

(2005) 02 OHC CK 0016

In the Orissa High Court

Case No : Civil Revision Petition No. 286 of 2003

Ballava Kumar Jaysingh

APPELLANT

Vs

Dr. Pramod Kumar Panda and Others

RESPONDENT

Date of Decision : 10-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, 9
Constitution of India, 1950 — Article 226 , 227
Indian Medicine Central Council Act, 1970 — Section 4(2)

Citation : (2005) 99 CLT 439

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : P.K. Khuntia and B.R. Barik, for the Appellant; P.C. Kar, J. Gupta and S.C. Mekap for Opp. Party 1 and Addl. Stg. Counsel (Central) For Opp. Parties 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

A.K. Patnaik, J.—This is a revision u/s 115 of the Code of Civil Procedure, 1908 (for short, "the CPC").

2. The facts briefly are that the Opp. Party No. 1 filed a suit C.S. No. 1 of 2003 in the Court of the Learned Civil Judge (Jr. Divn.), Aska. The case of the Opp. Party No. 1 in the plaint was that he was a registered medical practitioner and a member of the Indian Medicine Central Council and has been enrolled on the State Register of Indian Medicine Practitioners of Ayurved, Siddha and Unani system of medicines. The Indian Medicine Central Council Act, 1970 provided for the constitution of a Central Council of Indian Medicine and the maintenance of a Central Register of Indian Medicine and matters allied to it and Section 3 of the Act provided that the Central Government shall constitute a Central Council consisting of the members mentioned therein. Some of the members of the Central Council were to be elected by members enrolled on the State Register and one member from each category of Ayurved, Siddha and Unani system of

medicines was to be elected from each University from amongst themselves by the members of the faculty. The Central Government was to nominate members to the committee having special knowledge or practical experience in respect of Indian medicine not exceeding 30% of the total members elected from amongst the members enrolled on the State Register and from amongst the members of the University faculty. The President of the Central Council was to be elected by the members of the Central Council as provided u/s 3(2) of the Act and the Vice-President of the Central Council for each of the systems of medicine was to be elected in accordance with Section 3(3) of the Act. The further case of the Opp. Party No. 1 in the plaint was that Rule 3 of the Indian Medicine Central Council (Election) Rules, 1975 made provisions regarding qualification to vote for members to be elected u/s 3 of the Act and according to the said Rule 3, all persons whose names were enrolled on a State Register of Indian Medicine Practitioners of Ayurved, Siddha and Unani system of medicine shall be entitled to vote and Rule 4(2) provided that such State Register shall be made up-to-date on receiving election notice from the Returning Officer and such, notice shall be given one month prior to the election and Rule 4(1) provided that such State Register shall be supplied to the Returning Officer and to the Board of the State concerned. The Opp. Party No. 1 further alleged in the plaint that number of members though entitled to vote as per the said provisions were not enrolled on the State Register of Orissa and although the State Register of Orissa was not made up-to-date the election to the Central Council was held. The Opp. Party No. 1 thus prayed in the said suit for declaring that the State Register of Orissa for the election held in the year 2002 for the Indian Medicine Central Council was erroneous having not been brought up-to-date after notice of election and for holding that the Central Government had no power to appoint the Returning Officer for the State and for quashing the order in Annexure-B fixing the date of election to 16.9.2002. The Opp. Party No. 1 further prayed in the said suit that consequent upon grant of the aforesaid two prayers, the entire election process conducted must also be declared as vitiated under the law.

3. The petitioner who was impleaded as defendant No. 6 in the said suit received summons and appeared in the said suit filed an application under Order 14, Rule 2, CPC before the Learned Civil Judge, (Jr. Divn.), Aska and stated therein that the suit was barred inasmuch as Section 4(2) of the Indian Medicine Central Council Act, 1970 provided that where any dispute arises regarding any election to the Central Council, it shall be referred to the Central Government whose decision shall be final and prayed before the Court that the question whether the suit was barred under the said Act be decided as a preliminary issue. By Order dated 8.7.2003, the Court rejected the said petition filed by the petitioner and fixed the date for hearing of the suit. Aggrieved by the said Order dated 8.7.2003 passed by the Learned Civil Judge (Jr. Divn.) Aska in C.S. No. 1 of 2003, the petitioner has filed this revision u/s 115 of the CPC.

