

ORISSA HIGH COURT: CUTTACK

W.P.(C) No.19952 of 2012

In the matter of an application under Articles 226 and 227 of the Constitution of India.

T. Abhimanyu Dora, aged about 40 years,
S/o. T. Keshab Dora,
resident of village/P.O. Kujamendhi,
P.S. Banigochha, Dist : Nayagarh ... Petitioner

-Versus-

Sudipta Charan Ray, aged about 52 years,
S/o. Rudra Madhab Ray,
resident of At/P.O. Madhyakhanda,
P.S. Dasapalla, Dist: Nayagarh
and another ... Opp.Parties

For Petitioner : *Mr. S.P. Mishra, Sr. Advocate*
M/s. B.S. Panigrahi, S.K. Sahoo,
& J.K. Mohapatra

For Opp.Parties : *None*

P R E S E N T :

THE HONOURABLE MR. JUSTICE B.N. MAHAPATRA

Date of Order : 30.11.2012

B.N.Mahapatra, J. The present writ petition has been filed with a prayer to quash order dated 13.09.2012 (Annexure-5) passed by the learned Civil Judge (Sr. Division), Nayagarh (for short, "Election Tribunal") in Election Misc. Case No.15 of 2012, wherein the Election Tribunal has rejected the petition filed by the petitioner under Section 10 of C.P.C.

read with Section 151 C.P.C. Further prayer of the petitioner is to allow the said petition filed in Election Misc. Case No.15 of 2012 (Annexure-3).

2. Petitioner's case is that opposite party No.1 who was the election petitioner before the Election Tribunal presented a petition under Section 44A of the Orissa Panchayat Samiti Act, 1959 (for short, "Act, 1959") before the Election Tribunal as Election Misc. Case No.15 of 2012 impleading the petitioner and the proforma opposite party no.2 as opposite parties therein with a prayer to declare the election of the present writ petitioner as Chairman, Dasapalla Panchayat Samiti as void and to make a further declaration that the election petitioner is the uncontested Chairman of the said Panchayat Samiti. Further case of the election petitioner is that for the election of the Chairman, Dasapalla Panchayat Samiti, the writ-petitioner, Election Petitioner and one Kedar Majhi filed nomination before opposite party No.2-Additional Project Director, D.R.D.A., Nayagarh-cum-Election Officer on 11.03.2012. During scrutiny of the nomination papers the (election petitioner) opposite party No.1 here filed a written objection before opposite party No.2 objecting the candidature of the writ petitioner on the ground that he has been illegality elected as Samiti Member by giving a false caste certificate as O.B.C. and practising fraud. Therefore, it was alleged that the writ petitioner is disqualified to contest for the office of Chairman. Since the objection of the election petitioner has not been considered, he

filed the election petition. The election of the writ petitioner to the office of Samiti Member of Dasapalla Panchayat Samiti in Kujamendhi Grama Panchayat has been challenged by one Upendra Sahu, one of the contesting candidate to the office of Samiti Member of said Panchayat Samiti by filing an Election Petition bearing Election Misc. Case No.2 of 2012 making the same allegation that the writ petitioner is not belonging to OBC category but has submitted a false affidavit while filing the nomination papers and has prayed to declare the election of the writ petitioner to the post of Samiti Member of the said Panchayat Samiti as null and void and to declare him as the elected candidate in the said post. The said Election Misc. Case No.2 of 2012 is pending adjudication before the Election Tribunal. An application filed under Order 7, Rule 11, C.P.C. by the writ petitioner having been rejected by the Election Tribunal by order dated 26.07.2012, the writ petitioner has approached this Court by filing a writ petition bearing W.P.(C) No.14192 of 2012 and this Court vide order dated 10.08.2012 has been pleased to stay further proceeding in Election Misc. Case No.2 of 2012 which is continuing as such. While the matter stood thus, the writ petitioner filed an application on 04.09.2012 under Section 10 read with Section 151 C.P.C. *inter alia* stating therein that since in Election Misc. Case No.2 of 2012 and Election Petition No.15 of 2012 the issue is same, the Election Petition No.15 of 2012 which has been filed subsequently challenging the election

of the writ petitioner to the office of the Chairman of Dasapalla Panchayat Samiti, the same needs to be stayed till the candidature of the present petitioner to the office of Samiti Member is not decided. It was further stated in the said petition that in the event of continuance of the subsequent proceeding there shall be conflict of decision which shall lead to miscarriage of justice.

