

Orissa Power Transmission Corp.Ltd

v.

Asian School Of Business Mgmt.Trust &Ors

(Supreme Court Of India)

HON'BLE MR. JUSTICE G.S. SINGHVI HON'BLE MR. JUSTICE V. GOPALA GOWDA

Civil Appeal No. 6257 Of 2013 (Arising From Slp(C) No. 8168 Of 2013) | 05-08-2013

G.S. Singhvi, J.

1. Leave granted.

2. In exercise of the power vested in it under Section 29 of the Electricity (Supply) Act, 1948 (for short, 'the Act'), Orissa State Electricity Board (for short, 'the Board') (predecessor of appellant No.1) framed about 50 transmission schemes, which were notified on 30.05.1991 to enable the licensees and other interested persons to make representations. The notification was published in official gazette dated 20.7.1991. For the sake of reference, the relevant portions of the notification are extracted below:

“The Orissa Gazette

EXTRAORDINARY PUBLISHED BY AUTHORITY No.857 CUTTACK, SATURDAY
JULY 20, 1991 / ASADHA 29, 1913

ORISSASTATEELECTRICITY BOARD

BHUBANESWAR

NOTIFICATION

The 30th May 1991

No.4459- In accordance with Section-29 of Electricity (Supply) Act, 1948, the following transmission schemes which the Orissa State Electricity Board intends to undertake for execution, are published for general information. It is also notified in the interest of general public that any person interested in making representation regarding the execution of the above schemes, may submit such representation in writing so as to reach the Secretary, Orissa State Electricity Board, Bhubaneswar-751007 within 2 (two) months from the date of publication. Full details of the schemes and the plan may be seen in the Office of the Chief

Engineer (Planning, Monitoring and Coordination), Orissa State Electricity Board, Bhubaneswar on any working day during office hours.

A) 220 KV LINES

Sl. No.Name of the Scheme(Rs.In lakhs)

(1)(2)(3)

2220 KV DC line from Meramundali to Bhubaneswar (Chandaka) 150 Kms @14.47 lakhs/Km.2170.50

(emphasis supplied)

3. Some of the aforesaid schemes were modified vide notification dated 30.01.1996, which was also published in Official Gazette dated 15.2.1996.

That notification reads as under:

“The Orissa Gazette

EXTRAORDINARY PUBLISHED BY AUTHORITY

No.177 CUTTACK, THURSDAY FEBRUARY 15, 1996 / MEGHA 26, 1917

ORISSASTATEELECTRICITY BOARD

BHUBANESWAR

NOTIFICATION

The 30th January, 1996

No. 589 - PL.II-PFC-18/95 - In partial modification of Schemes against Sl.No. 2 of Gazette Notification No. 857, dated the 20th July, 1991 and in accordance with Section 29 of Electricity (Supply) Act, 1948, the following transmission schemes which the Orissa State Electricity Board intends to undertake for execution, are published for general information. It is also notified in the interest of general public that any person interested in making representation regarding the execution of the above schemes, may submit such representation in writing so as to reach the Secretary, Orissa State Electricity Board, Bhubaneswar -751007 within two months from the date of publication. Full details of the scheme and the plan may be seen in the office of the Chief Engineer (Transmission Project), O.S.E.B., Bidyut Bhawan, Sahidnagar, Bhubaneswar-751007 on any working day during office hours.

Name of the Scheme :- Strengthening of transmission network in and around Chandaka Command area (Bhubaneswar) and Bidanasi (Cuttack) Command area as per the detail scope furnished below:

Necessity of the Scheme :-(i) To transmit power from the main pooling centre at Meramundali to Chandaka/Mendhasai Command area.

Establishment of new 220 KV network at Bidanasi (Cuttack). Improve the reliability of power supply in Chandaka (Bhubaneswar) Command area.

Improvement of voltage profile in Bhubaneswar, Cuttack, Puri, Khurda, Jagatsinghpur Transmission System Scope of Work

Sl.No.Scope of SchemeApproximate estimated cost in lakhs of rupees

1 3

1Meramundali-Chandaka/Mendhasal (bhubaneswar) 400 KV DC line. (110 Kms.) with 220 KV bay extension at Chandaka and IVIeramundali.5,918.00

2Chandaka(Bhubaneswar)-Bidanasi (Cuttack) 220 KV DC line with bay Extension(25 Kms.).990.00

3Construction of 2 x 100 MVA, 220/132 KV substation at Bidanasif Cuttack).1,368.00

4Bidanasi (Cuttack)-Nuapada (Cuttack) 132 KVDC link line with bay Extension (13.6 Kms.)880.00

Total 9,156.00 lakhs

(emphasis supplied)

4. None of the licensees/other interested persons are shown to have made representation against any of the schemes including the one mentioned at item No.2 of notification dated 30.5.1991 and item No.1 of notification dated 30.1.1996 and the Board executed the same without any objection.

