

(2021) 04 OHC CK 0002
In the Orissa High Court
Case No : RVWPET No.422 Of 2019

State of Orissa represented through the Secretary to Govt.,
General Administration Department, Bhubaneswar

APPELLANT

Vs

Ramesh Chandra Swain & Ors

RESPONDENT

Date of Decision : 08-04-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100, 107, Order 43 rule 1(u), Order 41 Rule 23, Order 41 Rule 23A, Order 47 Rule 1, Order 47 Rule 1(c)
Code Of Criminal Procedure, 1973 — Section 340

Citation : (2021) 04 OHC CK 0002

Hon'ble Judges : Biswanath Rath, J

Bench : Single Bench

Advocate : S. Palit, S. Ghose, S.P. Mishra, S.N. Biswal, S. Sarangi, M.R. Dash, B. Sahoo, D. Mahapatra, N.K. Mishra, H.S. Mishra, B. Rout,

Final Decision : Allowed

Judgement

Biswanath Rath, J

1. The review petition under Order 47 Rule 1 of the C.P.C. at the instance of the State-Respondent arises out of the judgment dated 27.06.2012 passed in Miscellaneous Appeal No.994 of 2001 by the High Court thereby reversing the judgment in T.A. No.4/17 of 2001/1992 dated 12.10.2001 by the learned District Judge, Bhubaneswar interfering in a judgment and decree passed by the trial Court in O.S. No.203 of 1988-I.

2. Short background involved in this case is that the Respondent joining together filed O.S. No.203 of 1988-I in the Court of Munsif, Bhubaneswar making the State of Orissa as Defendant. The suit was filed for declaring the Plaintiffs as the owners over the land under their possession and for correction of the Record of Rights accordingly and thereby intimating the Collector, Puri to correct the Record of Rights involving the suit scheduled property therein; the property more particularly Khata No.38, Mouza-Bomikhal, Plot Nos.13 to 18 also giving therein

the corresponding Khata No.109 under Mouza-Bomikhal bearing corresponding plot nos.25, 26, 32 to 36, 42 to 47, 50 to 57. The Respondents herein as Plaintiffs had their case that the Plaintiffs 1 & 2 having four ana share, the Plaintiffs 9 to 17 having five ana four paise share and the Plaintiffs 18 to 21 having two anas eight paise share in the suit property, were also recorded as such in the Record of Rights. Their ancestors being the owners were in possession and as such were recorded as Sabik Record of Rights. It is claimed that after demise of the ancestors the Plaintiffs as the successors and owners remained in possession over the same. It is further claimed that the suit plots 11 to 18 and 370 & 371 under Khata No.38 in Mouza Bomikhal were recorded in the Record of Rights published in the year 1962 in the name of their predecessors and the Plaintiffs continued in paying rent. Plaintiffs also claimed that they have occupancy right and were recognized as such with acceptance of the rents by the vendors. Even the plaintiffs were paid with compensation in respect of the plot nos.12 & 18 under khata no.38 involving the land acquisition proceeding bearing L.A. Case No.26/73. The Plaintiffs claimed that though an area of Ac.0.069 decimals out of plot no.18 were acquired, balance Ac.0.25 decimals involving the plot no.18 were continued to remain in possession of the Plaintiffs. It is, on the premises that their occupancy was never terminated, nor their rights even acquired validly, further the Government having accepted rent and acquiring a portion out of the recorded plot in 1973 is estopped to say that the plaintiffs are not the owners and in possession. While claiming that the Plaintiffs raised crops from the disputed plot during 1968-70, the certificate proceeding was initiated against the Plaintiffs for arrear rent in respect of the Khata no.38. Whereafter the Plaintiffs continued to pay rent till 1982-83. It is alleged that during current settlement the Defendant unreasonably claimed title over the property and the Settlement Authorities illegally recorded the name of the defendants over the settled property, in spite of Plaintiff's resistance to the same. It is, in the above premises, Plaintiffs claimed that the Defendants having no manner of right, title over the disputed property attempted to disturb the Plaintiffs and as such the Plaintiffs got compelled to file suit for correction of the Record of Rights giving cause of action to be 24.04.1988. The suit was registered as O.S. No.203/1989-1. Pursuant to the notice the Respondent-Defendants contested the matter by filing written statement. The State-Defendant while denying and disputing each of the averments and claim contended that the scheduled property are purely Government land after being acquisitioned by Government during 1962 as per the Land Acquisition proceeding No.9/62-63. Since the Record of Rights was prepared before initiation of the land acquisition proceeding, the land somehow stood in the name of the Plaintiff's predecessor Daitari Sahu and others. For the land acquired through the land acquisition proceeding no.9/62-63 there has been correct preparation of the Record of Rights, subsequently giving a statement of the land acquired in tabular form. The State Government justified being the owner of the land involving the disputed property. It is clearly claimed by the State that the Plot Nos.12 to 18 have been duly acquired. It was claimed that for not being the owner of the disputed

property, mere payment of rent cannot create right, title or extinguish valid title involving the suit land. The Defendants reiterated regarding plot nos.12 to 16 corresponding to plot nos.65, 66 & 67. The State claimed that the whole area of plot nos.12 & 18 were acquired during 1962 as per the L.A. Proceeding No.9/62-63, but however, after final publication in 1962, mistakenly there has been acquisition of some further plots in the year 1973, which is claimed to be an illegal double benefits to the Plaintiffs. The State reiterated that in fact the whole land was already acquired following due process of law and the predecessors of the Plaintiffs have already received the compensation. The State, thus, contended that there is right rejection of the claim of the Plaintiffs for correction of the record of rights involving the disputed property, requiring no interference by any Court of law. The State completely denied the claim of the Plaintiffs to have raised crop over the disputed property. It is, in the above premises, the Defendant-Respondent i.e. the present Review Petitioner sought for dismissal of the suit. Upon entering into trial the Trial Court framed the following issues:

"1. Is the suit maintainable?