4. Mr. Khuntia, Learned Counsel for the petitioner submitted that law is well settled that a suit would be impliedly barred by the Act, if the provision contained

in the Act would show that an adequate and efficacious alternative remedy has been provided under the Act for deciding the dispute raised in the suit. He submitted that since an adequate and efficacious alternative remedy to the dispute raised in the suit have been provided u/s 4(2) of the Indian Medicine Central Council Act, 1970, the Learned Civil Judge (Jr. Divn.), Aska instead of rejecting the application of the petitioner under Order 14, Rule 2, CPC should have allowed the same and held the suit to be barred under the said Act. In support of this submission, Mr. Khuntia relied on the decision of the Supreme Court in Dhruv Green Field Ltd. Vs. Hukam Singh and Others, . He further submitted that the question as to whether the suit was barred u/s 4(2) of the Indian Medicine Central Council Act, 1970 in this case was a pure question of law and not a mixed question of fact and law and yet the Learned Civil Judge (Jr. Divn.), Aska has held in the impugned order that the bar of the suit raised by the Defendant No. 6 being a mixed question of fact and law cannot be decided as a preliminary issue under Order 14, Rule 2, CPC.

5. Mr. Kar, Learned Counsel appearing for the Opp. Party No. 1, on the other hand, sought to sustain the impugned order passed by the Learned Civil Judge (Jr. Divn.), Aska. He submitted that it will be clear from the impugned order that the Learned Civil Judge (Jr. Divn.), Aska has relied on the decisions of the Supreme Court in Gujarat University Vs. N.U. Rajguru and Others, and has held that though ordinarily the remedy provided by the statute provides a machinery or forum, the party should be relegated to that forum if exceptional or extraordinary circumstances exist to justify bypassing the alternative remedy provided by the statute. He submitted that the Learned Civil Judge (Jr. Divn.), Aska has also relied on the decision of the Delhi High Court in Dr. Hari Prakash Vs. All India Institute of Medical Sciences, wherein the Court examined the merits as it involved the question of interpretation of Section 3(d) of the Dentists Act even if an alternative remedy was provided u/s 5 of the Dentists Act. Mr. Kar also relied on the decision of the Supreme Court in Dhruv Green Field Ltd. v. Hukam Singh and Ors. (supra) and submitted that in the said decision it was clearly held that unless the remedy provided under the Act is exclusive, the jurisdiction of the Civil Court will not be excluded. He placed the impugned order passed by the Learned Civil Judge (Jr. Divn.), Aska just to show the peculiar facts and circumstances of the case for which the Learned Civil Judge (Jr. Divn.), Aska held that the jurisdiction of the Civil Court was not barred to entertain the suit of the Opp. Party No. 1 and that in any case, the bar of jurisdiction raised by the petitioner before him was mixed question of fact and law and cannot be decided as a preliminary issue under Order 14, Rule 2, CPC.

6. There is no doubt that an issue relating to the jurisdiction or bar created by any law to the suit cannot be decided as a preliminary issue under Order 14, Rule 2, CPC unless the said issue is purely an issue of law, only. The language of Order 14, Rule 2, CPC is clear that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue

relates to (a) the jurisdiction of the Court or (b) a bar to the suit created by any law for the time being in force. In the present case, the plea relating to the bar to the suit raised by the petitioner who was the Defendant No. 6 in the suit solely rested on the averments in the plaint and the provisions of the Indian Medicine Central Council Act, 1970, and in particular, Section 4(2) thereof. Thus if the Court could decide this issue relating to bar to the suit by mere reference to the averments in the plaint and the provisions of the Indian Medicine Central Council Act, 1970, the issue would be one of law only and not an issue of mixed question of fact and law. If, on the other hand, the petitioner-Defendant No. 6 would have relied on some facts which are not based on the averments in the plaint for decision on the issue relating to bar to the suit created by law, the issue of relating to such bar to the suit created by law would not have been an issue of law only but an issue raising mixed question of fact and law. In this case, the case of the petitioner-Defendant No. 6 was that the suit was barred since the petitioner Defendant No. 6 has relied on the facts as averred in the plaint and the provisions of the Indian Medicine Central Council Act, 1970, and in particular, Section 4(2) thereof, the issue relating to the bar of the suit raised by the petitioner-Defendant No. 6 was an issue of law only. Hence, the finding of the Learned Civil Judge (Jr. Divn.), Aska, in the impugned order that the issue relating to the bar of the suit raised by the Defendant No. 6 was a mixed question of fact and law is not at all correct.

7. Paragraph 10 of the judgment of the Supreme Court in the case of Dhruv Green Field Ltd. v. Hukam Singh and Ors. (supra) is quoted herein below :

"10. In the light of the above discussion, the following principles may be restated : (1) If there is express provision in any special Act barring the jurisdiction of a Civil Court to deal with matters specified thereunder the jurisdiction of an ordinary Civil Court shall stand excluded.