5. After 14 years and 6 months of publication of the schemes, Human Resources Development and Management Trust of India (for short, 'the Trust') (predecessor of respondent No.1), who had purchased some parcels of land in Mauza Andharua, Tahsil Bhubaneswar, District Khurda vide sale deed dated 30.10.2005 raised objection against execution of the scheme mentioned at item No.2 of notification dated 30.5.1991 on the ground that two of the transmission towers proposed to be erected would cross the building constructed by it. The Trust also requested appellant No.1 to shift the transmission towers and line to an alternative site.

6. Appellant No.1 and its officers did not accept the objection/representation of the Trust, who then filed Civil Suit No. 72 of 2006 in the Court of Civil Judge (Junior Division), Bhubaneswar and prayed for grant of the following relief:

“The plaintiff therefore humbly prays that this Hon'ble Court may graciously be pleased to pass a decree declaring that the defendant has no right to enter into the suit schedule property and also pass decree of permanent injunction permanently injunction the defendants from erecting/ constructing any tower on the suit schedule property and decree the suit with cost to the plaintiff.”

7. The Trust also filed an application for temporary injunction. The trial Court passed ad-interim order dated 9.3.2006 and directed that status quo regarding construction be maintained. That order was made absolute on 26.4.2006 and the appellants were restrained from entering the suit land and constructing any tower. That order was set aside by Ad-hoc Additional District Judge, Bhubaneswar in FAO (Misc. Appeal) No.40/33 of 2006 decided on

4.10.2008. The Additional District Judge noted that all the towers had already been erected on both sides of the disputed land and, therefore, it is not possible for the appellant to erect any tower leaving the suit land and thereby compromise the public interest. In the opinion of the learned Additional District Judge, the Trust could be compensated by the competent authority.

8. The Trust challenged the appellate order in Writ Petition (C) No.14806 of 2008, the prayer clause of which reads as under:

“The petitioner therefore, humbly prays that this Hon'ble Court may graciously be pleased to admit the writ application and call for the records from the court below and upon hearing the parties be pleased to issue a writ in nature of Certiorari or any other appropriate writ(s), direction(s) quashing the impugned order dtd. 04.10.2008 passed by the learned Adhoc Additional District Judge, F.T.C. No. 3, Bhubaneswar in F.A.O. (Misc. appeal) No. 40/33 of 2006 under Annexure - 9 and restrain the opp. parties from entering the suit schedule property of the petitioner and from erecting/constructing any tower on suit schedule property, pending adjudication of the writ petition.

And may pass such other order(s) as deemed just and proper.”

9. The learned Single Judge of the High Court dismissed the writ petition vide order dated 21.11.2008, the relevant portions of which are extracted below:

“17. As per the affidavit filed today, the entire work on either side on the suit land was completed and, therefore, the argument of the learned counsel for the respondent was that the petitioner is not entitled to any order of injunction as every work sought to be enjoined was already completed.

18. Further when once no objection was raised within the statutory period, the subsequent belated correspondence by any officer of Respondent may not act as an estoppel against them because such officer is not entitled to forgo the statutory period of prescribed for receiving objections or to extend it or even to waive it. Moreover, after having purchased the land in December, 2005, the building was constructed below the power line by petitioner only in July 2006, after knowing fully well that negotiation with officers of respondent failed.

19. In these circumstances, even assuming for argument sake, that there is some illegality in the Scheme, then what is provided in Section 12 of the Indian Electricity Act is only compensation and not dismantling of the entire line of numerous towers erected at the heavy cost of public money. Moreover, the scheme involves public interest. When private interest is

at stake and especially when compensation is awardable, no injunction could be granted especially when work sought to be enjoined has already been completed. Viewed in this angle, I am not able to entertain the writ petition and I find no error in the effect of the order of the lower appellate court.”

10. After about one year, respondent No.1 filed Writ Petition (C) No. 20659 of 2009 and prayed for grant of the following substantive reliefs:

“(I) Directing the Opposite Parties No.1 to 3 not to make any construction of the transmission tower/line-within the premises of the petitioner;

(II) Directing the Opposite Parties No.1to 3 to take a final decision regarding re-routing/re-alignment of the 220/132 KV Mendhasal – Bidanasi over head line within a stipulate time after completion of the profile survey by the petitioner.”

