IN THE HIGH COURT OF ORISSA AT CUTTACK
WP(C) No.32975 of 2022

(An application under Article 226 and 227 of the Constitution of India)

Subas Biswas	....	***Petitioner***

-versus-

Election Officer-cum-BDO, Mahakalapada, Kendrapara and Another	....	***Opposite Parties***

Advocate(s) appeared in this case:-

For Petitioner	:	Mr. Dayananda Mohapatra, Advocate
For Opp. Parties	:	Mr. S.P. Panda, AGA for O.P.1 Mr. S.K. Mishra, senior counsel for O.P.2

CORAM: JUSTICE B.P. ROUTRAY

JUDGMENT
25th January, 2024

B.P. Routray, J.

1. Heard Mr. D. Mohapatra, learned counsel for the Petitioner, Mr. S.P. Panda, learned AGA for Opposite Party No.1 and Mr. S.K. Mishra, learned senior counsel for Opposite Party No.2.

2. Present writ petition is directed against the impugned order dated 17th November, 2022 passed in Election Misc. Case No.3 of 2022 by

the learned Civil Judge, Kendrapara, wherein the prayer for amendment of the election petition has been allowed. The same is challenged by the returned candidate.

3. Mr. Mohapatra, learned counsel for the present Petitioner (elected candidate) submits that the order allowing amendment of the election petition is suffering from illegalities since new facts, which could have been brought in the original plaint itself, are permitted to be brought on record. He further submits that the election petitioner was not diligent enough in making his pleadings at the time of filing of the case and for lack of due diligence on the part of the election petitioner in drafting the plaint, the defects cannot be cured by way of amendment at a subsequent stage, more particularly in an election petition.

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4. Mr. Mishra, learned senior counsel for present Opposite Party (the election petitioner) submits in his reply that, the proposed amendment sought for and allowed by the learned Civil Judge does not bring any new fact on record and the same is for correction of some inadvertent typographical errors. He further submits that the proposed amendment does not change the nature and character of the case and

also does not bring any new fact on record except elaborating the submissions.

5. It needs to be mentioned at the outset that the amendment sought for is after filing of W.S. and before commencement of trial. It was prayed before framing of issues.

The election petition has been filed praying to declare the election of the elected candidate as invalid and void on the ground of having more than two children. As per plaint averments, the names of three children, allegedly begotten by the elected candidate, have been furnished along with their dates of birth. However, there was mistake in the names of the children. By way of amendment their names were corrected and certain documents were brought on record regarding their school admission papers etc.

6. Upon perusal of copy of the plaint filed under Annexure-1 and the amendment petition under Annexure-2, this court agrees with the finding of the learned trial court that the proposed amendment does not change the nature and character of the election petition.

7. So far as the submission regarding bringing new facts on record by way of amendment is concerned, Mr. Mohapatra relies on a decision of this court in the case of ***Ashok Kumar Gedi v. Jyotrimayee Behera and Other, 2022 (II) OLR 863***, to contend that the prayer for amendment cannot be allowed to bring a new fact or new grounds of challenge. In the said case amendments were sought for to cure some mistakes committed in the pleadings and in the opinion of the court such mistakes were inherent mistakes committed on the part of the Petitioner. This court by holding that there was casual attempt made by the trial court in allowing the amendment, has held as follows:-

> "6. Perusal of the reasoning assigned in the impugned order, for the support of law of land to the case of the petitioner and for clear restriction involving limitation bringing such disputes, this Court records that there is casual attempt by the trial court in considering such amendment application particularly involving election dispute. For there is mechanical disposal of the amendment application and allowing such application in illegal exercise of power, almost involving an attempt to extend the filing period of election dispute even there having no such power, this Court interfering in the order at Annexure-5 sets aside the same."

Further, in ***Harish Chandra Bajpai v. Triloki Singh, AIR 1957 SC 454***, it is observed by the Hon'ble Supreme Court that the power to

amend cannot be exercised so as to permit new grounds of charges to be raised or to alter the character of the suit.

