

(1987) 04 OHC CK 0026

In the Orissa High Court

Case No : Original Jurisdiction Case No. 561 of 1985

Gajendra Swain

APPELLANT

Vs

Block Development Officer-cum-Election Officer and Others

RESPONDENT

Date of Decision : 15-04-1987

Acts Referred:

Orissa Grama Panchayat Act, 1964 — Section 30
Representation of the People Act, 1951 — Section 7, 9A

Citation : (1987) 64 CLT 21

Hon'ble Judges : R.C. Patnaik, J; D.P. Mohapatra, J

Bench : Division Bench

Advocate : H.M. Dhal, B.P. Das and B. Pal, for the Appellant; A.K. Mukherjee, Meera Ghosh, S. Das and P.K. Lenka, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—The Petitioner and opposite party No. 2 were candidates at the election to the office of the Sarpanch of Basuaghai Grama Panchayat. The election was held on 22-1-1984 and the Petitioner was declared elected. Opposite party No. 2 instituted a proceeding u/s 30 of the Orissa Grama Panchayat Act for annulling the Petitioner's election and for a declaration that he was the elected Sarpanch.

2. The election of the Petitioner was challenged mainly amongst other grounds that he had a subsisting contract with the Government, when he filed his nomination. He was disqualified u/s 25 (1) (n). It was alleged that the Petitioner entered into a contract with the Executive Engineer, Prachi Division and C. A. D. A. Division No. 1, Bhubaneswar for execution of "F. D. R. etc. to Lingipur Distributory". The agreement was executed on 25-3-1983 and the work was completed and the Final Bill was passed on 5-10-1983. Final payment for the work was, however, made on 30-3-1984. The Petitioner filed his nomination on 31-12-1983. He was, therefore, disqualified candidate an acceptance of his nomination paper was contrary to Section 25 (1) (n). It was further averred that

since there was no other candidate besides him, he should have been declared as elected as the Sarpanch of the Grama Panchayat. The Petitioner while admitting that he had entered into the contract pleaded that by the date he filed his nomination, the work had been executed, final measurement had been made, certificate had been issued and final bill had been passed by the Executive Engineer but final payment could not be made due to want of letter of credit. Therefore, he contended that there was no subsisting contract between him and the Government. The learned Munsif held as per Annexure-I that having regard to the fact that final payment was made on 30-3-1984, there was a subsisting contract and the Petitioner was disqualified from filing his nomination. But, he refused the relief, sought by opposite party No. 2. of a declaration that he was the elected Sarpanch. In the appeal carried by the Petitioner the learned District Judge held as per Annexure-2 that the final bill was, passed by the Executive Engineer on 30-3-1984 and until final payment, contract between the Petitioner and the Government subsisted. He upheld the decision of the learned Munsif that the nomination of the Petitioner was accepted contrary to Section 25 (1) (n). The Petitioner has moved this Court for the quashing of the said decisions by judicial review.

3. Shri B. Pal, the learned Counsel for the Petitioner, has urged that the learned District Judge committed an error of record in holding that the final bill was passed by the Executive Engineer on 30-3-1984, when, in fact, the final bill was passed on 5-10-1983. When the Petitioner executed his part of the contract, certificate was issued and final bill was passed, there as end of the contract. The Petitioner's entitlement was quantified. The Government acknowledged the liability. Therefore, there was no more any subsisting contract. The relationship, thereafter, between the Petitioner and the Government, was that of creditor and debtor. He relied upon a few authorities Pyari Mohan Das Vs. Durga Sankar Das and Another, ; Konappa Rudrappa Nadgouda v. Vishwanath Reddy and Anr. A I. R. 1969 S.C. 447 and S. Munishamappa Vs. B. Venkatarayappa and others, , in support of his contention.

4. We ourselves verified the measurement book, which was exhibited in the proceeding as Ext. B. From the endorsements therein at page 29, it is clear that the final bill was passed by the Executive Engineer on 5-10-1983, but the entire amount could not be paid for want of letter of credit. The observation of the learned District Judge that the final bill was passed on 30-3-1984. is, therefore, an error of record. The question, therefore, is: would the Petitioner be held to be interested in a subsisting contract where final payment was not made by the date of filing of nomination though work had been completed, certificate had been issued and final bill had been passed quantifying the amount payable to him ? Does the contract come to an end with the preparation of the final bill or upon final payment?