11. The learned Single Judge noticed the prayer made in the civil suit, the orders passed by the trial Court, the lower appellate Court and the High Court in Writ Petition No.14806/2008, referred to the judgments of this Court in *K.S. Rashid and Son v. Income Tax Investigation Commission and others*, AIR 1954 SC 207, *Bombay Metropolitan Region Development Authority, Bombay v. Gokak Patel Volkart Limited and others* (1995) 1 SCC 642, *Jai Singh v. Union of India and others*, AIR 1977 SC 898 and held that the writ petition was not maintainable because the civil suit was pending before the competent Court. The learned Single Judge then considered whether the second writ petition was barred by *res judicata* and answered the same in the affirmative by observing that the cause of action for filing the two petitions was the same and identical reliefs had been sought by respondent No.1. The learned Single Judge relied upon the judgments in *Naresh Shridhar Mirajkar v. State of Maharashtra and another*, AIR 1967 SC 1, *State of Karnataka and another v. All India Manufacturers Organization and others* (2006) 4 SCC 683, *Direct Recruit Class-II Engineering Officers' Association v. State of Maharashtra and others* (1990) 2 SCC 715 and *Forward Construction Co. and others v. Prabhat Mandal (Regd.), Andheri and others* AIR 1986 SC 391 and held that the prayer made in the second writ petition does not merit consideration. The learned Single Judge also adverted to the issue of public interest and observed:

“The paramount public interest in this case cannot be lost sight of. On one hand, the larger interest of the State involving lakhs of electricity consumers spreading over several districts of Orissa and on the other hand the purported inconvenience of a few hundred of students. Time and again, the apex Court has deprecated the practice of the educational institutions acting in violation of law and committing irregular and illegal acts and thereafter, taking plea of career of the students. I am shocked that in the case at hand even the threat of law and order situation by the students has been argued. Plight of the students is apparently due to

improper action of the petitioner. If the career of the students is at stake, the petitioner is solely and wholly responsible for it.”

12. Having failed to convince the learned Single Judge to entertain its prayer, respondent No.1 filed Writ Appeal No. 393 of 2010. During the pendency of the appeal, respondent No.1 filed an application in the name of the Trust for withdrawal of the suit. The trial Court allowed the application vide order dated 16.3.2011, which reads as under:

“The case record is put up today being advanced by the Plaintiff. Advocate for the Plaintiff files a petition supported by an affidavit praying withdraw the suit on the ground stated therein. Copy served. No objection the petition is raised by the defendants. Heard the learned counsels for the parties on the petition for withdrawal of the suit. Since the plaintiff does not want to proceed with the suit, the petition for withdrawal is allowed and the suit is dismissed as withdrawn.”

13. The Division Bench of the High Court reversed the findings recorded by the learned Single Judge on the issue of maintainability of the writ petition by observing that the reliefs claimed in the two writ petitions were different. The Division Bench then referred to Sections 28 and 29 of the Act and held that notifications dated 30.05.1991 and 30.01.1996 were ultra vires the provisions of those sections because the procedure prescribed in those sections had not been followed and concurrence of the competent authority had not been obtained. The Division Bench also referred to interlocutory orders passed by it for production of full details of the scheme and held that the documents produced on behalf of the appellants herein were not sufficient to prove that the scheme had been framed, published and modified in accordance with the provisions of the Act and that in the absence of approval of the Central Government, the scheme cannot be implemented.

14. Shri P.P. Rao, learned senior counsel for the appellants argued that the impugned judgment is liable to be set aside because the view expressed by the Division Bench of the High Court on the validity of the scheme is ex-facie erroneous and is untenable. Learned senior counsel pointed out that notifications dated 30.5.1991 and 30.1.1996 were issued in accordance with Section 29 of the Act and both the notifications contained a clear stipulation that full details of the scheme and the plan can be seen in the office of the Chief Engineer (Planning, Monitoring and Coordination) and argued that a person who had purchased land after more than 14 years of the issue of first notification and raised construction after the scheme had been substantially executed could not have challenged the same on the ground of lack of particulars/details or any error in the notifications because the landowner(s) had neither made any representation nor filed objections. Shri Rao emphasized that the approval of the Central Government was not necessary because cost of the scheme was less than rupees hundred crores and as per notification dated 28.12.1995 issued by the Government of India, concurrence of the Central Electricity Authority was required only if the cost of the scheme was more than hundred crores. Learned senior counsel then argued that the second