2. Is there any cause of action for the suit?

3. Whether the entire suit properties have been acquired by the Government of Orissa in L.A. Case No.9 of 1962 or only some portion have been acquired in L.A. Case No.25 of 1973?

4. Whether the Plaintiffs are the rightful owners of the suit property, having right, title, interest and possession over it?

5. If the Plaintiffs are entitled to the reliefs prayed in the suit?"

The Plaintiffs examined witnesses and also exhibited documents marked as Ext.1 to Ext.5/a. Similarly the defendants while examining witnesses, also exhibited documents marked as Ext.A to Ext.B/1. Consequent upon completion of the trial based on the pleadings and evidence of the parties the Trial Court vide its judgment dated 28.10.1991 and decree dated 11.11.1991 decreed the suit holding that the Plaintiffs are the owners of the suit property and thereby directed the Settlement Authority to correct the record of rights accordingly. It appears, in the suit the State-Defendant filed document marked as Ext.A, A/1 & A/2, which relates to Land Acquisition Case no.9/61-62. It further appears, these documents have been admitted by the Trial Court without objection. Being aggrieved, the G.A. Department of the State of Odisha filed appeal before the learned Additional District Judge, Bhubaneswar vide T.A. No.17 of 1992. The lower Appellate Court hearing the appeal on contest by order dated 16.08.1993, however, dismissed the appeal due to barred by limitation. It appears, being aggrieved by the said dismissal order on the ground of limitation, the Defendant-Appellant filed Civil Revision No.272/1993. This High Court by its order dated 12.07.1995 rejected the Civil Revision No.272/1993 on the premises of failure of the Defendants in explaining the delay. Being aggrieved by the order of dismissal

in the Civil Revision, the Defendants carried SLP(C) No.7912 of 1996 before the Hon'ble Apex Court. It appears, the Hon'ble Apex Court by its judgment dated 5.09.1997 allowed the SLP(C), but however subject to payment of a cost of Rs.20,000/- in restoration of the T.A. There also arose some dispute with regard to non-payment of the cost in the meantime and the misc. case for condonation of delay was again allowed, subject to however payment of additional cost of Rs.10,000/-. The matter again entered into another SLP vide SLP (C) No.4970 of 2000 regarding non-payment of cost issued by order dated 5.01.2001 and while restoring the T.A. the Hon'ble apex Court directed the Additional District Judge to dispose of the appeal within a period of six months. While the matter stood thus, on 12.10.2001 the Additional District Judge, Bhubaneswar allowed the T.A. No.17/92 (4 / 2001) recording his finding for retrial of the suit and affording the defendants also an opportunity to amend the written statement bringing the land acquisition proceeding as well as other relevant notifications, pleadings relating to initiation of land acquisition proceeding and also giving opportunity to the Plaintiffs to controvert the same.

Being aggrieved with the judgment of the Additional District Judge, Bhubaneswar in remanding the suit vide T.A. No.17 of 1992 the Plaintiffs preferred M.A. No.994 of 2001 contemplating that the Additional District Judge, Bhubaneswar has mechanically exercised power under Order 41 Rule 23-A of the C.P.C. The High Court by its judgment dated 27.06.2012 allowed the Miscellaneous Appeal No.994 of 2001 holding that there has been mechanical exercise of power by the lower Appellate Court and thereby, illegally reopened the suit and while observing so, the High Court also passed a judgment declaring the judgment and decree in the suit vide O.S. No.203 of 1989 (I) becomes valid, which resulted filing of the present review by the Plaintiff-Appellants.

3. It is apt to indicate here that the Review No.422 of 2019 was filed undoubtedly with 2195 days of delay. The delay in preferring review was condoned by this Court by order dated 23.12.2019 which order being challenged in the Hon'ble apex Court, the Hon'ble apex Court dismissed the SLP (C) No.3086 of 2020.

4. Now coming to the plea at the instance of the State in the Review Petition, this Court finds, the Review Petition is filed on the plea that after the judgment of this Court in M.A. No.994 of 2001 the Plaintiff-Opposite Parties filed M.C. No.25769 of 2018 praying for correction of the record on the basis of the judgment of the Court. The G.A. & P.G Department being the custodian of the land within the jurisdiction of the Bhubaneswar Municipal Corporation, a detailed verification was conducted to ascertain the position of the suit land pending for mutation. The State claims that khata no.297 relating to mouza-Bomikhal stands recorded in the name of the G.A. & P.G. Department and being prepared and finally published by the Statutory Authority under the provisions of the Orissa Survey and Settlement Act, 1958. On further inquiry, it was also found that the private land measuring Ac. 46.44 decimals in village Bomikhal was acquired by the