5. The learned Counsel for the Petitioner placed strong reliance on a decision of this Court in Pyari Mohan Das's case (supra). There, the work had been

completed, order had been passed by the Sub-Divisional Officer for getting the measurement done and making final payment of the balance amount due to the candidate. But by the date of filing of the candidate's nomination, there was still a balance left to him under the contracts. P. V. B. Rao, L, observed that a direction for final payment put an end to the contract and nothing remained to be done by both sides under the contract inasmuch as a suit could be filed on the order of the final payment which was the cause of action. Reference to the contract was not necessary. The position of the parties would be that of creditor and debtor from the date of the order directing final payment. The order directing final payment was an irrevocable one. But Narsimham, C.J., who was the other member with him in the Division Bench, did not express any opinion on this question.

In Munishamappa's cases³ (supra), though the candidate's tender was accepted and work order was issued to him, he did not agree to certain terms. Thereafter there was an arrangement between him and the Government that the remaining work would be got done by other contractors. In these circumstances, the Supreme Court held that the contract had come to an end and there was no subsisting contract on the date the candidate filed his nomination. This decision is not an apt one.

In Konappa Rudrappa Nadgouda's case² (supra), it was held:

.... If the work is completed, it would not mean that the contract is subsisting, if, say, a glass pane is found broken or a tower bolt or drop bolt or a handle has not been fixed where it should have been. The law is not so strict as all that and a sensible view of the Section will have to be taken. The right of a person to stand for an election is a valuable right just as a right of a person to vote. But if the contract subsists in such manner that it cannot be said to have been substantially completed, the law must take its own course.....

This decision is equally not of much help.

6. The question is no longer *res integra*. It has come up for consideration before Judges in England and here. English cases have been considered by Costello, J. in *Satyendra Kumar Das and Another Vs. Chairman of the Municipal Commissioners of Dacca and Others*, . We quote a few excerpts, relied on and referred to by him. Andrews, J. in *O. Carrol v. Hastings* (1905) 2 Ir. R. 590, observed:

Even however, if he had completed the contract on his part at the time of the election but had not received payment for it, I would be of opinion, although this question was left undecided in *Ford v. Newth* that he would have been still concerned in the printing contract. He would undoubtedly while unpaid have been interested and materially interested in that contract and therefore in my, opinion concerned in it.

O'Brien, L. C.J. observed:

The Respondent at the time when he acted as councillor clearly was concerned in the contract in question inasmuch as he had not then reaped the fruit of it he had not been paid the amount due under it. As I observed during the argument of the case he could have brought an action on the contract to enforce payment; and it would be a strange proposition that a person was not concerned in a contract in respect of which he could bring an action to enforce payment, of what was due to him under it. The Respondent had not realised the fruits of his contract and it appears to me, that at the date in question he was still concerned in the contract."

"I adhere to every word I said. At the time he acted that is to say before he was paid the contract he had made with the council still existed, it was not merged, abandoned rescinded, extinguished or satisfied; and if any demur was made as to payment before payment" was actually made, he could have sued upon the contract specially; or if he sued for work done at the request of the Defendants the contract would have been a part of his necessary proof to After considering the aforesaid authorities, Costello, J. observed:

.... Although the contractors might have got their bills passed and although the only outstanding in connection with the contract was the question of payment, by no means it follows that there was no question on which controversy or dispute could have arisen as between the contractors and the council.. We think that in these circumstances it cannot be said that the Plaintiffs had no interest as they undoubtedly had at the time of making the contract, at the time of carrying out the contract and they also had an interest in it at the time when the bills were finally passed. Looking at the matter from this point of view, we think that it cannot be said that the position as between the contractors and the council was merely that of creditors and debtors and that all obligation under the original contract had disappeared.

An identical question arose in *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others*, . In that case, the Supreme Court approved and followed the views of Costello, J. in *Satyendra Kumar Das's case*⁴ (supra) and of O'Brien, L. C.J. and observed.:

It was contended, on the strength of certain observations in some English cases, that the moment a contract is fully executed on one side and all that remains is to receive payment from the other, then the contract terminates and a new relationship of debtor and creditor takes its place. With the utmost respect we are unable to agree. There is always a possibility of the liability being disputed before actual payment is made and the vendor may have to bring an action to establish his claim to payment. The existence of the debt depends on the contract and cannot be established without showing that payment was a term of the contract.