writ petition filed by respondent No.1 should have been dismissed by the High Court by invoking the doctrine of res judicata because similar prayer had been rejected in the earlier round of litigation. Learned senior counsel referred to affidavits filed by Shri Amar Nath Mohanty, Assistant General Manager, EHT(Construction) before the High Court to show that none of the three alternative proposals were feasible. Shri Rao also invited the Court's attention to additional affidavit dated 26.4.2013 of Shri Amar Nath Mohanty to show that height of the two towers LOC 36 and LOC 37 has been so raised that the line will be 4.58 meters (14.56 feet) above the existing line and there will be a clearance of 9 meters (28.62 feet) between the highest point of existing three storey building in the campus of respondent No.1 and the proposed line as against the requirement of 5.4 meters (17.17 feet) in terms of Rule 80 of the Indian Electricity Rules, 1956. From the affidavit of Shri Amar Nath Mohanty, Shri Rao also pointed out that tower Nos. LOC 1 to 35 and LOC 40 to 117 have already been erected over a length of 31.124 kilometers by spending Rs.14.31 crores. In the end, the learned senior counsel submitted that even if there was any mistake in the description of the scheme, the High Court should not have interfered with the same because appellant No.1 had already erected towers by spending huge amount and it would not be in public interest to change the route of the line by shifting/dismantling the existing towers.

15. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for respondent No.1 supported the impugned judgment and argued that the Division Bench of the High Court did not commit any error by directing appellant No.1 to re-align the transmission line by shifting the transmission towers to some other area because construction thereof will be highly detrimental to the people including the students living in the Campus. Dr. Singhvi further argued that the scheme framed by the Board cannot be executed because the same was not framed after following the procedure prescribed under Sections 28 and 29 of the Act. Learned senior counsel pointed out that the scheme mentioned at item No.2 of notification dated 30.5.1991 and at item No.1 of notification dated 30.1.1996 does not relate to the area in which the land of respondent No.1 is situated and, therefore, the appellants cannot erect transmission towers over the existing buildings. Learned senior counsel then argued that the Division Bench of the High Court rightly refused to apply the doctrine of res judicata because the reliefs claimed in the two proceedings were entirely different. In support of this argument, Dr. Singhvi relied upon the judgment of this Court in *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar* (2004) 7 SCC 166.

16. We have considered the respective arguments. Sections 28 and 29 of the Act, which have bearing on the decision of this appeal read as under:

“28. Preparation and sanctioning of scheme.—(1) For the efficient performance of its duties under this Act, the Board or a Generating Company, as the case may be, may prepare one or more schemes, relating to the establishment or acquisition of generating stations, tie-lines, sub-stations or transmission lines, as are referred to in clause (e) of section 18 or clause (c) of sub-section (1) of section 18A, as the case may be.

(2) The Board or, as the case may be, the Generating Company which has prepared a scheme may, sanction such scheme either generally or in respect of any part of the area specified in the scheme and where a scheme has been sanctioned in respect of any part of the area, such scheme may subsequently be sanctioned in respect of any other part of that area:

Provided that where the scheme is of the nature referred to in subsection (1) of section 29, the scheme shall not be sanctioned (generally or for part of an area) by the Board or the Generating Company except with the previous concurrence of the Authority.

(2A) The Board or, as the case may be, the Generating Company shall, as soon as may be after it has sanctioned any scheme which is not of the nature referred to in section 29, forward the scheme to the Authority and, if required by the Authority so to do, supply to the Authority any information incidental or supplementary to the scheme within such period as may be specified by the Authority.

(3) Every scheme sanctioned under this section shall be published in the Official Gazette and in such local newspapers as the Board or, as the case may be, the Generating Company may consider necessary.

29. Submission of schemes for concurrence of Authority, etc.—

(1) Every scheme estimated to involve a capital expenditure exceeding such sum, as may be fixed by the Central Government, from time to time, by notification in the Official Gazette, shall, as soon as may be after it is prepared, be submitted to the Authority for its concurrence.

(2) Before finalisation of any scheme of the nature referred to in sub-section (1) and the submission thereof to the Authority for concurrence, the Board or, as the case may be, the Generating Company shall cause such scheme, which among other things shall contain the estimates of the capital expenditure involved, salient features thereof and the benefits that may accrue therefrom, to be published in the Official Gazette of the State concerned and in such local newspapers as the Board or the Generating Company may consider necessary along with a notice of the date, not being less than two months after the date of such publication, before which licensees and other persons interested may make representations on such scheme.

(3) The Board or, as the case may be, the Generating Company may, after considering the representations, if any, that may have been received by it and after making such inquiries as it thinks fit, modify the scheme and the scheme so finally prepared (with or without modifications) shall be submitted by it to the Authority along with the representations.

(4) A copy of the scheme finally prepared by the Board or, as the case may be, the Generating Company under sub-section (3) shall be forwarded to the State Government or State Governments concerned:

Provided that where the scheme has been prepared by a Generating Company in relation to which the Central Government is the competent government or one of the competent governments, a copy of the scheme finally prepared shall be forwarded also to the Central Government.

(5) The Authority may give such directions as to the form and contents of a scheme and the procedure to be followed in, and any other matter relating to, the preparation, submission and approval of such scheme, as it may think fit.