Government vide Revenue Department Notification No.18004-LA/271/60 Puri-R-dated 20.04.1960 for development of the road from new capital to University side. This particular land was acquired at public expenditure for public purpose. It is only after requirement of thorough verification to ascertain the Hal Sabik and pre-sabik position in the land acquisition notification, the Revenue Inspector involved clearly indicated that the area applied for mutation correspondences to the land acquired during 1960. Consequently, the Tahasildar, Bhubaneswar was provided with all details to consider the Mutation Case No.25769 of 2018 in accordance with law. The Plaintiff-Respondents by filing W.P.(C) No.13606 of 2019 attempted to quash the communication to the Tahasildar dated 26.07.2019. The aforesaid writ petition is still pending. On verification of the record involving land acquisition record pertaining to L.A. No.9/61-62, it also came to notice that though the original award along with enclosures are not available in the case record, but however, a copy of the award being available on record, it was found, an amount of Rs.2,91,955.10/- has been awarded against this very same land measuring Ac.46.644 decimals of land. Record also establishes handing over of the possession of this very land to the Revenue Officer on 27.07.1962. For this purpose there is also an abatement statement prepared vide letter no.1393 dated 25.07.1974 being filed as Annexure-F to the Review Application. There are also some materials available indicating that possession in respect of acquired land has been handed over to the requisitioning authority on 27.07.1962. Award statement prepared U/s.11 of the Land Acquisition Act is also filed as available at Annexure-1 to the review petition. In the meantime, involving another development the Plaintiffs attempted to go through a contempt application against the high Officials of the Government for working-out the judgment dated 27.06.2012 passed in Miscellaneous Appeal No.994 of 2001 and with a clear intent to save the public property and very valuable property an attempt was made by the State to reopen the Miscellaneous Appeal and/or the Suit at least to be decided in taking into consideration the relevant facts and materials, which have all come to the notice of the State Authorities and have a definite help for effective adjudication of the dispute involved herein. In spite of the fact that there involves a Civil Court decree and for which execution proceeding though is a clear remedy, it is not known under what provision a contempt petition involving a civil court decree can be entertained to execute a judgment and decree of a Civil Court. This clearly established that the Plaintiffs have attempted their level best to give threat of contempt and that too in the matter of correction of Record of Rights, to which right accrued through a Civil Court judgment and decree. Thus the present Review Petition is filed for clear involvement of fraud, suppression of material facts and developments involving very same land and that too when the property already became a property of the State.

5. In his submission Mr. S. Palit learned AGA with Mr. S. Ghose, learned ASC while reiterating the above factual position and legal background, taking this Court to the findings of the learned Additional District Judge, Bhubaneswar

through paragraph nos.9, 10 & 11 of the first appellate court judgment submitted that the lower appellate Court taking into account some of the developments involved herein has already directed for retrial of the dispute by remanding the matter. It is, in the premises that there has been right exercise of power under Order 41 rule 23 of the C.P.C by the first appellate court, Mr. Palit, learned AGA contended that for the better interest of the parties and for a valuable land required for public purpose, even possession of which is already taken by way of land acquisition on payment of appropriate compensation, the order passed by this Court in Miscellaneous Appeal No.994 of 2001 is required to be reviewed and a fresh judgment may be passed taking into consideration the materials referred to by the learned Additional District Judge, Bhubaneswar as well as the materials taken support in the review application.

6. Mr. Palit, learned AGA also relying on a decision of the Hon'ble apex Court in the case of J.Balaji Singh Vs. Dibakar Kole and Ors. as reported in 2017 (14) SCC 2007 submitted that the Petitioner has the support of the above decision and thus placing the said judgment made a request for setting aside the judgment passed in M.A. No.994 of 2001 and passing a fresh judgment after hearing all the parties in the M.A. No.994 of 2001.

7. There has been a lot of hide & seek played by the Opposite Parties in review petition in conducting the case as clearly borne from the order-sheet involving the review petition. Suit was fought jointly, similarly the Appeal was also fought with one set of counsel. In the miscellaneous appeal also all the defendants joining together fought the appeal through one set of counsel, but surprisingly in the review application there has been different set of counsel including dropping of so many counsel in between.

Be that as it may in the final hearing also on several dates the Opposite Parties did not appear to contest the matter, for which the Court was constrained to bring the matter on the heading of "To be mentioned" with an intention to provide last opportunity to the contesting Opposite Parties, to avoid that the matter is not decided ex parte. Finally the Plaintiffs in two sets participated in the hearing through Mr. S.P. Mishra, learned Senior Advocate being assisted by Mr. S.S. Biswal, learned counsel for the Opposite Party No.7 and also one Mr. S.S. Mishra, learned counsel for the Opposite Party Nos.11 & 12. The other counsel in spite of several opportunities did not choose to contest the matter.

8. Mr. S.P. Mishra, learned Senior Advocate for the Opposite Party No.7 in his attempt to object the entertainability of the review petition, taking this Court to the provision at Order 47 of the C.P.C. submitted that unless the present review application falls into the conditions in the Order 47 Rule 1 of C.P.C. the same remains unentertainable. Mr. S.P. Mishra, learned Sr. Advocate also referring to the provision at Section 107 of the C.P.C contended that the Court hearing the appeal and deciding the same by a judgment passed in exercise of power under Order 41 Rule 23 of the C.P.C. has power to pass a judgment and decree and is not confined only to confirm the remand order or to set aside the remand order.

