

A.F.R

ORISSA HIGH COURT : C U T T A C K

WP(C) NO.22309 OF 2022

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

Smt. Sarala Mallik

: Petitioner

-Versus-

Smt.Tapaswini Mallik & ors.

: Opp.Parties

For Petitioner

:

M/s.A.Rath & S.Rath

For O.P.1

:

Mr.P.R.Barik, Adv.

For O.Ps.2 & 3

:

None

CORAM :

JUSTICE BISWANATH RATH

Date of Hearing : 14.09.2022 & Date of Judgment : 27.09.2022

1. The Writ Petition involves a challenge to the order of the Election Tribunal-cum-Civil Judge (Jr.Divn.), particularly the order dated 10.8.2022 rejecting an Application under Order 7 Rule 11 of C.P.C. at the instance of the defeated candidate, Petitioner herein and O.P.1 therein, arising out of Election Petition No.10/2022.

2. Background involving the case is the Petitioner along with the O.Ps. contested for the post of Sarapanch, Ratnagiri Grama Panchayat (herein after called as "the G.P.") under Bari Block in the district of

Jajpur in the G.P. Election, 2022. The Petitioner herein, the O.P. therein was declared elected with huge margin of vote and the O.P. herein, the Petitioner therein remained as the unsuccessful candidate. Being aggrieved in the declaration of O.P.1 therein as the elected candidate, O.P.1 herein brought the election dispute. It is claimed, after the notice of election dispute is served on the elected candidate, the Petitioner herein alleges, the O.P. therein being disqualified to be a candidate for the post of Sarapanch, as she has given birth three children being borne after 1995 disclosing therein that O.P.1 has given birth two girl children on 3.10.2009 and gave birth another girl child on 14.12.2019 claiming elected candidate to be disqualified under Section 25(5) of the O.G.P. Act, 1964. Upon receipt of notice, present Petitioner, O.P.1 therein, the elected candidate filed two different petitions on 6.5.2022 and 23.6.2022 challenging the maintainability of the election petition on variety of grounds. Present Petition appears to be confined to the impugned order dated 10.8.2022 involving Petition dated 6.5.2022. It is needless to mention here that the petition dated 6.5.2022 was for rejection of the plaint under the provision of Order 7 Rule 11 of C.P.C. on the ground that the election petition/plaint involved does not disclose any cause of action. The petition under Order 7 Rule 11 of C.P.C. appears to have been

dismissed by the impugned order dated 10.8.2022 under Annexure-3 resulting in filing of the present Writ Petition.

3. Mr.Rath, learned counsel for the elected candidate-Petitioner in his attempt to challenge the rejection of the petition under Order 7 Rule 11 of C.P.C. and taking this Court to the provision at Section 33(1)(a) of the O.G.P. Act contended that for there is no detailed disclosure of the material facts to support his claim on the allegation that the elected candidate was disqualified for having more than three children, the election petition is affected on account of no disclosure of material facts. An attempt is also made by Mr.Rath reading through the provision of Section 31(1)(a) of the O.G.P. Act along with the grounds of rejection that the election petition being filed in a cavalierly manner and since remains contrary to the provision at Section 33(1) of the O.G.P. Act, there is no proper consideration of the allegation of the Petitioner resulting the bad impugned order. Mr.Rath further taking this Court to the decisions in ***Azhar Hussain v. Rajiv Gandhi*, 1986 Supp SCC 315** and further taking support of two other decisions in ***Ram Sarup Gupta v. Bishun Narain Inter College*, (1987) 2 SCC 555** and ***Bachhaj Nahar v. Nilima Mandal and another*, (2008) 17 SCC 491** attempted to take support of both the decisions in his challenge to the impugned order under Annexure-3.

4. Mr.P.R.Barik, learned counsel for the defeated candidate, O.P 1, on the other hand reading through the provision at Section 31(1) of the O.G.P. Act together with the pleading of the Party in the Election case No.10/2022 through Paragraph-3 contended, there has been sufficient pleading requiring the matter to be adjudicated upon framing of appropriate issues by the trial court. It is in the above view of the matter, Mr.P.R.Barik, learned counsel, opposed the move of the Petitioner through the Writ Petition.