(6) In respect of any scheme submitted to the Authority for its concurrence under sub-section (1), the Board or, as the case may be, the Generating Company shall, if required by the Authority so to do, supply any information incidental or supplementary to the scheme within such period, being not less than one month, as may be specified by the Authority.”

17. An analysis of the above reproduced provisions makes it clear that the Board or the Generating Company can prepare one or more schemes for efficient performance of its duties under the Act. Such schemes may relate to the establishment or acquisition of the generating stations, tie-lines, sub-stations or transmission lines. By notification dated 28.12.1995 issued by the Government of India in the context of Section 29(1) of the Act, concurrence of the Central Electricity Authority was made mandatory for the schemes involving capital expenditure of hundred crores. Therefore, no scheme involving capital expenditure of rupees hundred crores or more can be sanctioned by the Board or Generating Company except with the previous concurrence of the Central Electricity Authority. In terms of Section 28(3), the scheme is required to be published in the Official Gazette and in the local newspapers. Section 29(2) requires that every scheme shall contain the estimates of the capital expenditure involved, salient features thereof and the benefits likely to accrue therefrom. The scheme is required to be published giving the licensees and other interested persons an opportunity to make representation. Section 29(3) postulated consideration of representation by the Board or the Generating Company, as the case may be, before finalizing the scheme. In terms of Section 29(5), the competent authority can give appropriate direction in the matter of preparation of scheme or call upon the Board or the Generating Company to supply information incidental or supplementary to the scheme.

18. A reading of notification dated 30.5.1991 makes it clear that the Board had notified almost 50 schemes and invited representations from interested persons. Some of the schemes were subsequently modified by notification dated 30.1.1996. In both the notifications, it was

specifically mentioned that full details of the schemes and the plans can be seen in the office of the Chief Engineer (Planning, Monitoring and Coordination) / Chief Engineer (Transmission Project). The landowner(s) from whom the Trust purchased the land vide sale deed dated 30.10.2005 neither made any representation nor filed objection against the scheme. Indeed, it is not even the pleaded case of respondent No.1 that anyone else had made representation or filed objection against any of the schemes. Therefore, neither the Trust nor respondent No.1, who constructed buildings knowing fully well that the Board had already framed scheme for the area in which its land was situated could object to erection of the remaining two towers or seek shifting of the scheme and the officers of appellant No.1 did not commit any illegality by refusing to entertain the request of respondent No.1 for shifting of the transmission towers by diverting 220 KV line from the existing alignment.

19. Unfortunately, the Division Bench of the High Court completely overlooked the fact that respondent No.1 had stepped into the shoes of a person who had no grievance against the scheme framed by the Board or execution thereof by appellant No.1 and proceeded to decide the matter as if execution of the scheme has commenced after construction of buildings by respondent No.1. This is the first fatal flaw in the approach adopted by the Division Bench of the High Court.

20. The exercise undertaken by the High Court for ascertaining the availability of alternative route through which the transmission line could be routed was totally unwarranted and half waked consideration of the affidavits filed on behalf of the appellants has resulted in miscarriage of justice. As noted above, the scheme was notified on 30.5.1991 and was modified on 30.1.1996. During this period, respondent No.1 was not in picture. Admittedly, the Trust had purchased the land after more than 14 years and 6 months of initial publication of the scheme. Therefore, neither the Trust nor respondent No.1 had the locus to seek a mandamus for re-alignment of the route and the Division Bench of the High Court committed serious error by ordaining appellant No.1 to shift the transmission towers from their present site completely ignoring the fact that almost 150 towers had already been erected by appellant No.1 by spending more than rupees fourteen crores. In paragraphs 8 to 15 of the additional affidavit filed by him in Writ Appeal No.393/2010, Shri Amar Nath Mohanty spelt out the following reasons for not accepting three alternatives suggested by respondent No.1:

“That in its sketch map produced in the Hon'ble Court on 18.02.2011 during hearing, the ASBM Trust has proposed three alternatives to (a) divert/realign the now operating 220 KV Mendhasal-Chandaka line and (b) divert /realign the ongoing 220 KV Mendhasal-Bidanasi line in question to outside his premises identified in that sketch as:-

1. - Alternative-1

2. - Alternative-2

3. - Common to both Alternatives

1 -Alternative-1 line identified in the sketch as = A, 1B, 1C

This diversion suggests to link the Bidanasi end at Point-A of ongoing 220 KV Mendhasal-Bidanasi line with the existing operating 220 KV Mendhasal-Chandaka line towards Chandaka end at Point-1C.

2 -Alternative-2 line identified in the sketch as = A 2B, 2C, 2D

This diversion suggests to link the Bidanasi end at Point-A of the on- going 220 KV Mendhasat-Bidanasi line with the existing operating 220 KV Mendhasal-Chandaka line at its Mendhasal end at Point-2D.

