distinction between the earlier writ petition and the present writ petition by saying that the earlier writ petition was disposed of by exercising jurisdiction under Article 227 whereas the present writ petition has been filed invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution which is much wider. This submission of Mr Pangari is not factually correct. Both the earlier and the present writ petitions are filed under Articles 226 and 227 of the Constitution. Moreover, the apex Court in ***Surya Dev Rai v. Ram Chander Rai & Ors.***, (2003) 6 SCC 675, held that it is well settled that the power of superintendence conferred on the High Court under Article 227 is administrative as well as judicial, and is

capable of being invoked at the instance of any person aggrieved or may even be exercised *suo motu*. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.

Moreover, in both the writ petitions the cause of action as well as relief claimed by the petitioner being one and the same, it makes no difference even if the earlier writ petition was disposed of exercising jurisdiction under Article 227 as contended and the present writ petition is filed under Article 226 of the Constitution. It needs no reiteration that the earlier writ petition and the present writ petition are filed both under Articles 226 and 227 of the Constitution.

14. The second question is as to whether correspondence of the petitioner with officers of the opposite parties gives any right to the petitioner. The third question is whether a subsequent purchaser of a land can oppose construction of the transmission line over the land of the petitioner which was approved and notified under a Scheme prior to his purchase and when no objection was raised by the original owner. These questions have also been adjudicated by this Court in the previous writ petition, i.e., W.P.(C). No.14806 of 2008 and this Court held as follows:

“Further when once no objection was raised within the statutory period, the subsequent belated correspondence by any officer of Respondent may not act as an estoppel against them because such officer is not entitled to forego the statutory period prescribed for receiving objections or to extend it or even to waive it.

Moreover, after having purchased the land in December 2005, the building was constructed below the power line by petitioner only in July 2006, after knowing fully well that negotiation with officers of Respondent failed.”

15. Law is no more *res integra* that purchaser of a land cannot acquire better title and right than that of his vendor. In the instant case, the scheme for construction of 220 KV high tension transmission line from Mendhasal-Bidanasi was sanctioned and published in the year 1996. The petitioner's vendor did not raise any objection to the same. The petitioner purchased the said land on 30.12.2005. Thus, the vendee cannot assert better right than the vendor. It cannot claim to stop transmission network. At the best, the petitioner can claim for compensation as payable under law.

16. The fourth question is whether the public interest has preference over the petitioner's interest.

In the present case, pursuant to the Scheme, the opposite parties have erected 115 towers on both sides of the petitioner's land except two towers and over-head lines are to be constructed on the petitioner's land. The OPTCL has invested a substantial amount to implement the scheme. Because of non completion of the work undertaken as per the Scheme, power supply to Bhubaneswar, Khurda and many other towns is in jeopardy.

17. The paramount public interest in this case cannot be lost sight of. On one hand, the larger interest of the State involving lakhs of electricity consumers spreading over several districts of Orissa and on the other hand the purported inconvenience of a few hundred of students. Time and again, the apex Court has deprecated the practice of the

educational institutions acting in violation of law and committing irregular and illegal acts and thereafter, taking plea of career of the students. I am shocked that in the case at hand even the threat of law and order situation by the students has been argued. Plight of the students is apparently due to improper action of the petitioner. If the career of the students is at stake, the petitioner is solely and wholly responsible for it.

18. In the above premises, the petitioner is not entitled to any equitable relief as with eyes open and being fully conscious that its vendor has not filed any objection to the scheme, it has constructed the boundary walls and buildings. Thus, the petitioner cannot get any benefit out of its own wrong.

19. The inevitable conclusion is that the writ petition deserves dismissal which I direct.

Writ petition dismissed.