

ITEM NO.303

COURT NO.5

SECTION XIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s). 34373/2014

(Arising out of impugned final judgment and order dated 29/11/2014
in FA No. 158/2001 passed by the High Court Of Orissa At Cuttack)

ORISSA OLYMPIC ASSOCIATION TH.GEN.SECRETARY Petitioner(s)

VERSUS

STATE OF ORISSA AND ANR

Respondent(s)

Date : 19/08/2015 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE DIPAK MISRA
HON'BLE MR. JUSTICE PRAFULLA C. PANT

For Petitioner(s) Mr. Raghavendra S. Srivatsa, AOR
Mr. Gaurav Khanna, Adv.
Mr. Dayanand Mohaptra, Adv.
Mr. Amit A. Pai, Adv.

For Respondent(s) Mr. Ajay Kumar Singh, Adv.
Mr. M.P. Gupta, Adv.
Mr. R.R. Gupta, Adv.
Mr. Ashok Panigrahi, Adv.

UPON hearing the counsel the Court made the following
O R D E R

In pursuance of our order dated 07.05.2015, the Accountant and Auditor General, Odisha has submitted the report pertaining to "the accounts in respect of Kalyan Mandap and 23 shops standing on the disputed area (0.75 acre)". The findings recorded in the report are to the following effect :

"Report on Audit of "the accounts in respect of Kalyan Mandap and 23 shops standing on the disputed area" in Barabati Stadium, Cuttack

1. Scope of Audit

As per order dated 22 January 2015 of the Hon'ble Supreme Court of India as communicated vide letter No.D-446/14/XIA dated 24 January 2015 of Assistant Registrar of the Surpeme Court of India, Accountant General (General and Social Sector Audit), Odisha was directed (22 January 2015) by the Apex Court to audit the accounts of 23 shops and the Kalyan Mandap erected on 0.705 acre parcel of disputed/encroached land. Accordingly, one Report was filed in the Apex Court. However, vide order dated 7 May 2015, Honorable Court directed to submit a specific and precise Report within eight weeks.

In compliance of above orders of Hon'ble Apex Court, Principal Accountant General (G&SSA), Odisha conducted audit of the accounts of OOA during 30 January 2015 to 28 February 2015 and 8 to 12 June 2015 with respect to income received by it by renting out the property on land under dispute. This consists of 23 shops and one Kalyan Mandap, known by the name of Barabati Palace. The latter was leased out to one private firm (M/s. Incon Associates) till full adjustment of cost of construction (Rs.80.47 lakh)¹ out of 50 per cent of rent payable.

1.2 Introduction

The Government of Odisha in erstwhile Revenue Department sanctioned 25.450 acre² land in favour of OOA, on lease, in three different phases during July 1949 to February 1969. Out of 25.450 acre of land, an area of 24.733 acre³ was recorded in the name of OOA in 1988 settlement indicating that the Record of Rights (RoR) was valid upto 1989. Out of the above, lease period for 20.808 acre has lapsed in September 1989 and has not been renewed so far and the matter is sub-judice⁴ in High Court of Odisha. Out of two other parcels of land viz. 1.939 acre and 2.703 acre, land measuring 1.222 acre and 2.703 acre settled in 1988 settlement respectively, has already been reverted back to government khata⁵. Out of the remaining 0.717 acre, land measuring

1 Vide agreement dated 9 July 1996 (17 years) subsequently amended vide agreement dated 24 April 1998 and 28 March 2002

2 Three (3) parcels of land measuring 20.808 acre, 2.703 acre and 1.939 acre.

3 0.717 acre out of 25.450 acre of land was not settled.

4 WP (C) No.5360/2002 and Misc. Case No.3999/2002

5 RP Case No.188/2003, Mutation Case No.1801/2004 (1.222 acre) and Vide Misc. Case No.19/2002 (2.703 Acre)

0.634 acre remained under unauthorized occupation (encroachment) of OOA on which a Kalyan Mandap (Barbati Palace) and 23 shops were constructed (1990-99) Encroachment case⁶ was filed by the Tahsildar in 1990-91, but the matter has remained sub-judice (February 2015).

2. Audit findings

Audit noticed that OOA started construction of 23 shops on the disputed land during 1990-91 out of its own resources, completed the construction in 1995-96 at a cost of Rs.14.21 lakh and let out the same in March 1996. Further it permitted construction of a Kalyan Mandap by M/s. Incon Associates, a private partnership firm, on the disputed land in 1996-97. OOA started receiving rent from the 23 shops from March 1996 and from Kalyan Mandap from January 1999. List of proprietor of these 23 shops and their business activities is indicated in Annexure 1.