3- Line Common to both Alternatives identified in the sketch as= 1,2,3

This diversion suggests to link the Mendhasal end at one of existing tower location, of the on-going 220 KV Mendhasak Bidanasi line through Point- 1 & 2 with the existing operating 220 KV Mendhasal –Chandaka line at its Chandaka end at Point-3.

9. That all three proposals i.e Alternative 1(A, 1B,1C), Alternative 2 (A,2B,2C,2D) and Common to both Alternative (1,2 & 3) proposed by the ASBM Trust are not feasible to be carried out.

(a) As per the proposal Alternative which is Common to both Alternatives along with Alternative 2, if executed, will divert the existing 220 KV Mendhasal-Chandaka line as well as the 220 KV Mendhasal-Bidanasi line in question from the premises of ASBM. Any one such alternative can not divert either line. If this proposal i.e Common Alternative with Alternative 2 is worked out, it will involve erection of 7 Nos. of new towers along with the transmission line in the proposed route and eight Nos. of towers already constructed have to be dismantled/abandoned. The cost of such diversion will involve around Rs. 1 Crore excluding the amount of compensation payable to the land owners over whose land the line and towers are to be erected.

(b) As per the proposal the Alternative Common to both the proposals can not be treated as a full-fledged Alternative unless this is worked out along with the proposed Alternative 1. This proposal will involve erection of six (6) new towers along with the transmission line and 5 Nos. of constructed towers have to be abandoned/dismantled. The approximate cost of this diversion will be little less than Rs.1 crore besides compensation payable to owners.

10. That the proposal as suggested by the Appellant if executed, will pass over many private lands and buildings under construction and also over jungle lands and some Anabadi lands of the State Government as would be evident from the land particulars filed herewith as Annexure J/1 series which has been obtained by the Opp. Parties from the office of the Revenue Inspector, Chandaka, Dist- Khurda. On further verification it is found that all the towers, transmission line including corridor will pass through series of private plots for which it is not possible to re-route the line as suggested.

11. That as against the towers to be constructed on the land of the ASBM, the diversion as proposed if worked out, compensation payable will be much more since there will be large number of owners as against the single owner ASBM Trust.

12. That besides payment of compensation the proposed diversion will also create series of Right of Way (ROW) problems in view of the constructions and multistoried buildings coming up over the route which will not be possible in law without publishing fresh scheme in accordance with law. This is highly impractical and hence not feasible.

13. That besides the above if the diversion of the line as proposed in any Alternatives are accepted then necessary statutory notification has to be published afresh in the state gazette as well as in the local News Papers inviting objections from the general public and in that event any person may approach the Court of law and seek redressal of grievance including any order of injunction. This will further inordinately delay the already delayed construction of transmission line which is very vital for power supply to Bhubaneswar, Cuttack, Puri, Khurda, Jagatsingpur Command Areas.

14. That to complete the existing line only two (2) towers are to be constructed, one tower within the area of ASBM and another partly in area of ASBM out of which stub setting has been completed in respect of one tower, of which two (2) legs are inside the compound wall of ASBM and the other two (2) legs are outside the compound wall of ASBM. There is no construction on the land on which these two (2) towers are to be built. It is also submitted that the construction of those two (2) towers will not endanger the life and property of the Institution since it has been proposed to maintain the vertical clearance at a much more height than specified in Rule 79 & 80 of Indian Electricity Rule, 1956 which provides a vertical clearance of 5.4 Mtrs. for 220 KV line above the top of the building. Accordingly in

the instant case the vertical clearance will be 10 Mtrs. above the top of the existing structure of ASBM.

15. That the photographs filed herewith as Annexure K/1 series would show that the 220 KV Mendhasal-Chandaka transmission line has passed through the compound of the Appellant ASBM long since which is existing and ASBM has later constructed its building and structures near the line.”

21. The reasons assigned by the concerned officer of appellant No.1 for not accepting the alternatives suggested by respondent No.1 were germane to the inability of appellant No.1 to change the alignment of the route and shift the transmission towers and the Division Bench of the High Court committed serious error by entertaining the prayer made by respondent No.1.