3. The Election Petitioner filed the petition under Annexure-4 inter alia stating therein that both the Election Misc.Cases are not being the same nor between the same parties the decision in one case shall not operate as res-judicata in the other proceeding. He has also pleaded in the objection petition that the said misc. case being one under a special statute and not a suit under the C.P.C., Section 10 C.P.C. is not applicable to the present case. Filing of the objection petition is nothing but to delay the proceeding and therefore, he prayed under Annexure-4 to reject the said petition. Learned Election Tribunal after hearing the parties rejected the petition dated 04.09.2012 (Annexure-3) vide order dated 13.09.2012 passed under Annexure-5. Hence, the present writ petition.

4. Mr. S.P. Mishra, learned Senior Advocate appearing for the petitioner submitted that the Election Tribunal has passed the impugned order without exercising judicial mind and rejected the application under Section 10 read with Section 151 C.P.C. in a mechanical manner while

the circumstance of the present case necessitates to stay further proceeding of subsequent Misc. Case in order to avoid conflict of decisions. The other reason given by the learned Election Tribunal to reject the petition under Annexure-3 is that a similar petition on self same ground filed on 23.07.2012 has already been rejected vide order dated 27.07.2012. The said reason is not sustainable in law since in that case learned Tribunal has held that Section 10 C.P.C. is not applicable to the instant case as the proceeding is not a suit and further by the time the said petition was rejected, the opposite parties had not filed their show cause to the Election Misc. Case. The aforesaid observation of the learned Tribunal is based on misconception of fact and therefore, they are not sustainable in law. Mr. Mishra, learned Senior Advocate submitted that since both the proceedings involve the same issue in order to avoid contradictory findings in both the proceedings, Section 151 CPC should have been invoked even if it is held that Section 10 C.P.C. is not applicable and imposition of cost of Rs.300/- is not valid.

5. Mr. Mishra, further submitted that on a bare reading of the averments made in the election petitions under Annexures-1 and 2 it reveals that in both the cases, the issue to be decided is whether the petitioner belongs to OBC Category and has been duly elected as Panchayat Samiti Member from Kujamendhi Grama Panchayat of Dasapalla Panchayat Samiti. In both the election petitions although the

relief claimed is of different character, the issue involved in both the cases are directly and substantially the same. Therefore, in the event, Election Misc. Case No.2 of 2012 is decided the decision in the said proceeding shall operate as res judicata in Election Misc. Case No.15 of 2012. Since the issue involved in both the cases is with regard to the status of the person, the decision is one in rem and shall be binding to the whole world including the parties in both the election cases. If both the proceedings are allowed to continue, there is every chance of conflict of decisions as the proceedings shall be decided on the basis of the evidence to be led in the respective cases.

In support of his contention, Mr. Mishra relied upon the following decisions of the Hon'ble Supreme Court as well as different High Courts in the cases of (i) *Trikamdas Jethabhai and others Vs. Jivraj Kalianji and another*, AIR (29) 1942 Bombay 314; (ii) *Shaw Wallace & Co. Ltd. Vs. Bholanath Mandanlal Sherawala & others*, AIR 1975 Calcutta 411; (iii) *Shri Durga Charan Routray Vs. Narasingha Charan Das*, 69 (1990) CLT 163; (iv) *National Institute of Health and Neuro Sciences Vs. C. Parameshawara*, AIR 2005 SC 242; (v) *Smt. Suryamani Sarangi Vs. Pravakar @ Prava Sankar Sarangi & another*, 2007(II) OLR 370 and (vi) *Chandrasekhar Mohanty & others Vs. State of Orissa and others*, 2007(II) OLR 459. Concluding his argument, Mr. Mishra,

submitted to stay further proceeding in Election Misc. Case No.15 of 2012 till disposal of Election Petition No.2 of 2012.

6. The only question that arises for consideration by this Court is whether the Election Tribunal is justified in rejecting the objection petition dated 04.09.2012 (Annexure-3) filed by the writ petitioner under Section 10 read with Section 151, C.P.C. in Election Misc. Case No.15 of 2012 under Annexure-1.