Taking this Court to the different portions of the judgment of the learned Single Judge in M.A. No.994 of 2001 Mr. S.P. Mishra, learned Senior Advocate even though submitted that normally a matter under this contingency would have been decided either confirming the judgment of the lower appellate court or remanding the matter to the lower appellate court for fresh disposal in disagreement with the judgment of the lower appellate court with a direction to the lower appellate court to pass a fresh judgment in the first appeal. But for the power conferred U/s.107 of the C.P.C. Mr. S.P. Mishra, learned Sr. Advocate contended that the learned Single Judge here is also equally powered to pass a judgment and decree to give complete justice to the parties. Taking this Court to the decisions in the case of Ashwini Kumar K. Patel v. Upendra J. Patel and others : AIR 1999 SC 1125 more particularly paragraph nos.7 & 8 therein, in the case of District Executive officer vs. V.K. Pradeep and others : 1999 SCC Online Kerala 36, in the case of State of Punjab and others vs. Bakshish Singh : 1998 (8) SCC 222, in the case of Devaraju Pillai Vrs. Sellagge Pillai : AIR 1987 SC 1160, in the case of Ram Singh Chauhan Vrs. Director of Secondary Education involving Review Application M.U. No.1155 of 2019 decided by the High Court of Uttarakhand on 10.06.2020 and lastly in the case of Asharfi Devi (Dead) Vrs. The State of Uttar Pradesh : (2019) 5 SCC 86 Mr. S.P. Mishra, learned Senior Advocate attempted to justify his submissions and claimed that for the support of the above decisions to the case of the Plaintiffs, the review application should be dismissed in confirmation of the decision of the learned Single Judge judgment in M.A. No.994 of 2001.

9. Mr. S.S. Mishra, learned counsel for the Opposite Party Nos.11 & 12, however, taking this Court to the miscellaneous application filed by him submitted that for the allegation of fraud against the Plaintiffs at the instance of the State Government, scope of exercising power through Section 340 of Cr.P.C. should be kept open for the affected Plaintiffs. Mr. S.S. Mishra, learned counsel, however, prayed for keeping such a request reserve for future purpose and in the process simply adopted all the submissions made by Mr. S.P. Mishra, learned Senior Advocate in challenge to the entertainability of the review application and prayed for dismissal of the review application.

10. Considering the rival contentions of the parties, this Court finds, in the beginning on the institution of the suit vide C.S. No.203/1989-1 the Plaintiffs joining together in paragraph nos.2 & 3 claimed that the suit plot nos.11 to 18 and 370 & 371 under Khata No.38, Mouza-Bomikhal were recorded in the name of their predecessors in the record of rights published in the year 1962. At the same time in paragraph no.3 the Plaintiffs again claimed that they were occupancy royats and being recognized by their vendor.

The Plaintiffs admitted that they were also paid compensation, but unfortunately, the Plaintiffs have made a statement in paragraph no.3 that they were paid compensation with respect of plot nos.18 & 12 under khata no.38 involving L.A. Case no.26 of 73. In spite of they being party to the L.A. Case No.9/62-63, did

not find any mention of the same in the suit proceeding. Even though it was stated that the Plaintiffs subsequently clarified the position involving plot no.18 to the effect that even though the land measuring Ac.0.069 dec. out of plot no.18 were acquired but the balance Ac.0.251 dec. in the said plot continued to remain in their possession. In the scheduled portion in the suit disclosed as follows:

" SCHEDULE

Mouza-Bomikhal,	Khata	No.38	Plot	no.13	Area	Ac.2.475
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decs.

Plot no.14 Area Ac.0.870 decs.

Plot no.15, Area Ac.1.480 decs.

Plot no.16, Area Ac.0.775 decs.

Plot no.17, Area Ac.0.280 decs.

Plot no.18, Area Ac.0.251 decs.

Out of Ac.0.320 decs.

Entire corresponding to Mouza - Bhoingar -

Khata No.109 Plot no.44 area Ac.0.078 dcs.

Plot no.42 area Ac.0.738 decs.

Plot no.43 area Ac.0.401 decs.

Plot no.36 area Ac.0.322 decs.

Plot No.32 area Ac.0.487 decs.

Plot no.33 area Ac.0.177 decs.

Plot no.34 area Ac.0.120 decs.

Plot no.35 area Ac.0.215 decs.

Plot no.45 area Ac.0.877 decs.

Plot no.48 area Ac.0.325 decs.

Plot no.47 area Ac.0.296 decs.

Plot no.50 area Ac.0.631 decs.

Plot no.51 area Ac.0.043 decs.

Plot no.52 area Ac.0.153 decs.

Plot no.53 area Ac.0.092 decs.

Plot no.54 area Ac.0.270 decs.

Plot no.55 area Ac.0.213 decs.

Plot no.56 area Ac.0.306 decs.

Plot no.57 area Ac.0.019 decs.

Plot no.25 area Ac.0.032 decs.

Plot no.26 area Ac.0.226 decs."

11. In filing written statement the State of Odisha while denying each and every claim of the Plaintiffs in paragraph no.4 contended that the suit land as per the scheduled of property appended to the plaint are purely Government land after it is acquisitioned by the Government in 1962 as per the land acquisition proceeding no.9/62-63. Not only this in page 2 of the written statement the State of Odisha also gave a detailed declaration of the land acquired by the Government. The statement relied on by the State is taken note here as follows:

Sl. No.