2.1 Levy and collection of rent from 23 shops and Kalyan Mandap

OOA could not produce counter-foils of money receipts used during 1995-96 to 2007-08, rent ledger for 1995-96 to 2003-04 and stated that all records up to 2003-04 and all vouchers upto to 2007-08 had already been destroyed instead it furnished to Audit a statement of rent due and collected during the period from March 1996 to March 2004 in respect of Kalyan Mandap and 23 shops, which Audit has relied upon in absence of the above basic records. Further, during 2008-09 to 2013-14, though money receipts were produced, however, rent collected by OOA through money receipts from M/s. Incon-Associates towards Kalyan Mandap (Barabati Palace) was mixed up with that of Barbati Guest house (another building taken on hire from OOA by the same firm) due to which Audit had to rely on the rent ledger and audited annual accounts. Besides, cashbook was found (June 2015) to be not written after 31 March 2014.

2.1.1 Rent collected by OOA from 23 shops

As per the accounts certified by the Chartered Accountant and other records produced before

⁶ Enroachment Case No.213/01/1990-91, Misc. Case 263/91 arising out of T.S. Case No.312/91

Audit, OOA had earned revenue of Rs.55.35 lakh towards rent (Rs.52,52,788) and donation (Rs.2,82,100) from 23 shops during March 1996 to December 2014. Out of this Rs.50,28,069 was received and Rs.2,24,719 was outstanding as on 31 December 2014. However, full donation was realized Shop wise rent due, received and outstanding is indicated at Annexure 2.

2.1.2. Rent due and collected by OOA from M/s. Incon Associates for Kalyan Mandap (Barabati Palace)

As per the rent ledger, during January 1999 to December 2014 rent of Rs.41,99,174⁷ was due to OOA towards rent of Kalyan Mandap (Barabati Palace). Out of this, rent of Rs.13,28,470 was received by OOA from M/s. Incon Associates, Rs.21,51,809 was adjusted⁸ towards the cost of construction as per the agreements while Rs.5,24,439 remained outstanding as of 31 March 2014. During April to December 2014, Rs.2,57,816 was shown as collected by OOA in the rent ledger but the same included rent for Barabati Palace and other dues for which actual rent paid for Barabati Palace could not be ascertained by Audit as annual accounts of OOA for 2014-15 has not been finalized (June 2015).

Rent due, collected and adjusted by OOA from Barabati Palace during January 1999 to December 2014 are indicated at Annexure 3.

Thus, OOA had earned a revenue of Rs.97.33 lakh during 1996-97 to 2014-15 (upto December 2014) by utilizing the property i.e. 23 shops and Kalyan Mandap (Barabati Palace) lying on the disputed land.

2.1.3 Difference in income as per the accounts of M/s. Incon Associates and by the new management (Collector, Cuttack)

M/s. Incon Associates earned revenue amounting to Rs.2.44 crore⁹ from Barabati Palace towards

⁷ Up to March 2014 Rs.40,04,718 and April to December 2014 Rs.1,94,456

⁸ The cost of construction was borne by the private party viz. M/s. Incon associates who adjusted fifty per cent of rent from monthly rent towards cost of construction.

⁹ As per financial statement of M/s. Incon Associates for the years 1998-99 to 2013-14 (except 2000-01 and 2006-07 which were not produced to Audit). Moreover, oney Receipts in respect of these receipts could also not be furnished to Audit.

booking charges for different events during January 1999 to December 2014¹⁰ as per records produced by it.

At the direction of the Honorable High Court of Odisha/Honourable Supreme Court of India, the management of Barabati Palace was taken over by the District Collector, Cuttack during the period from 30 November 2014 to 12 December 2014 and then from 24 January 2015.

Audit attempted to make a comparison of net earnings from Barabati Palace under both the managements and noticed that in the books of M/s. Incon Associates though income relating to Barabati Palace was shown distinctly however, expenditure incurred thereon was not shown in its accounts separately but mixed with other business like running Barabati Guest House, Barabati Palace and Catering.

However, as per certified financial statements for 2007-08 to 2013-14, total income of M/s. Incon Associates from Barabati Palace was Rs.1.71 crore.

Present management (i.e. Collector, Cuttack from 30 November 2014 to 12 December and then 24 January 2015 onwards) confirmed that they were charging Rs.70,000 plus service tax per social events up to 18 February 2015 and Rs.80,000 plus service tax thereafter and 78 bookings had been made with collection of booking charges of Rs.77.50 lakh during same period and incurring expenditure of Rs.2.61 lakh within about five months (up to May 2015). This indicated that Barabati Palace had more revenue earning potential than that disclosed in the accounts of M/s. Incon Associates.