7. Case of the present writ petitioner is that both the proceedings i.e., Election Misc. Case No.15 of 2012 and Election Petition No.2 of 2012 involve the same issue and in order to avoid the contradictory finding in both the proceedings, further proceeding in Election Misc. Case No.15 of 2012 needs to be stayed. According to learned Senior Advocate Mr. Mishra, on perusal of the averments made in both the election petitions under Annexures-1 and 2 it reveals that in both the cases, the issue to be decided is as to whether the petitioner belongs to OBC category and has been duly elected as Panchayat Samiti Member for Kujamendhi Grama Panchayat of Dasapalla Panchayat. Samiti. The case of the election petitioner is that the parties and subject matter of Election Petition No.2 of 2012 and Election Misc. Case No.15 of 2012 being not same, neither Section 10 CPC nor Section 151 CPC is applicable in the matter. The decision in Election Misc. Case No.2 of 2012 cannot operate as res judicata so far the 2nd Election Misc. Case

No.15 of 2012 is concerned. Further, the present case being one under the Special Statute and not a case under the CPC, Section 10 of CPC is also not applicable.

8. Three requirements of Section 10, CPC are (1) the matter in issue is directly and substantially the same in both the suits; (2) the same party or parties claiming under same title in both the suits; (3) the Court in which the previously instituted suit is pending is competent to grant the relief claimed in the subsequent suit. (See *Mayadhar Behera vs. Bhagabat Nath and another*, 1984 (I) OLR 749).

9. Law is well settled that the object underlying Section 10, CPC is to avoid two parallel trials on the same issue between the same parties in respect of same matter in issue by two Courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. (See *National Institute of Mental Health & Neuro Sciences vs. C. Parameswar*, AIR 2005 SC 242).

10. The Hon'ble Supreme Court in the case of *National Institute of Health and Neuro Sciences (supra)*, held that the language of Section 10, CPC suggests that it is referable to a suit instituted in the Civil Court and it cannot apply to proceedings of other nature instituted under any other statute.

The above decision of the Hon'ble Supreme Court supports the case of the Election Petitioner and not the writ petitioner.

11. The Calcutta High Court in the case of *Shaw Wallace & Co. Ltd. (supra)* held that the expression, "the matter in issue" in controversy between the parties and a mere identity of some of the issues in both the suits is not sufficient to attract Section 10, CPC and unless the decision of the suit operates as res judicata in the other suit it cannot be said that the matter in issue is directly and substantially the same in both the suits, that is to say, the decision in one suit must non-suit the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same.

The Bombay High Court in the case of *Trikamdas Jethabhai and others (supra)* also took the similar view.

12. In the instant case, the subject matter of controversy between the parties is not same and the decision of the previous suit will not operate as res judicata in the other suit.

13. This Court in *Smt. Suryamani Sarangi (supra)* held that the inherent power can be exercised in order to avoid contrary finding in two different suits involving same issue. As stated above, the issue involved in both the cases being not same this case is of no help to the present petitioner.

14. The decision of this Court in the case of *Shri Durga Charan Routray (supra)* is of no help to the present petitioner as in that case the decree in earlier suit was under challenge before this Court in the First Appeal and the later suit was for self same relief. Main issue in both the suits being directly and substantially the same, this Court held that the later suit is liable to be stayed till disposal of the First Appeal by the High Court.

15. In the case of *Chandrasekhar Mohanty & others (supra)* there were two suits pending between the same parties and the matter in issue was substantially the same in both the suits. In that case, this Court held that Section 10, CPC strictly has no application. However considering the nature of the issue involved and prayer made in both the suits this Court held it appropriate to stay further proceedings in both the suits till disposal of O.E.A. Appeal in exercise of jurisdiction under Section 151, CPC.

Fact of the aforesaid case is completely different from the case at hand.

16. Now the question arises as to whether the issues involved in both the cases are same. In Election Petition No.2 of 2012, the following prayer has been made:

“It is therefore prayed that the honourable court may graciously be pleased to pass an order declaring

the election of opposite party No.3 to the post of samiti member of Dasapalla Panchayat Samiti in Kujamendhi Grama Panchayat as null and void and to declare the petitioner as elected in the said post as he has secured second highest votes, to grant cost of the petition and to pass any such order/orders as this honourable court may deem fit and proper in the interest of justice;

And for which act of kindness the petitioner as in duty bound shall ever pray”

In Election Misc. Case No.15 of 2012, the following prayer has been made:

“The petitioner, therefore, prays the Hon’ble Court to be pleased to declare the election of the opposite party No.1(one) as Chairman, Dasapalla Panchayat Samiti as void and make a further declaration that the petitioner is the uncontested Chairman of the said Panchayat Samiti.”