Land acquired by Govt. relating to pre-1962 plots

Part/ full corresponding plots as per 1962 R.O.R Sabik Suit plots

Part/ full corresponding plots as per R.O.R 1987-88. Now suit plots

1

2

3

4

1

62

14

45

2

63

13, 14, 15

36, 42, 43, 46, 47, 50, 51, 52, 53, 54, 55, 56, 57 & 45

3

64

12, 13, 15

36, 46, 47, 50, 52, 55, 56, 57, 53

4

65

15, 16, 17, 18

26, 25, 33, 34, 35, 32

5

66

12, 15, 16, 17, 18

35, 36

It is, at this stage of the matter, this Court taking into account the serious contest between the parties, more particularly the contentions of Mr. S.P. Mishra, learned Senior Advocate regarding entertainability of the review petition, clearly hit by the provision of the Order 47 Rule 1 of C.P.C., this Court here takes note of the provision at order 47 Rule 1 of C.P.C:

"(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

12. On reading of the aforesaid legal provision in entertaining a review, this Court finds, under Sub-rule (c) of Rule 1 of Order 47, the review is entertainable under several grounds. First and foremost ground is, if there is discovery of new or important matter or evidence, which after exercise of due diligence, which is not within his knowledge or could not be produced by him at the time when the decree was passed and also or for any other sufficient reason may apply for review of judgment, this Court here finds, judgment of the Single Judge is attacked by the State-the Review Petitioner on two fold; one is that when the Single Judge was hearing appeal involving the remand order being passed in exercise of power under Order 41 Rule 23 of C.P.C., ought not have allowed the appeal by passing a fresh judgment and decree and it is contended that in the event the Single Judge was in disagreement with the judgment of the first appellate court for the first appellate court having not applied its mind on the

merit involving the appeal, ought to have remanded the matter to the first appellate court for considering the appeal afresh and the other option left with the Single Judge was, in the event he was agreeing with the findings of the first appellate court, he could have simply dismissed the miscellaneous appeal under the provision at Order 43 rule 1(u) of the C.P.C.

13. This Court here taking into account the decision of the Hon'ble apex Court in the case of J. Balaji Singh v. Diwakar Cole : (2017) 14 SCC 207 finds, in deciding the scope of the Court in exercising its power under Order 43 Rule 1 (u) vide paragraphs 17 & 18 the Hon'ble apex Court has come to observe as follows:

17. So far as the impugned order is concerned, the High Court, in our view, committed jurisdictional error when it also again examined the case on merits and set aside the judgment of the first appellate court and restored the judgment of the trial court. The High Court, in our opinion, should not have done this for the simple reason that it was only examining the legality of the remand order in an appeal filed under Order 43 Rule 1(u) of the Code. Indeed, once the High Court came to a conclusion that the remand order was bad in law, then it could only remand the case to the first appellate court with a direction to decide the first appeal on merits.

18. The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43 Rule 1(u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43 Rule 1(u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43 Rule 1(u) which reads thus:-

"1(u) an order under rule 23 or rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court"

On reading through the direction of the Hon'ble apex Court in paragraph nos.17 & 18 this Court finds, for the limited scope with the High Court while exercising power under Order 43 Rule 1(u), once the superior Appellate Court concludes, remand order passed by the lower Appellate Court was bad in law, then it can remand the matter to lower Court with a direction to decide the appeal before it on merits. Thus, there is no doubt that the Single Bench in deciding the M.A. an appeal under Order 43 Rule 1(u) has exceeded its jurisdiction and thus the judgment involved herein becomes bad in law. Taking into account the judgment of the Hon'ble apex Court more particularly in para-19 therein, this Court for the above position of law finds, power exercised by the learned Single Judge was available only in exercise of power U/s.96 or Section 100 of C.P.C.

14. Further for the clear plea of the State right through the suit that the State had acquired the entire land through land acquisition proceeding No.9/61-62, further materials surfacing like payment of compensation involving such land

acquisition proceeding, handing over of the land by the beneficiaries, preparation of abatement statement vide letter dated 25.07.1974 and the other records relied on by the State during 1st Appellate stage, during miscellaneous appellate stage and corroborated through the review petition and no denial on existence of such documents or even on existence of land acquisition proceeding No.9/61-61 by any of the Respondents as of now, particularly keeping in view the vast patch of land in the heart of capital city of Bhubaneswar are already acquired for public purpose that too on payment of compensation and involving such compensation, admittedly no dispute is pending as of now, all these cannot be lost sight of. There is plaint averment in paragraphs 3, 4 & 7 to the effect that there has been partial acquisition of the land for plot no.18 by the State in the L.A. Case no.26/1973. To this there is a written statement with clear pleading in paragraph no.4 that the claim of the Plaintiffs is wholly false, suit land as per the plaint scheduled are purely Government land after it is acquisitioned by the Government during 1962 as per the land acquisition proceeding no.9/62-63. Which plea also stands fortified in the statement of land acquired, thus again the statement made in paragraph no.5 there is a clear statement that the whole land is acquired in L.A. proceeding no.9/62-63, but however, finding defective indication in respect of the land acquired for plot no.12 land involving the plot no.12 was again acquired in 1973 thus it clearly appears the plaintiffs played fraud on the Court by not bringing anything on L.A. proceeding No.9/62-63 and on suppression of vital aspect attempted to grab a decree confining its claim only on the basis of land acquisition case no.26/1973 even though it was only in respect of the part of plot no.12.