2.1.4 Advance rent collections payable to the District Administration by M/s. Incon Associates

M/s. Incon Associates vide letter No. Nil dated 2 December 2014 intimated that during the first phase (i.e. from 30 November 2014 to 12 December 2014) of taking over of the charge of the Kalyan Mandap by the District Administration, the mandap was booked by nine (9) persons and an amount of Rs.1.86 lakh was collected by it as per the

¹⁰ Excepting for 2000-01 and 2007-08 for which annual accounts were not produced to Audit.

details furnished below :

Sl. No.	Date of function	Name of the User of Mandap (S/Shri)	Money Receipt No. Of Barabati Palace	Advance Received by Manager, Barabati Palace (in Rs.)	District Adminsitra tion money receipt number	Amount received by District Administration (in Rs.)	Total Collectio n (in Rs.)
1.	30-Nov-14	Bibekanada Swain	144	20000	86/672130	50000	70000
2.	01-Dec-14	Muna Jain	153	21000	86/672131	50000	71000
3.	02-Dec-14	R.K. Mohapatra	159	20000	86/672143	50000	70000
4.	03-Dec-14	Gyanaranjan Swain	147	15000	87/672155	55000	70000
5.	06-Dec-14	S.S. Sharma	154	30000	87/672157	40000	70000
6.	07-Dec-14	Sibu Khuntia	140	10000	87/672160	60000	70000
7.	09-Dec-14	B C Rout	168	20000	87/672164	50000	70000
8.	10-Dec-14	Pragyan Mohapatra	151	30000	87/672163	40000	70000
9.	12-Dec-14	Jayanti Rath	117	20000	87/672159	50000	70000
		TOTAL		186,000		445,000	631,000

(Source: Information furnished by the Manager, Barabati Palace)

As the hiring charges of the Mandap was Rs.70,000 per day, the District Administration collected an amount of Rs.4.45 lakh from the users of Kalyan Mandap. Similarly, Collector also collected Rs.1.20 lakh on advance booking of said mandap during the period when management remained with M/s. Incon Associates. However, the differential amount of Rs.0.66 lakh due to the District Administration has not been deposited by M/s. Incon Associates (June 2015). Besides, service tax amounting to Rs.90,000 was neither collected from the concerned users by the Collector nor by M/s. Incon Associates.

2.2. Accounting issues

2.2.1 Accounting of 23 shops in OOA records

The OOA constructed 23 shops out of its own sources during 1990-91 to 1995-96 at a cost of Rs.14.21 lakh. Since OA could not provide vouchers in support of such expenditure, Audit relied upon the balance appearing in the Annual

Accounts and Ledgers and noticed that:

In the accounts of OOA, expenditure¹¹ incurred towards repair and maintenance relating to 23 shops were clubbed with repair maintenance of other civil structures like stadium, office building, etc. Similarly, separate metering and billing for electricity charges upto 2004-05 for 23 shops was not done. Therefore, identification of expenditure against receipts from 23 shops standing on disputed/encroached land could not be possible in Audit.

2.2.2 Accounting of Kalyan Mandap (Barabati Palace) in OOA records

Audit examined the annual accounts of both OOA relating to the Barabati Palace and M/s Incon Associates running the Barabati Palace (as produced by them) and noticed that:

- OOA accounted for Rs.80.47 lakh being construction cost of Barabati Palace and other installations (plant and machinery) as its own asset in 1998-99 (Rs.57.66 lakh) and 2000-01 (Rs.22.81 lakh) and booked matching amount under liabilities as Deposit (accrual of assets against self-construction of buildings) received from M/s. Incon Associates, as cost of construction was not met by OOA.
- In the annual accounts of OOA for the period 1999-2014, Audit noticed that a sum of Rs.21,51,809 being 50 per cent of rent received from M/s. Incon Associates was adjusted from Deposit (accrual of assets against self-construction of buildings) head.

Though said Kalyan Mandap building was constructed on disputed land, accounting the same as a permanent asset of OOA in its account was, thus, irregular as per Accounting Standard (AS 10)

- Besides, said asset (Building: Rs.61.35 lakh) was not capitalized based on expenditure incurred but on estimated

11 Export in one year i.e. 2005-06 when OOA spent Rs.76,700 for repair and maintenance of one shop

construction cost and so did not represent the actual cost of the building. OOA also irregularly charged depreciation for Rs.26.45 lakh during 2003-04 to 2013-14 on said building, even though title of the land was disputed. Besides, M/s. Incon Associates, the lessee of Barabati Palace, incurred expenditure towards repair and maintenance as well as electricity charges of the Barabati Palace.