5. Considering the rival contentions of the Parties and taking support of the provision at Section 31 of the O.G.P. Act deals with bringing in election dispute, this Court finds, the provision at Section 31 of the O.G.P. Act reads as follows :-

“31. Presentation of Petitions :- (1) The Petition shall be presented on one or more of the grounds specified in Section 39 before the 1 [Civil Judge (Junior Division)] having jurisdiction over the place at which the Office of the Grama Sasan is situated together with a deposit of such amount, if any, as may be prescribed in that behalf as security for costs within fifteen days after the date on which the name of the person elected is published under Section 15 :

Reading the aforesaid provision, this Court finds, the petition shall be presented under Section 31 of the Act on one or more grounds specified in Section 39 of the O.G.P. Act. This Court, therefore, likes to take into account the provision at Section 39 of the O.G.P. Act, which reads as follows :-

“39. Grounds for declaring election void :- (1) The 1 [Civil Judge (Junior Division)] shall declare the election of a returned Candidate void, if he is of the opinion-

(a) that on the date of his election the Candidate was not qualified or was disqualified to be elected under the provisions of this Act or the rules made thereunder; or

(b) that any corrupt practice has been committed by the Candidate; or

(c) that any nomination paper has been improperly rejected or accepted; or

(d) that such person was declared to be elected by reason of the improper rejection or admission of one or more Votes for any other reason was not duly elected by a majority of lawful Votes; or

(e) that there has been any non-compliance with or breach of any of the provisions of this Act or of the rules made thereunder

Reading the aforesaid provision, this Court for the nature of the case requiring a declaration of the elected candidate disqualified to contest the election involved, finds, the petition was in the trap of Section 39(1)(a) of the O.G.P. Act. It is further reading the provision of the O.G.P. Act, 1964, this Court finds, Section 33 deals with the contents of the petition, which reads as follows :-

“33. Contents of Petition :- (1) An election Petition –

(a) shall contain a concise statement of the material facts on which the Petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the Petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the Petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings.

(2) Any schedule or annexure to the Petition shall also be signed by the Petitioner and verified in the same manner as the Petition.

It is here reading the aforesaid provision and keeping in mind the allegation involved herein, this Court for the nature of dispute and not involving the allegation of corrupt practice rather purely a case to declare

the elected candidate disqualified for having three children by the time of nomination, finds, the provision at Section 33(1)(a) of the O.G.P. Act has application to the case at hand, which mandates the election petition shall contain a concise statement of material facts on which the Petitioner relies. So far as the Petitioner's allegation required the election petition with clear declaration of material facts is a requirement only in the case of corrupt practice as provided under Section 33(1)(b) of the O.G.P. Act.

6. Keeping in view the legal provision, this Court here likes to note the pleading to find if the pleading involving the election petition suits the mandate of Section 33(1)(a) of the O.G.P. Act. It be stated here that the election petition simply involves declaration of disqualification of the elected candidate for having three children and there is no ailment of corrupt practice.

7. This Court from Annexure-1, the election petition filed by the O.P.1 herself finds, the election petitioner in Paragraph-3 has the following pleading :-

“That the O.P.No.1, who was declared as the elected Sarpanch of Ratnagiri G.P. having polled highest nos. of valid votes is a disqualified person for the membership of Gram Panchayat under Section-25(v) of the G.P. Act having three children. The O.P. No.1 gave birth two girl children on 3.10.2009. Again the O.P.No.1 gave birth another girl child on 14.12.2019. Hence the O.P. No.1 has more than two children after the cut-off date. She is a disqualified person to contest for the post of Sarpanch. On

22.1.2022, on the date of scrutiny, the petitioner protested the candidature of O.P. No.1 before the Scrutiny Officer and requested the scrutiny officer not to accept the nomination paper of O.P. No.1 as she is a disqualified person for the membership of Gram Panchayat. The scrutiny officer in spite of the protest of the petitioner accepted the nomination of O.P. No.1.”

Reading the pleading in the election indicated herein above, this Court finds, the election petition is in the trap of Section 39(1) of the Act involving a disqualification of the elected candidate under the provision of Section 25(v) of the O.G.P. Act. Since case is clearly falling in the trap of Section 33(1), it simply needs election petition shall contain a concise statement of material facts on which the Petitioner relies. In the circumstance, this Court finds, the petition under Order 7 Rule 11 of C.P.C. by the Petitioner was bound to fail and there may not be any illegality by the Election Tribunal in rejecting such petition requiring no interference in the impugned order.

8. For the Petitioner relying certain decisions, this Court entering into the decisions in **Azhar Hussain v. Rajiv Gandhi, 1986 Supp SCC 315**, **Ram Sarup Gupta v. Bishun Narain Inter College, (1987) 2 SCC 555** and **Bachhaj Nahar v. Nilima Mandal and another, (2008) 17 SCC 491**, for the narrations herein above on the factual aspect and the application of the provision of the Act, this Court finds, the decision in **Azhar Hussain** (supra) since involves an allegation involving corrupt practice and for the present case not involved the allegation of corrupt

practice, decision, if any, there by the Hon'ble apex Court has no application to the case at hand. So far as the decisions in **Ram Sarup Gupta v. Bishun Narain Inter College, (1987) 2 SCC 555** and **Bachhaj Nahar v. Nilima Mandal and another, (2008) 17 SCC 491**, this Court finds, these two decisions rather support the case of the O.Ps. So far as the legal aspect is concerned, position already settled through the Hon'ble apex Court on the question of plaint being discarded if does not contain the material disclosures. This Court here taking into account the decision, vide **Bhagwati Prasad v. Chandramaul** : AIR 1966 SC 735, finds, the Hon'ble apex Court dealing with such aspect came to observe in Paragraphs-9 & 10 as follows :-