(2) If there is no express provision in the Act but an examination of the provisions contained therein leads to a conclusion in regard to exclusion of jurisdiction of a Civil Court, the Court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely be concluded that the jurisdiction of the Civil Court is barred. If, however, no such adequate and effective alternative remedy is provided then exclusion of the jurisdiction of the Civil Court cannot be inferred.

(3) Even in cases where the jurisdiction of a Civil Court is barred expressly or impliedly, the Court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity."

Thus, the Proposition No. 2 in the aforesaid Judgment of the Supreme Court states that where there is no express provision in the Special Act creating a bar to a suit but the examination of the provisions contained therein leads to a conclusion in regard to the exclusion of jurisdiction of a Civil Court, the Court would then inquire whether any adequate and efficacious alternative remedy is

available under the Act and if the answer is in the affirmative, it can safely be concluded that the jurisdiction of the Civil Court is barred.

8. In this case, as has been discussed above, the Opp. Party No. 1 -plaintiff has prayed for declaring the State Register of Orissa for the election in the year 2002 for the Indian Medicine Central Council to be erroneous having not been brought up-to-date after notice of election and for holding that the Central Government had no power to appoint Returning Officer for the State and for quashing the order fixing the date of election. The Opp. Party No. 1-plaintiff has also prayed as a consequential relief that the entire election process conducted was vitiated under the law. All the aforesaid three reliefs related to election to the Central Council. Section 4(2) of the Indian Medicine Central Council Act, 1970 provides that any dispute which arises regarding any election to the Central Council shall be referred to the Central Government whose decision shall be final. The said Section 4(2) of the Indian Medicine Central Council Act, 1970 is quoted herein below :

"4(2) Where any dispute arises regarding any election to the Central Council, it shall be referred to the Central Government whose decision shall be final."

The expression "any dispute" regarding any election to the Central Council is wide enough to include the dispute raised in the suit filed by the Opp. Party No. 1-plaintiff before the Learned Civil Judge (Jr. Divn.), Aska. Any remedy relating to election to the Central Council including the declaration sought for by the Opp. Party No. 1 -plaintiff in the plaint can be granted by the Central Government to whom the dispute is to be referred u/s 4(2) of the Act. The expression "final" in Section 4(2) of the Act would show that the decision of the Central Government to whom the reference of the dispute u/s 4(2) would be final and the said decision cannot be challenged before any Civil Court. It has been held by the Supreme Court in *Kihoto Hollohan v. Zachillhu and Ors.* (1992) 2 SCC 651, that such a finality clause is an indication of exclusion of the jurisdiction of the Civil Court though such finality clause cannot exclude the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

9. The decision of the Supreme Court in *Gujarat University v. Shri N. U. Rajguru and Ors.* (supra) on which the Learned Civil Judge (Jr. Divn.), Aska has relied in the impugned order is not a case of a suit but a case of Writ Petition and it has been held therein that in exceptional or extraordinary circumstances, the alternative remedy is by-passed by the High Court while exercising jurisdiction under Article 226 of the Constitution. Similarly, the decision of the Delhi High Court in *Dr. Hari Prakash v. All India Institute of Medical Sciences* (supra) also relief on by the Learned Civil Judge (Jr. Divn.), Aska in the impugned order is not a case of a suit but a case of Writ Petition under Article 226 Constitution and the Court has held that in the peculiar facts and circumstances since the case involved the question of interpretation of Section 3(d) of the Act, even though an remedy was provided u/s 5 of the said Act, the High Court can decide the dispute between the parties. So far as the jurisdiction of Civil Court is concerned, the

same is governed not by under Articles 226 and 227 of the Constitution but by Section 9, CPC. Section 9, CPC states that the Courts shall (subject to the provisions herein contained in the CPC) have jurisdiction to try all suits of a Civil nature excepting suits of which the cognizance is either expressly or impliedly barred. The Civil Court cannot entertain the suit on the ground that there are exceptional or extraordinary circumstances to entertain the suit. In the present case, the provisions of the Indian Medicine Central Council Act, 1970, and, in particular, Section 4(2) thereof clearly show that the suit was impliedly barred and if that be so, the Learned Civil Judge (Jr. Divn.), Aska could not have entertained the suit on the ground that there were exceptional or extraordinary circumstances for entertaining the suit.

10. For the aforesaid reasons, the impugned Order dated 8.7.2003 passed by the Learned Civil Judge (Jr. Divn.), Aska in C.S. No. 1 of 2003 is set aside and it is held that the said suit filed by the Opp. Party No. 1-plaintiff in the Court of the Learned Civil Judge (Jr. Divn.), Aska is impliedly barred by the provisions of the Indian Medicine Central Council Act, 1970.

The Civil Revision petition is accordingly allowed. Considering however the facts and circumstances of the case there shall be no order as to costs.