15. This Court here finds, on the pleading and demand of parties there is framing of issue no.3 which reads as follows:-

"Whether the entire suit properties have been acquired by the Government of Orissa in L.A. Case No.9/62-63 or only some portions have been acquired as in L.A. Case No.26/1973."

From the scan of statement of D.W.1, it appears, the State witnesses the D.W.1 the R.I. of the G.A. Deptt. not only clearly stated that the entire suit land have been acquired in 1961-62 under L.A. No.9/1961-62, which is in clear corroboration of pleadings of the State in the W.S. as indicated hereinabove. This Court here finds, even though the State could not file relevant documents to support their above stand, but however, produced Exts.A, A-1, A-2, B, B-1, though after closure of evidence, but case record shows all these documents went on record without objection of Plaintiffs. Since these documents go to the root of the case, in the interest of justice the Trial Court ought to have directed the parties to enter into further pleadings and evidence to establish the contents therein with scope of rebuttal evidence to the Plaintiffs. Unfortunately in spite of admission of Exts.A, A-1, A-2, B & B-1 having greater relevance and in spite of clear pleading of the State, the trial Court did not give any attachment to all these, it is, therefore, the lower Appellate Court, on the other hand, on

appreciation of all the above has opened the suit for retrial. Since the Plaintiffs have the scope of rebuttal, there is also no prejudice to the Plaintiffs and in the circumstances, only conclusion in disposal of the M.A. No.994 of 2001 is to approve the judgment of the 1st Appellate Court and see a fresh disposal of the suit by way of open remand. Here this Court observes, the documents surfaced in the process of the litigation materially affecting the result of the suit would be an error apparent on the face of record and there is no doubt that the case at hand is clearly maintainable under the provision of Order 47 of C.P.C and the State / Petitioner is able to make out a case for review. This Court here takes into account the decision of the Hon'ble apex Court in the case of Gulam Abbas & Ors. v. Mulla Abdul Kadar reported in (1970) 3 SCC 643 which clearly endorses the view hereinabove rendered by this Court.

16. Suit is filed in clear suppression of fact that the owner of the land even after receipt of whole compensation of Rs.2,91,955.10/- for whole acquisition of land measuring Ac.46.644 decimals, handed over of entire land to the Revenue Officer on 27.07.1962. The Plaintiffs thus played fraud on Court even. Original land acquisition award involving very same land, payment of full compensation and preparation of abatement statement all these cannot be lost sight of. Above clearly brings the present review application within the fold of Order 47 Rule 1 of C.P.C and the review is thus clearly entertainable and succeeded.

This Court here finds, the submissions of Mr. Palit, learned AGA for the State also gets support through the decisions in the cases of State of Orissa v. Harapriya Bisoi :AIR 2009 SC 2991, S.P. Chengalvaraya Naidu (Dead) by LRS v. Jagannath (Dead) by LRS and others : (1993) Supp. 3 SCR 422, Hamza Haji v. State of Kerala and another : (2006) 7 SCC 416, Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education and others : (2003) Supp. 3 SCR 352, Bhaurao Dagdu Paralkar v. State of Maharashtra and others : (2005) 7 SCC 605.

17. This Court, at this stage, also examines the decisions cited by Mr. S.P. Mishra, learned Senior Advocate and also taken support by Mr. S.S. Mishra, learned counsel appearing for a set of Plaintiffs/Opposite Parties herein and finds as follows:-

AIR 1928 P.C. 261 (Tom Boevey Barrett Vs. African Products, Ltd.) for different facts is not applicable to the case at hand. Similar situation is also involved in AIR 2005 SC 809 (Sangramsinh P. Gaekwad and others Vs. Shantadevi P. Gaekwad and others). AIR 1971 (S.C.) 2177 (Mohan Lal Vs. Anandibai) cited by Mr. Mishra, learned Sr. Adv. rather supports the case of the State-Petitioner. AIR 1976 (SC) 163 (Afsar Sheikh and another Vs. Soleman Bibi and others) involves a second appeal U/s.100 of C.P.C. AIR 1977 (SC) 615 (Varanaseya Sanskrit Vishwavidyalaya and another Vs. Rajkishore Tripathi (Dr.) and another) involves an application under Order 39 rules 1 & 2. ILR (1989) Kar. 425 (K.S. Mariyappa Vs. Siddalinga Setty) involves a proceeding U/s.96 of C.P.C. Similar situation is in AIR 1986 Orissa 97 (Padma Bewa Vs. Krupasindhu Biswal and others). In (1980) Vol.45 STC 212 (Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi)