2.2.3. Non-reconciliation of accounts between OOA and M/s. Incon Associates

As per terms of agreement with M/s. Incon Associates, 50 per cent of the rent in each month was to be adjusted towards construction cost of Barabati Palace. In the accounts of OOA, while cost of construction was booked under fixed assets to be reduced by depreciation each year, in the accounts of M/s. Incon Associates, same was shown under current assets, loan and advances (OOA account) till 2006-07 to be reduced by 50 per cent of rent payable each year. Investment in Barabati Palace was distinctly shown from 1999-2007 in the accounts of M/s. Incon Associates, but thereafter the same was mixed with other investments due to which amount of investment made in Barabati Palace alone could not be ascertained in Audit. During 1999-2007, OOA adjusted Rs.11.79 lakh in its account whereas M/s. Incon Associates had shown adjustment of Rs.13.76 lakh during the same period as detailed at Annexure 4. The difference of Rs.1.97 lakh was not reconciled (June 2015).

2.2.4 Accounting of Kalyan Mandap (Barabati Palace) in the accounts of M/s. Incon Associates

Working results and financial position of M/s. Incon Associates (as per its Annual Accounts from 1999-00 to 2013-14¹²) revealed that it had three different businesses viz. letting out of Barabati Palace, Barabati Guest House and Catering. Expenditure relating to Barabati Palace alone could not be assessed as expenses of all businesses were clubbed. Moreover, following records could not be produced to Audit:

- Cash books from 1998-99 to 2009-10;

¹² 2000-01 and 2007-08 were not furnished to Audit

- Booking and Collection Register from 1999-00 to December 2014;
- Money Receipts from 1999-00 onwards;
- Bill Copies from 1999-2000 to 2009-10;
- Bill Register;
- Tariff charges of Kalyan Mandap with detailed break-up.

Hence, accounts of M/s. Incon Associates could not be relied upon by Audit.

2.3 Absence of requisite due diligence in fixing revenue share

2.3.1. High payback period

The details of rent structure for Kalyan Mandap as agreed in the agreements and adjustments to be done for cost of construction is indicated in table below:-

Sl. No.	Features of agreement	1 st Agreement dated 9 July 1996	2 nd Agreement dated 24 April 1998	3 rd Agreement dated 20 July 1998	4 th Agreement dated 28 March 2002
1	Cost of construction permitted (Rs.)	10.00 lakh	25.00 lakh	40.00 lakh	80.47 lakh
2	Monthly rent payable (Rs.)	10,000	15,000	17,000	21,000
3	Whether prior approval of General Body taken?	Yes	No	No	No
4	Rent as percentage of capital	1.00	0.6	0.425	0.26
5	Provision for revision of rent	No provision	No provision	No provision	Five (5) per cent increase once in three years
6	Amount per month to be adjusted by OOA towards cost of construction as reflected in advance deposit account of M/s. Incon Associates	50 per cent of monthly rent	50 per cent of monthly rent	50 per cent of monthly rent	50 per cent of monthly rent
7	Actual cash inflow per month to OOA after adjustment towards	5,000	7,500	8,500	10,500

	construction (Rs.)				
8	Tenure of agreement	Till adjustment of cost of construction in full or 17 years whichever is earlier	Till adjustment of cost of construction in full or 28 years whichever is earlier	Till adjustment of cost of construction in full or 28 years whichever is earlier	Till full adjustment of cost of construction
9	Date from which agreed rent was payable	1-Dec-1997	1-Dec-1998	1-Dec-1998	1-Apr-2002

(Source: Information furnished by the Manager, Barabati Palance)

As can be seen from the table, M/s. Incon Associates kept on increasing the cost of construction and OOA regularized the expenditure by signing agreements without prior approval of General Body. The rent was not increased commensurate with the increase in construction cost as reflected above by ratio between rent agreed and cost of construction. OOA could not produce any record to justify the basis of determination of such monthly rent. As per agreement (July 2002) 50 per cent of rent would be adjusted towards expenditure incurred on construction of said Kalyan Mandap and so full adjustment of cost of construction would have happened after 47 years in 2044 (Annexure 5).

2.3.2. Arbitrary fixation of rent for Kalyan Mandap: Actual rent vis-a-vis fair rent

Revenue sharing is a major bidding parameter to ensure that the parties willing to share the highest revenue would get selected. Audit noticed that, OOA did not exercise any due diligence for revenue sharing like the actual income stream of the private partner from utilizing this building, mutually acceptable level of Internal Rate of Return (IRR) and fixing of minimum reserve percentage of revenue share etc. Rather, it seemed to have fixed the annual rent arbitrarily without examining the anticipated revenue earning.