It is true the contractor might abandon the contract we prefer to hold that a contract .continues in being till it is fully discharged by both sides.

Though Satyendra Kumar Vas's case⁴ (supra) was cited before this Court during hearing of Pyari Mohan Vas's case (supra), it was distinguished on facts. The observation of the learned Judge, that a direction for final payment terminates the contract is contrary to the decision of the Supreme Court and the view, that: after the preparation of the final bill the relationship between the parties was that of creditor and debtor has not found favour with the Supreme Court and the other Courts in the cases relied upon by the Supreme Court in Chattrbhuji Vithaldas's case⁶ (supra). Had Narsimham, C.J. agreed with the view expressed by P. V. B. Rao, J., we would have referred the matter for consideration by a larger Bench. But, inasmuch as Narsimham, C.J. had expressed no opinion on the rule laid down in Pyari Mohan Vas's case (supra) on this question, which therefore remains the view of a learned Single Judge, the authority does not bind us. Besides, Chattrbhuji Vithaldas's case⁶ (supra) is not the solitary one in the field. The question again arose in Laliteswar Prasad Sahi Vs. Bateswar Prasad and Others, in which Chattrbhuji Vithaldas's case⁶ (supra) was followed and it was held:

....a contract for the supply of goods or for the execution of any works or the performance of any services undertaken does not cease to subsist only because the goods had been supplied or work had been executed or services performed. It continues to subsist till payment is made and the contract is fully discharged by performance on both sides.

(Emphasis supplied)

To remove the hardship, the parliament intervened and provided an explanation to Section 9-A of the Representation of the People Act, 1951, by the Representation of the People (Amendment) Act, 1966, which came into force with effect from 14-12-1966. The explanation reads as under:

Explanation.-For the purposes of this Section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part:" In the objects and reasons, it was stated:

This change has become necessary in order to do away with the disqualification that attaches to a person for being chosen as or for being a member of parliament or State Legislature even after he has fully performed his part of the contract, since it would hardly be justifiable to retain such a disqualification provision in a modern welfare State when State activities extend almost over every domain of the citizen's affairs where very many persons, in one way or the other, have contractual relationship with the Government. That being the case an unduly strict view about Government contract in the present day might lead to the disqualification of a large number of citizens many of whom may prove to be able and capable members of parliament or State Legislatures. It would be of interest to note in this connection that in the United Kingdom, any

disqualification arising out of any contract with the Crown has been done away with by the House of Commons Disqualifications Act, 1957.

The ratio of *Chatturbhuj Vithaldas*'s case⁶ (supra) and *Laliteshwar Prasad Sahi*'s case⁷ (supra) may not be any longer good law as regards election under the Representation of the People Act, 1951, but would govern cases where a provision, akin to that contained in the Explanation to Section 9-A of the Representation of the Peoples Act, is absent.

7. At the first blush in course of arguments we thought that this case was squarely covered by the dictum of P. V. B. Rao, J. in *Pyari Mohan Das*'s case¹ (supra). On further consideration, when the provisions contained in Section 25 (1) (n) are similar to those contained in Section 7 (d) of the Representation of the Peoples Act, we are of the view that there are weightier and binding authorities against the said view. *Laliteshwar Prasad*'s case⁷ (supra) is a recent case where the contrary view has been taken. Therefore, having regard to the provisions contained in Section 25 (1) (n), our answer is that inasmuch as despite the contractor's execution of his part of the contract and passing of the final bill if payment is not made, the party has to fall back on the contract for enforcement of his right the contract does not come to an end until the, other party, namely the Government performs its part by making the payment.

8. We, therefore, see no merit in this writ application, which is accordingly dismissed. But in the facts and circumstances there would be no order as to costs.

9. We would, however, like to suggest if provisions akin to Section 9-A of the Representation of the Peoples Act as introduced by the Representation of the People (Amendment) Act, 1966, should not be incorporated into Section 25 (1) (n) for the reasons (see statements of objects and reasons) which impelled the parliament to incorporate the Explanation.

D.P. Mohapatra, J.

10. I agree.