here the Hon'ble apex Court said, the review is entertainable where a glaring omission or patent mistake or like grave error has crept on earlier by the judicial fallibility, thus this decision rather supports the State. Similarly (1999) 4 SCC 396 (Budhia Swain and Others Vs. Gopinath Deb and others), (2019) 11 SCC 800 (Ponnayal Vs. Karuppannan and another), (1987) 2 SCC 555 (Ram Sarup Gupta Vs. Bishun Narain Inter College and Others), AIR 1975 SC 1500 (Sow Chandra Kante and another Vs. Sk. Habib) are not applicable for difference in facts. Similarly AIR (1998) SC 2276 (P.K. Ramachandran Vs. State of Kerala and another), (2012) 5 SCC 157 (Maniben Devraj Shah Vs. Municipal Corpn. Of Brihan Mumbai), (2013) 4 SCC 52 (Amalendu Kumar Bera and others Vs. State of W.B.), (2012) 3 SCC 563 (Postmaster General and others Vs. Living Media India Ltd. and another), (2012) 5 SCC 566 (State of U.P. and others Vs. Ambrish Tandon and another) are all on limitation aspect, which stage in the case at hand is already over. Since condonation of delay aspect in entertaining the review by this Court is already affirmed by the Hon'ble apex Court on dismissal of the SLP (C) No.3086 of 2020, all the above decisions except two decisions which as per the observation of this Court supports the State rather, do not support the case at hand. Involving (2019) 5 SCC 86 (Asharfi Devi Vs. State of U.P. and others) this is a case where order of the review was only in challenge in the Hon'ble apex Court and the Hon'ble apex Court observed, the request to involve the challenge to the main judgment not permissible at this stage, has no application to the case at hand. (2018) 4 SCC 587 (Sivakami and others Vs. State of T.N. and others) also for different facts involved therein has no application to the case at hand. This Court has also gone through the decisions vide 1999 SCC Online Kerala 36 (District Executive Officer Vs. V.K. Pradeep & Ors.) and 1998 (8) SCC 222 (State of Punjab and others vs. Bakshish Singh) cited by Mr. S.P. Mishra, learned Senior Advocate and finds, none of these decisions have any application to the case at hand.

18. This Court now proceeds to discuss some other decisions which also support the case of the Review Petitioner, which runs as follows:-

In the case of Vijay Syal Vrs. The State of Punjab : (2003) 9 SCC 401 the Hon'ble apex Court in para-24 has observed and held as follows:

"24. In order to sustain and maintain the sanctity and solemnity of the proceedings in law courts it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court, when a court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take the consequences that follow on account of its own making. At times lenient or liberal or generous treatment by courts in dealing with such matters is either mistaken or lightly taken instead of learning a proper lesson. Hence there is a compelling need to take a serious

view in such matters to ensure expected purity and grace in the administration of justice."

In the case of *Rajender Singh Vrs. Lt. Governor Andaman and Nicobar Island and others* : (2005) 13 SCC 289, the Hon'ble apex Court giving stress on consideration of allegation of overlooking the documents relied on by the appellant held it is a clear case of an error apparent on the face of the record and non-consideration of relevant documents and as such in para-15 & 16 therein held as follows:

"15. We are unable to countenance the argument advanced by learned Additional Solicitor General appearing for the respondents. A careful perusal of the impugned judgment does not deal with and decide many important issues as could be seen from the grounds of review and as raised in the grounds of special leave petition/appeal. The High Court, in our opinion, is not justified in ignoring the materials on record which on proper consideration may justify the claim of the appellant. Learned counsel for the appellant has also explained to this Court as to why the appellant could not place before the Division Bench some of these documents which were not in possession of the appellant at the time of hearing of the case. The High Court, in our opinion, is not correct in overlooking the documents relied on by the appellant and the respondents. In our opinion, review jurisdiction is available in the present case since the impugned judgment is a clear case of an error apparent on the face of the record and non-consideration of relevant documents. The appellant, in our opinion, has got a strong case in his favour and if the claim of the appellant in this appeal is not countenanced, the appellant will suffer immeasurable loss and injury. Law is well settled that the power of judicial review of its own order by the High Court inheres in every court of plenary jurisdiction to prevent miscarriage of justice.

16. The power, in our opinion, extends to correct all errors to prevent miscarriage of justice. The courts should not hesitate to review their own earlier order when there exists an error on the face of the record and the interest of justice so demands in appropriate cases. The grievance of the appellant is that though several vital issues were raised and documents placed, the High Court has not considered the same in its review jurisdiction. In our opinion, the High Court's order in the review petition is not correct which really necessitates our interference."

In the case of *Kuldip Gandotra Vrs. Union of India and others* : (2007) 136 DLT 44 (D.B.) the Hon'ble apex Court in deciding a petition under Order 47 rule 1 of C.P.C. in para-2 & 8 has observed as follows:

"2. Since fraud strikes at the very root of an Order/judgment and effects solemnity, and the Rule of Law, Courts have exercised their inherent power whenever it is brought to their notice that fraud has been practiced. The above principles have been recently reiterated by the Supreme Court in the case of *Hamza Haji v. State of Kerala* and another reported in (2006) 7 SCC 416,

wherein the entire case law on the subject has been extensively examined and considered. In the said case, it has been held that a second review application in law is not maintainable but a Court can exercise its power as a court of record to nullify a decision procured by playing a fraud. A decision procured by fraud must be set at naught and no person who is guilty of having come to Court with unclean hands and practising fraud should be allowed to take advantage and benefit of an order/judgment obtained and tainted by fraud. Power to recall is somewhat different and distinct from power of review. Power of recall is an inherent power, whereas power of review must be specifically conferred on the authorities/Court (Refer *Budhiya Swain v. Gopinath Deb* reported in (1994) 4 SCC 396 for the distinction between the two and when power to recall can be exercised).