Since competitive bidding was not followed while entering into agreements with M/s. Incon Associates, Audit compared the actual rent charged for Barabati Palace with 'Fair Rent' which is prescribed in Paragraph 4.1.14 read with Annexure XIII of Orissa Public Works

Department (OPWD) Code Volume II. Government hires private buildings at such rate.

Audit got the fair rent of such shops and kalyan Mandap (Barabati Palace) calculated (February-March 2015) by the competent authority and compared the same with rent fixed in the agreement which is indicated in table below:

Statement showing comparison of actual rent charged versus fair rent from 1999 to 2014 for Barabati Palace

Year	Actual Rent Fixed (Rs.)	Fair Rent (Rs.)	Difference (Rs.)
1999	2,40,000	8,32,728	5,92,728
2000	2,49,000	8,32,728	5,83,728
2001	2,52,000	8,32,728	5,80,728
2002	2,40,000	8,88,480	6,48,480
2003	2,52,000	8,88,480	6,36,480
2004	2,52,000	8,88,480	6,36,480
2005	2,52,000	8,66,400	6,14,400
2006	2,64,600	8,66,400	6,01,800
2007	2,64,600	8,66,400	6,01,800
2008	2,64,600	14,10,120	11,45,520
2009	2,74,500	14,10,120	11,35,620
2010	2,77,800	14,10,120	11,32,320
2011	2,77,800	22,13,184	19,35,384
2012	2,88,213	22,13,184	19,24,971
2013	2,91,684	22,13,184	19,21,500
2014	2,91,684	41,49,684	38,58,000
Total	39,92,481	2,19,49,692	1,79,57,211

(Source: Fair rent furnished by R & B and rent charged as per agreement with M/s. Incon Associates)

Thus, it is evident from the above comparison that the rent structure was not fixed rationally keeping in view the cost of land, cost of capital investment, the market rent accruable, time value of money, rate of return and the payback period. Even in 2002, when the last agreement was signed, rent fixed was substantially below the fair rent.

Over the years, fair rent has increased substantially but rent charged by OOA has only increased marginally."

From the aforesaid report, the differential sum that comes into existence is Rs.1,79,57,211/- (Rupees one crore seventy nine lac, fifty seven thousand two hundred and eleven only). Certain documents have been annexed in support of the report. A copy of the report has been handed over in Court to Mr. Raghvendra Srivastva, learned counsel for the petitioner. It is open to the petitioner to file an objection to the same within four weeks hence.

At this juncture we may state that on 07.05.2015, the following direction was also issued was passed :

"At this juncture, we may note with profit that in pursuance of our order dated 24.03.2015, the State of Odisha has produced the certified copies of two lease deeds; one dated 04.09.1949 and the other dated 19.04.1974. Keeping in view the two lease deeds and the schedule of property mentioned therein, we think it appropriate to constitute a Committee of judicial officers who shall, with the help and assistance of the revenue authorities, shall measure the lease hold area and submit a report whether the 23 shops and the *Kalyan Mandap* are within the said lease hold area or not. Regard being had to the controversy involved, we appoint the District Judge, Cuttack to be the Chairman of the committee and request the Chief Justice/Acting Chief Justice to nominate two other Additional District Judges who may be from Cuttack District or other districts. Needless to say, the learned Chief Justice/Acting Chief Justice shall nominate the Additional District Judges who have experience in the field. The Principal Secretary, Revenue and Disaster Management shall extend the fullest cooperation in consultation with the Chief Secretary of the State and shall provide all the facilities to the Committee so that there can be proper measurement and no deviancy is shown. At the time of measurement, the representative (only one) of the petitioner-Association shall remain present. A notice shall be given by the Chairman of the Committee about the date the measurement to the Association. Mr. Ashok Panigrahi, learned counsel for the State submitted that apart from the registered lease deeds which have been filed

before this Court, the original lease deeds shall also be made available to the Chairman of the Committee."

A letter has been received from the competent authority of the High Court of Orissa as well as from the District Judge, Cuttack seeking extension of time as one Mr. Bijay Kumar Mishra, Addl. District & Sessions Judge, Kamakshyanagar has been taken ill and another 1st District & Sessions Judge, namely, Mr. Bidyut Kumar Mishra, has been nominated.

Keeping in view the aforesaid unforeseen circumstances, time is extended till the end of September 2015 to submit the report.

Let the matter be listed at 2.00 p.m. on 08.10.2015.

(Gulshan Kumar Arora)
Court Master

(H.S. Parasher)
Court Master