22. A somewhat similar question was considered by this Court in Ramakrishna Poultry (P) Limited v. R. Chellappan (2009) 16 SCC 743. The appellant in that case had purchased land in June, 2004/November, 2004. At about the same time, the Power Grid Corporation of India Ltd. took up the work of construction of 400 KV Perambalur-Pugalur D/C line as part of Neyveli Thermal Station Expansion Project for evacuation of electricity generated therein. This required installation of transmission towers at various locations, some of which were private lands including the land belonging to the appellant. In the first round of litigation, the High Court directed District Magistrate to hear the parties and decide the representation to be made by the appellant. The District Magistrate directed the Corporation to re-align the transmission line in such a way that it did not pass above the poultry sheds constructed by the appellant. This affected the respondent, who filed writ petition before the High Court. The learned Single Judge dismissed the writ petition. The Division Bench held that the District Magistrate did not have any power to direct change of alignment. This Court took cognizance of the fact that the Corporation had agreed to raise the height of the transmission lines and observed:

“38. Keeping aside the technical aspect of the matter as to whether the order passed by the District Collector was one under Section 16 or Section 17 of the Telegraph Act, 1885, in order to arrive at a practical solution to the problem, the Power Grid Corporation accepted the alternate suggestion made on behalf of the appellant Company and raised the height of the lowest point of sag of the transmission lines between the two towers on either side of the poultry sheds of the appellant Company from 46.5 m to 52 m, which in practical terms means a clearance of 30 ft between the lowest point of the sag and the highest point of the poultry shed. Of course, it has been contended by Mr Ganesh that according to the report of the experts, even if the height of the tower was raised to 100 m, the electro-magnetic field created by the transmission of high voltage electricity would still encompass the poultry sheds and adversely affect the reproductive system not only of the chickens but of all living things within that zone.

39. However, what goes against the case of the appellant Company is the fact that the purchases of the land for starting the poultry business and the erection of the poultry sheds were effected at a point of time when the process of identifying the route of the transmission lines was already in progress and survey work was being undertaken. We find it difficult to accept that the appellant Company did not have knowledge of the ongoing project, which is for the benefit of a large number of people of the area as against the interest of a single individual.

40. In view of the objections on behalf of the Power Grid Corporation that the deviation in the transmission lines, as suggested on behalf of the appellant Company, could not be practically achieved, we are left with the next best solution i.e. to increase the clearance between the lowest point of the sag of the transmission cable and the topmost portion of the appellant's poultry sheds. It should not also be forgotten that from the point of the sag on both sides the cable moves upwards and the clearance becomes even greater on both sides of the lowest spot. During the hearing we had asked Mr Tripathi to confirm with the engineers of the Power Grid Corporation to explore the possibility of raising the height of the towers even further to lessen the damage, if any, that may be caused to the egg-laying capacity of the layers in the appellant's poultry farm."

(emphasis supplied)

23. We also agree with Shri P. P. Rao that the learned Single Judge of the High Court had rightly refused to entertain the second writ petition and the Division Bench committed an error by setting aside the order passed by him. A careful reading of the relief clauses of the two writ petitions makes it clear that substantially similar prayer had been made in both the cases. The first petition which could be treated as one filed under Article 227 of the Constitution was dismissed by the High Court by assigning detailed reasons including the one that larger public interest outweighed the individual interest of respondent No.1. However, while deciding the writ appeal filed against the order passed in Writ Petition No.20659/2009, the Division Bench overlooked this vital factor and ordered shifting of the transmission line.

24. In *Ramchandra Dagdu Sonavane v. Vithu Hira Mahar* (2009) 10 SCC 273, this Court discussed the doctrine of res judicata embodied in Section 11 of the Code of Civil Procedure and held:

"It is well known that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also principles not

only of direct res judicata but of constructive res judicata are also applied, if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties.

The principle of res judicata comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of the law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided.”

25. The facts brought on record show that in the suit filed by the Trust, the trial Court had granted an injunction, which was vacated by the lower appellate Court and the petition filed against the order of the lower appellate Court was dismissed by the High Court on the premise that respondent No.1 had purchased the land only in December, 2005 and the building was constructed in July, 2006 knowing fully well that negotiations with the officers of appellant No.1 had failed. The learned Single Judge further observed that it would be against public interest to pass an order which may necessitate dismantling of the entire line of numerous towers erected by spending public money. Even after dismissal of the petition filed under Article 227 of the Constitution and its failure to persuade the Court to sustain the order of injunction passed by the trial Court, respondent No.1 kept the suit pending and, at the same time, filed the second writ petition. This was a clear case of abuse of the process of the Court. It is a different thing that even in the second round, respondent No.1 could not persuade the learned Single Judge to entertain its prayer. The suit was withdrawn only after the writ appeal was entertained by the Division Bench of the High Court. This shows that respondent No.1 had availed parallel remedies and gave up its pursuit before the Civil Court only after the Division Bench of the High Court indicated its willingness to hear the writ appeal on merits.

