

# ORISSA HIGH COURT : CUTTACK

W.P.(C) No. 19223 of 2013

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

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Satyajit Pani	...	Petitioner
	Versus	
Smt. Binita Pani and others	...	Opposite parties

<b><i>For petitioner</i></b>	-	Mr.	<b><i>Bidyadhar Mishra, Sr. Advocate, Sidheswar Mohanty, S.Pattnaik and A.Das.</i></b>
	<b><i>M/s.</i></b>		
<b><i>For opposite parties</i></b>	-		<b><i>Dayananda Mohapatra, M.Mohapatra, G.R.Mohapatra, A.Dash&amp; S.K.Mallik (for opp.party no.1) A.P.Bose, N.Hota, Mrs. V.Kar, D.Sahoo and S.S.Routray (for opp.party no.2) M/s. N.P.Parija, P.Pradhan and S.K.Rout (for opp.party no.3) M/s. P.K.Swain and N.Behera (for opp.party no.4) M/s. G.N.Mohapatra, P.K.Sahooand B.N.Mohapatra (for opp.parties 5 &amp; 6).</i></b>

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**P R E S E N T**

**THE HONOURABLE MR. JUSTICE S. K. MISHRA**

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<b><i>Date of hearing- 03.09.2013</i></b>	<b>:</b>	<b><i>Date of Judgment - 30.10.2013</i></b>
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**S.K.Mishra, J.**        The petitioner in this case assails the order dated 16.08.2013 passed in Civil Suit No.364 of 2010 of the court of Additional Civil Judge (Senior Division), Puri dismissing his application under Order I, Rule 10 of the Code of Civil Procedure, 1908, hereinafter referred to as the "Code" for brevity.

2. Facts of the case leading to filing of this writ petition may be summarized as follows:

On 02.04.1979, a partnership firm in the name and style "M/s. Hotel Paradise, Puri" was constituted having Udayanath Pani, Suhasini Pani, Samuel Pani and Bijay Kumar Pani as partners. Udayanath and Suhasini are husband and wife. Samuel Pani and Bijaya Kuamr Pani are their sons. On 31.07.1979, the partnership of M/s. Hotel Paradise was registered with Registrar of Firms and was given Regn. No. 306 of 1979. On 14.09.1994 Udayanath Pani died. The surviving three partners reconstituted the partnership firm. On 21.05.2007 Samuel Pani died. It is alleged that the partnership was reconstituted after the death of Samuel Pani as Binita Pani, wife of Samuel Pani, declined to be a partner. It is therefore assented by the plaintiff that the partnership was reconstituted with the two partners namely; Suhasini Pani and Bijay Kumar Pani. On 05.03.2010, the legal representatives of Samuel sent a legal notice demanding Account and to refer the matter to arbitration. On 15.03.2010 a reply was given to the said notice.

3. It is alleged that on 26.05.2010, the defendants no.1 to 3 forcibly entered into the hotel and snatched away money from the Manager, for which a report was lodged before the Kumbharpada Police on the same day. On 27.05.2010, it is further alleged that the legal representatives of Samuel again entered and forcibly occupied the Hotel.

4. On 31.05.2010, the legal representatives of Samuel filed Arbitration Proceeding under Section 11 of the Arbitration and Conciliation Act before this Court for appointment of an Arbitrator. On 07.07.2010, the plaintiff namely, M/s. Hotel Paradise, Suhasini Pani and Bijay Kumar Pani filed a suit bearing C.S. No.364 of 2010 before the Addl. Civil Judge (Senior Division), Puri seeking declaration that defendants 1 to 3 have no manner of right to interfere in the business of Hotel Paradise, they be permanently restrained from interfering with the running of the Hotel and to take any forcible step amongst

the customers and take money from customers in the name of the Hotel, to submit account, restore all Books of Accounts, for cost and any other relief.

5. It is alleged by the present petitioner that on 01.09.2011 Suhasini being 50% share-holder, notified her intention to retire as well as to introduce Satyajit as partner as she intended to transfer her 50% share to Satyajit and asked for Bijaya's consent. On 05.09.2011, Bijay intimated his consent for transfer to Satyajit as well as consent to introduce Satyajit as partner. On 17.09.2011, the document of transfer of 50% share and interest in partnership of Suhasini in the name of Satyajit Pani w.e.f. 31.03.2012 afternoon was executed. On 21.09.2011, Suhasini filed application for withdrawing from the suit without taking consent from previous lawyer. Suhasini filed her second application for withdrawing from the suit or for grant of permission to engage new lawyer to conduct the suit on her behalf, the same was allowed. On 12.12.2011, Suhasini filed application to delete her name from the suit.