8. In the instant case, upon perusal of record, it is observed that the proposed amendments are not to the effect of bringing new facts but the same are elaborating the pleadings already taken in the plaint (election petition). So, the amendments sought for do neither bring any new fact nor do it affect the nature and character of the case, but only elaborates the pleadings. It is no more *res integra* that the prayer to amend cannot be refused unless it changes the nature and character of the suit, subject to filing of the same at appropriate stage (see *Aniglase Yohannan vs. Ramlatha and Others, (2005) 7 SCC 534, Ajendraprasadji N. Pandey and Another vs. Swami Keshavprakeshdasji N. and Others, (2006) 12 SCC 1, Chander Kanta Bansal vs. Rajinder Singh Anand, (2008) 5 SCC 117, Rajkumar Guraward (dead) through LRS. vs. S.K. Sarwagi and Company Private Limited and Another, (2008) 14 SCC 364, Vidyabai and Others vs. Padmalatha and Another, (2009) 2 SCC 409, Man Kaur (dead) By LRS vs. Hartar Singh Sangha, (2010) 10 SCC 512, Dibakar Patra vs. Jatadhari Mishra, 2005(II) OLR 628*)

9. Mr. Mohapatra further contends that there was lack of due diligence on the part of the election petitioner in bringing such facts in the election petition and therefore, the proposed amendment should be rejected and in support of his submission he relies on a decision in ***J. Samuel and Others v. Gattu Mahesh and Others, (2012) 2 SCC 300***, wherein the Hon'ble Supreme Court have held as follows:-

> "xxxx .. .. xxxx .. ..
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> 19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.
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> 20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.
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> 21. In the given facts, there is a clear lack of `due diligence' and the mistake committed certainly does not come within the preview of a typographical error. The term "typographical error" is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical

> failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.
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> 22. The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip. xx .. .. xx .. ..”

10. The aforesaid case as relied on by Mr. Mohapatra was a suit for the specific performance where the mandatory requirement of offering and acceptance of the contract was not pleaded. But in the case at hand considering the nature that it is an election dispute and no new fact has been sought to be brought on record by way of amendment, in the opinion of this court, the afore-cited case would not apply in the present facts of the case. It is further observed that it would not be correct to opine that there was lack of due diligence on the part of the

election petitioner to bring the details of fact in the plaint since necessary pleadings regarding disqualification of the elected candidate was already there with required averments.

11. It is true that the procedure for amendment of pleadings as per the civil procedure code squarely applies in respect of election case under the Gram Panchayat Act in terms of its provision contained in Section 35(1) of the said Act. In ***Kalandi Mallik v. Sricharan Sethy and two others, 2007 (Supp.-II) OLR 627*** this court while dealing with a case of almost similar nature, where the pleadings were to the effect that the elected member was having more than two children in order to be disqualified, it has been held as follows:-

> "xx .. .. xx .. .. xx .. ..
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> Keeping in view the above settled principle and looking to the facts involved in this case, it is seen that learned Civil Judge has opined that the fact of disqualification of the petitioner on the ground available under Section 25(1)(v) is already on record. The election petitioner (O.P. No.1 in this writ petition) could know about the fifth child only after institution of the election petition and therefore insertion of such a plea is not barred by limitation, inasmuch as, such plea is available on record in paragraphs-6 and 7. The approach adopted by learned Civil Judge does not appear to be illegal or incorrect. Therefore, there is nothing to interfere with the impugned order.

Learned counsel for the petitioner states that the ground of limitation, which he has raised is sufficient enough to reject the application for amendment. As noted earlier, the ground of limitation is not available to him because the disqualification is specifically pleaded in paragraphs-6 and only the facts and figures have been corrected as per the amendment. Be that as it may, if such a ground is raised in the counter/written statement and if such an issue is raised then at the time of hearing that may be considered by learned Civil Judge in accordance with law basing on the facts and evidence available to him."

12. Keeping in view the broad aspect involved in the instant case that it was already there in the pleading about three children along with their names and dates of birth in the pleading, this court fully agrees with the finding of the learned trial court that the proposed amendment will not change the nature and character of the present election case and the facts brought in amendment are essential for just decision of the case. In such view of the matter no merit is seen in the writ petition to interfere with the impugned order.

13. Accordingly the writ petition is dismissed.

(B.P. Routray)
Judge

M.K. Panda/PA

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