8. We are conscious of the fact that there is difference between a mere mistake and even negligence which by itself is not fraud but merely evidence of fraud. However, the present case is one in which the petitioner/non-applicant made a false representation deliberately and intentionally concealing facts to mislead the Court. In the present facts, the motive to mislead and the intention to do so is writ large. Fraud is proved when it is shown that false representation was intentionally and recklessly made without caring to know whether it is true or false. In the present matter, vital and relevant material facts were concealed. The Petitioner/non-applicant was fully aware that true facts were not brought to the notice of the Court. Thus actual fraud has been established and it is not a case of mere constructive fraud."

In another case in the case of *Meghmala and others Vrs. G. Narasimha Reddy and others* : (2010) 8 SCC 383 dealing with a case involving fraud and an act of conspiracy to take out the right of others and orders obtained on misrepresentation or playing fraud upon competent authority. Such order cannot be sustained in the eye of law. The Hon'ble apex Court in para-28 to 32, para-33, 34, 35 & 36 has held as follows:

"28. -It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors.* AIR 1994 SC 853). In *Lazarus Estate Ltd. Vs. Besalay* 1956 All. E.R. 349), the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything.

29. In *A.P. State Financial Corpn. v. GAR Re-Rolling Mills* [(1994) 2 SCC 647 : AIR 1994 SC 2151] and *State of Maharashtra v. Prabhu* [(1994) 2 SCC 481 : 1994 SCC (L&S) 676 : (1994) 27 ATC 116] this Court observed that a writ court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is always known to defend the law from crafty evasions and

new subtleties invented to evade law."

30. In *Shrisht Dhawan v. Shaw Bros.* [(1992) 1 SCC 534 : AIR 1992 SC 1555] it has been held as under: (SCC p. 553, para 20)

"20. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

31. In *United India Insurance Co. Ltd. v. Rajendra Singh* [(2000) 3 SCC 581 : 2000 SCC (Cri) 726 : AIR 2000 SC 1165] this Court observed that "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.

32. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See *Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi* [(1990) 3 SCC 655 : 1990 SCC (L&S) 520 : (1990) 14 ATC 766] , *Union of India v. M. Bhaskaran* [1995 Supp (4) SCC 100 : 1996 SCC (L&S) 162 : (1996) 32 ATC 94] , *Kendriya Vidyalaya Sangathan v. Girdharilal Yadav* [(2004) 6 SCC 325 : 2005 SCC (L&S) 785] , *State of Maharashtra v. Ravi Prakash Babulalsing Parmar* [(2007) 1 SCC 80 : (2007) 1 SCC (L&S) 5] , *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* [(2007) 8 SCC 110 : AIR 2007 SC 2798] and *Mohd. Ibrahim v. State of Bihar* [(2009) 8 SCC 751 : (2009) 3 SCC (Cri) 929] .)

33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide *Vimla (Dr.) v. Delhi Admn.* [AIR 1963 SC 1572 : (1963) 2 Cri LJ 434] , *Indian Bank v. Satyam Fibres (India) (P) Ltd.* [(1996) 5 SCC 550] , *State of A.P. v. T. Suryachandra Rao* [(2005) 6 SCC 149 : AIR 2005 SC 3110] , *K.D. Sharma v. SAIL* [(2008) 12 SCC 481] and *Central Bank of India v. Madhulika Guruprasad Dahir* [(2008) 13 SCC 170 : (2009) 1 SCC (L&S) 272] .]

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide *S.P. Chengalvaraya Naidu* [(1994) 1 SCC 1 : AIR 1994 SC 853] , *Gowrishankar v. Joshi Amba Shankar Family Trust*

[(1996) 3 SCC 310 : AIR 1996 SC 2202] , Ram Chandra Singh v. Savitri Devi [(2003) 8 SCC 319] , Roshan Deen v. Preeti Lal [(2002) 1 SCC 100 : 2002 SCC (L&S) 97 : AIR 2002 SC 33] , Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education [(2003) 8 SCC 311 : AIR 2003 SC 4268] and Ashok Leyland Ltd. v. State of T.N. [(2004) 3 SCC 1 : AIR 2004 SC 2836])

35. In *Kinch v. Walcott* [1929 AC 482 : 1929 All ER Rep 720 (PC)] it has been held that:

"... mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury".

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

36. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of *res judicata* are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est."

19. For the findings of this Court supporting the case of the Review Petitioner and the catena of decisions taken note hereinabove, this Court has no hesitation in entertaining the Review Petition and allowing the same.

20. As a result, this Court interfering with the judgment dated 27.06.2012 and the decree involved in Miscellaneous Appeal No.994 of 2001 sets aside the same and for the detailed discussions made hereinabove, dismissing the Miscellaneous Appeal No.994 of 2001 thereby confirming the judgment involving T.A. No.4/17 of 2001/1992, directs the Parties to appear before the Trial Court in the O.S. No.203 of 1988-I on 19.04.2021. Keeping in view the direction in T.A. No.4/17 of 2001/1992 the Review Petitioner is directed to file the additional written statement and additional documents on the date of appearance itself with service of a copy on the other side the Plaintiffs. Considering that there is sufficient delay in the meantime, the Trial Court is also directed to conclude the suit vide O.S. No.203 of 1988-I as expeditiously as possible, but not later than six months from the date of this judgment, but however, with opportunity of further evidence to both sides.

21. The RVWPET Petition succeeds. However, there is no order as to the cost.