6. On 11.04.2012 information was filed before the I.G.R. in Form V informing transfer of the share of Suhasini and induction of Satyajit as new partner to partnership M/s. Hotel Paradise. On 21.04.2012, the trial court allowed deletion or name of Suhasini from the suit, subject to payment of Rs.10/- as cost. On 02.08.2012, defendant no.1 Ajit Pani filed his written statement admitting the knowledge of transfer of Suhasini's share in favour of Satyajit. On 03.09.2012, the Defendant no.1 adopted the written statement of defendant no.3, so she was also having knowledge of the transfer. On the same day, the trial court recalled its order dated 21.04.2012 for deletion of name Suhasini from the suit, for non-payment of cost. On 19.10.2012 Suhasini was transposed to the category of defendant no.4 from plaintiff no.2 on the application of the plaintiffs. Suhasini filed her written statement as Defendant no.4 on 06.12.2012. On 16.02.2013 she filed additional written statement. The trial of the case began on 31.07.2013. On behalf of defendant no.1 to 3 Sujit Pani filed evidence on affidavit as D.W. 1. Thereafter, the evidence from the side of the defendant was closed and the arguments were being heard. At this stage on 09.08.2013, Satyajit filed an application under Order 1 Rule 10(2) of

the Code. The other parties filed their counter affidavits to the petition and the plaintiff no.2 did not raise any objection to the said petition. Learned Addl. Civil Judge (Senior Division), Puri on 16.08.2013 rejected the application for impleation of party. Such order is assailed in this writ petition.

7. After hearing the parties and examining the materials placed before him, learned Addl. Civil Judge (Senior Division) has rejected the application for impleation of party mainly on the ground that there is no *inter se* dispute of the partners to be determined in this case and the presence of the petitioner is not necessary for effective adjudication of the issues of the suit.

8. In course of hearing, learned counsel for the petitioner files an affidavit of the petitioner that if the petition for impleation is allowed, he will not insist for recalling any witness for further cross-examination or adduce fresh evidence on his behalf and he shall not file any pleadings.

9. Admittedly, the suit is for declaration, perpetual injunction and accounts. Now the dispute of the present petitioner rising is that he is the *bona fide* purchaser of the share of Suhasini and the fact is stoutly denied by the defendants no.4 and 5 in their counter affidavit filed in this Court. So at this juncture, the Court is to see whether the petitioner is a *bona fide* purchaser of the share of the Suhasini, the defendant no.4.

10. In the case of ***Kasturi v. Iyyamperumal and others***, AIR 2005 SC 2813; the Supreme Court held that in equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. It further held that a purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. The Supreme Court therefore stated that it is now clear that two tests are to be satisfied for determining the question who is a necessary party. The Supreme Court rules that the tests are- (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party.

11. In applying the principle to the present case, it is seen that there is no right to any relief to the present petitioner in respect of the controversy involved in the present proceeding and an effective decree of a perpetual injunction and rendition of accounts can be issued in favour of the plaintiff, even without presence of the present defendant.

12. In course of hearing, both the sides relied upon the reported case of ***Vidur Impex and Traders Pvt. Ltd. and others v. Tosh Apartments Pvt. Ltd. and others***, 2012 AIR SCW 4677=2012 (8) SCC 384, wherein the Supreme court has examined the principles governing addition of parties under Order I, Rule 10 of the Code. In paragraph 36, the Supreme Court has laid down the principles governing the disposal of such applications. It is appropriate to quote the said paragraph :

“36. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party

within reasonable time of his acquiring knowledge about the pending litigation.”

13. It is seen that the applicant claims to have purchased the share and interest of defendant no.4. Defendant no.4 is an illiterate old widow and she has filed a counter affidavit to the effect that she has not executed any such documents in favour of the petitioner and by way of fraudulent misrepresentation, the same has been taken by the present petitioner, who happens to be her grandson. In that view of the matter, this Court is of the view that the applicant is guilty of contumacious conduct and therefore, the application for adding him as a party should be declined.

14. Learned counsel for the petitioner as well as the learned counsel appearing for the parties argued on the question of reopening of trial in case the petitioner joins as a party to the suit. As pointed out earlier, the petitioner has filed an affidavit that he will not file any further pleadings nor call for any witness for cross-examination or lead evidence. If the petitioner has no pleadings to submit in the case and he would not cross-examine the witnesses nor he will lead any evidence on his behalf, then on what ground he submits that he is a necessary party. Does he want to be added as a party to be a mute spectator in a litigation between the plaintiff and the defendants ? If yes, he is not a proper and necessary party.

15. The Supreme Court in the case of **Surya Dev Rai v. Ram Chander Rai and others**, (2003) 6 SCC 675 has held that writ of certiorari is directed against any act or of proceeding against the subordinate court can be issued even if the lis is between the two private parties. Thereafter, the Supreme Court has sum up the conclusions in the following words:

“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

(1) Amendment by Act 46 of 1999 with effect from 1.7.2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above

said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in re-appreciation of evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters of exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.”

It is therefore clear that unless there is any allegation of jurisdictional illegality in the order passed by the learned trial Judge, the application under Article 226 read with Article 227 of the Constitution should not be exercised. Learned counsel for the petitioner failed to show that this writ petition comes within the parameter prescribed by the Hon'ble Supreme Court in the case of **Surya Dev Rai v. Ram Chander Rai and others** (*supra*).



In that view of the matter, the writ petition is dismissed being devoid of any merit.

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**S.K.Mishra, J.**

*Orissa High Court, Cuttack*  
*Dated, October 30, 2013/JNS.*