26. The judgment in *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar* (supra), on which strong reliance has been placed by Dr. Singhvi, is clearly distinguishable. The facts of that case were the appellant had filed suit on 4.4.2002 in the Court of Sub-Judge, Patna challenging the action taken by Bihar State Industrial Credit and Investment Corporation Ltd. under Section 29 of the State Financial Corporations Act, 1951 for sale of its assets. On the very next day a writ petition was filed by the appellant for the same relief. While the Civil Court did not pass an interim order in terms of the prayer made by the appellant, the learned Single of the Patna High Court granted the prayer for stay of the auction proceedings subject to the condition of payment of Rs.10 lakhs. However, when the pendency of suit was brought to the notice of the learned Single Judge, he dismissed the writ petition by holding that the appellant had suppressed the factum of civil suit. The Division Bench of the High Court dismissed the appeal filed against the order of the learned Single Judge. A two Judge Bench of this Court referred to *R. v. General Commissioner for the purposes of the Income Tax Act*

for the District of Kensington (1917) 1 KB 486 and *State of Haryana v. Karnal Distillery Co. Ltd.* (1977) 2 SCC 431 and observed:

“Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable (sic), the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not. The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226 [*A.N. Venkateswaran v. Ramchand Sobhraj Wadhvani* AIR 1961 SC 1506]. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If, however, a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. The rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another court. But this Court has also held in *Chandra Bhan Gosain v. State of Orissa* (1964) 2 SCR 879 that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application under Article 32. But where in the parallel jurisdiction, the order is not a speaking one or the matter has been disposed of on some other ground, this Court has, in a suitable case, entertained the application under Article 32 [*Tilokchand Motichand v. H.B. Munshi* (1969) 1 SCC 110]. Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of, the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226 [*K.S. Rashid and Son v. Income Tax Investigation Commission* AIR 1954 SC 207]. Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.

In this case, admittedly, the appellant has withdrawn the suit two weeks after the suit had been filed. In other words, the appellant elected to pursue its remedies only under Article 226. The pleadings were also complete before the High Court. No doubt, the interim order which was passed by the High Court was obtained when the suit was pending. But by the time the writ petition was heard the suit had already been withdrawn a year earlier. Although the appellant could not, on the High Court’s reasoning, take advantage of the interim order, it was not correct in rejecting the writ petition itself when the suit had admittedly been withdrawn, especially when the matter was ripe for hearing and all the facts necessary for determining the writ petition on merits were before the Court, and when the Court was not of the view that the writ petition was otherwise not maintainable.”

27. The ratio of the above extracted observations is that the Court will not allow a party to pursue two remedies simultaneously. The proposition laid down by this Court does not help the cause of respondent No.1. Instead, the same can be relied upon for holding that the Division Bench of the High Court committed an error by setting aside the order of the learned Single Judge who had non-suited respondent No.1 on the ground that it had not only availed parallel remedies but pursued the same till the writ appeal filed against the order of the learned Single Judge was entertained.

28. The finding recorded by the Division Bench of the High Court that the scheme was not in consonance with Sections 28 and 29 of the Act is also erroneous. In response to the observation made by the High Court on 25.3.2011, Shri Amar Nath Mohanty filed further affidavit dated 29.3.2011, paragraphs 3 to 6 of which are extracted below:

“3. That the nomenclature of the schemes like Chandaka-Bidanasi- Mendhasal are only indicative in nature for internal project planning, while actual construction takes place after survey of the line and alignment and tower spotting are finalized in accordance with the notified scheme. These details are kept in the office. In the instant case, the land schedule etc., are not available but the profile of the said portion is available which is enclosed herewith as Annexure-M/1 .

4. That there are several examples where the name of sub-station is different from its specific site locations. For example the Chandaka Grid Sub-station is in Patia Mouza written in brackets as Chandaka Industrial Estate, the "Bargarh Grid Sub-station" in Bhubaneswar is in Kesura Village and Jharsuguda Grid Sub-station is in Village sarasmala.

5. That the line work has been completed from both Mendhasal and Bidanasi end; except this small portion which is left out; the line alignment is already fixed with two remaining towers coming in the area of ASBM. So further change cannot be made.

6. That the Appellants in course of arguments have also produced a Map before this Hon'ble Court which has also been annexed by the Respondents as Annexure-H/1 to the Affidavit filed by the Respondents on 25.03.2011 and the said Map clearly discloses that two towers are to be erected on the land of ASBM.”

29. In our view, the explanation given for not incorporating full details of the scheme in the notifications should have been accepted by the High Court and there was no justification to direct re-routing of the transmission line on the specious ground of non-compliance of the two provisions.

30. In the result, the appeal is allowed, the impugned judgment is set aside and Writ Petition No.20659/2009 filed by respondent No.1 is dismissed. Respondent No.1 shall pay cost of Rs.10 lakhs to appellant No.1 because implementation of the scheme was frustrated due to unwarranted litigation by the Trust and respondent No.1. The cost shall be paid to appellant No.1 within a period of three months from today.