17. Thus, while in the previous election petition the prayer is to declare the election of the writ petitioner to the post of samiti member of Dasapalla Panchayat Samiti in Kujamendhi Grama Panchayat as null and void and to declare the petitioner as elected in the said post, in the subsequent petition i.e. Election Misc. Case No.15 of 2012 the prayer is to declare the election of returned candidate as Chairman in Dasapalla Panchayat Samiti as void one and make a further declaration that the Election Petitioner in that case, is the uncontested Chairman to the said Panchayat Samiti. Thus, the reliefs sought for in both the elections petitions and prayers made therein are completely different. The issue

involved in both the cases is not same. The election petitioners and opposite parties in both the petitions are also different.

18. The documents relied upon by the Election Petitioner in Misc. Case No.2 of 2012 are as follows:

- “1. Letter No.7335 dt. 21.02.2012 of public information Officer, Dasapalla Tahasil office along with Xerox copy of Record of rights of Mouza-Kujamendhi under Khatian No.9, and 65/38 with signature & seal.
2. Letter No.7536 dt. 21.02.2012 of public information officer Dasapalla Tahasil along with Xerox copy of OBC certificate of T. Abhimanyu Dora.
3. Xerox copy of form No.9 allotting symbol to candidates for samiti member of Kujamendhi Gram Panchayat dt. 8.01.2012
4. Xerox copy of form No.19 of Dasapalla Block showing list of Panchayat constituencies reserved for category.
5. Other documents if any be found available would be produced at the time of hearing.”

The documents relied upon by the petitioner in Election Petition No.15 of 2012 are as follows:

- “1. Certified copy of R.O.R. of Khata No.9 of village Kujamendhi in favour of T. Kesaba Dora.
2. Certified copy of R.O.R. of Khata No.65/38 of villaga-Kujamendhi in favour of T. Abhimanyu Dora.
3. True Xerox copy of objection dated 11.03.2012 filed by the petitioner before the Election Officer, Dasapalla Panchayat Samiti.
4. True Xerox copy of the order dated 07.03.2012 of Sub-Collector, Nayagarh passed in Misc. Certificate Appeal No.1 of 2012.

5. True Xerox copy of resolutions dated 11.3.2012 of Dasapalla Panchayat Samiti containing result of election of Chairman of said Panchayat Samiti including declaration of T. Abhimanyu Dora elected as Chairman.

19. This shows that in both the cases the parties rely upon completely different documents to establish their respective cases.

In view of the above, this Court is of the view that both the election petitions filed by the parties before the Election Tribunal are of different in nature and the issues are different, the parties to both the suits are also different. Therefore, the provision of Section 10 read with Section 151 CPC has no application to the present case.

20. Another important aspect of the case to be looked at is that the writ petitioner in the writ petition averred that he has filed an application under Order 7, Rule 11, CPC in Election Petition No.2 of 2012 with a prayer to reject the petition on different grounds stated therein. The petition under Order 7, Rule 11, CPC having been rejected by the Election Tribunal by order dated 26.07.2012 he has approached this Court in W.P.(C) No.14192 of 2012. This Court vide order dated 10.08.2012 has stayed further proceeding in the Election Petition No.2 of 2012 which is continuing as such.

In that view of the matter, if the writ petitioner succeeds in the previous W.P.(C) No.14192 of 2012 and Election Petition No.2 of

2012 is held to be not maintainable on any of the grounds taken in the petition filed under Order 7, Rule 11, CPC then the Election Petitioner in Election Petition No.15 of 2012 will suffer for no fault of him.

21. Apart from the above, the Act, 1959 being a special statute, right of the election petitioner to maintain appeal arises under the special statute. Therefore, he should not be deprived of the statutory right created in his favour under the Special Statute.

22. In view of the above, this Court does not find any infirmity or illegality in the impugned order passed by the Election Tribunal under Annexure-5 warranting interference by this Court.

23. In the result, the writ petition is dismissed.

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B.N.Mahapatra,J.