9. There can be no doubt that if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. The same principle was laid down by this Court in *Sheodhar Rai v. Suraj Prasad Singh* [AIR (1954) SC 758] . In that case, it was held that where the defendant in his written statement sets up a title to the disputed lands as the nearest reversioner, the Court cannot, on his failure to prove the said case, permit him to make out a new case which is not only not made in the written statement, but which is wholly inconsistent with the title set up by the defendant in the written statement. The new plea on which the defendant sought to rely in that case was that he was holding the suit property under a shikmi settlement from the nearest reversioner. It would be noticed that this new plea was in fact not made in the written statement, had not been included in any issue and, therefore, no evidence was or could have been led about it. In such a case clearly a party cannot be permitted to justify its claim on a ground which is entirely new and which is inconsistent with the ground made by it in its pleadings.

10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of

substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

It is needless to mention here that in the Full Bench decision of the Hon'ble apex Court in Ram Sarup Gupta (supra) absolutely similar action in attending to call if plaint fails for there is no material disclosures in the pleading in Paragraphs-6 & 7 therein, the Hon'ble apex Court came to observe as follows :-

6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the licence was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with

strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In *Bhagwati Prasad v. Chandramaul* [AIR 1966 SC 735 : (1966) 2 SCR 286, 291] a Constitution Bench of this Court considering this question observed:

“If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the court cannot do injustice to another.”

7. Before we examine the pleas raised by the defendants in their written statement it is necessary to keep in mind that the plaintiff himself stated in para 4 of the plaint that the property in dispute has been in occupation of the school as licensee under the permission of Raja Ram Kumar Bhargava erstwhile owner of the property. Defendants 11 to 17 in paras 10 to 16 of their written statement while dealing with the question of licence expressly stated that the school had made pucca constructions and had been making various substantial additions and alterations in the building without any objection. Raja Ram Kumar Bhargava had given away the premises in dispute permanently to the school and they have been

in occupation of the premises for the last 20 years and during that period they have been making substantial additions and alterations in the building including re-plastering, re-flooring etc. by incurring heavy expenses. In para 18 of their written statement they pleaded that the licence was coupled with a grant and in any case it was a permanent and irrevocable licence in favour of the school and the same could not be revoked by the plaintiff. The pleadings so raised make it abundantly clear that the defendants had raised a specific plea that the licence was coupled with grant, it was a permanent and irrevocable licence and in pursuance of the licence the licensee had carried out work of permanent character incurring expenses for the advancement of the purpose for which the licence had been granted. In fact, Issues 4, 5 and 6 framed by the trial court relate to the question whether licence was irrevocable. The issues so framed involved the question of irrevocability of the licence under both the clauses (a) and (b) of the Section 60 of the Act. The plaintiff went to trial knowing fully well that defendants' claim was that the licence was irrevocable, on the ground that they had made permanent constructions and incurred expenses in pursuance of the licence granted for the purpose of school. The plaintiff knew the case he had to meet, and for that purpose he produced Raja Ram Kumar Bhargava in evidence in support of his plea that the licence was a simple licence and it was not irrevocable as pleaded by the defendants. This question has been considered in great detail by T.S. Misra, J. and we are in agreement with the view taken by him.

9. This Court for the findings of this Court on the provision of the O.G.P. Act that the pleadings made in Paragraph-3 involving the election dispute, sufficient enough making a case for trial also finds support through the aforesaid decisions. In the circumstance, this Court declines to interfere with the impugned order, vide Annexure-3 and dismisses the Writ Petition for having no merit.

10. For rejection of the Order 7 Rule 11 of C.P.C. Petition involved herein, this Court directs the Election Tribunal to immediately proceed with the trial of the election dispute after finding the written statement of the Petitioner on Board, if there is no written statement as of now, to

provide at least one week time to the present Petitioner to file her written statement, entering into framing of issues within seven days thereafter and attempt to finalise the election dispute at least within a period of three months from the date of filing of written statement by the Parties.

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(Biswanath Rath, J.)

Orissa High Court, Cuttack.
The 27th September, 2022/M.K.Rout, A.R.-cum-Sr.Secy.

