
(2014) 03 OHC CK 0051

In the Orissa High Court

Case No : W.P. (C) No. 12409 of 2013 and C.O.N.T.C. No. 772 of 2013

Apsarun Begum and Others

APPELLANT

Vs

Sk. Gulam Nabi and Others

RESPONDENT

Date of Decision : 13-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 7, 115
Constitution of India, 1950 — Article 226, 27
Criminal Procedure Code, 1973 (CrPC) — Section 144(2)

Citation : (2014) 118 CLT 273 : (2014) 1 ILR 958 : (2014) 1 OLR 689

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Judgement

Dr. B.R. Sarangi, J.—The plaintiff-petitioners have filed this writ petition assailing the order dated 17.5.2013 under Annexure-11 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A. No. 387 of 2013 arising out of C.S. No. 1356 of 2012, refusing to direct the local police to render necessary assistance for implementation of the order of status quo passed by the Court below under Annexure-3 in respect of the suit land. The petitioners further seek for a direction to restrain the defendants-opposite parties from making any construction over the suit land.

2. The epitome of the facts of the case is that the plaintiffs-petitioners instituted a suit for partition claiming 1/5th share from out of the suit property described under Schedule "A" of the plaint under Annexure-2 alleging that the defendants-opposite parties are bent upon to raise construction over it by excluding them. The plaintiff-petitioners, being the widow of Sk. Salim Tulla and the guardian of her minor children stated that she has been residing in the house of her parents, as the opposite parties being the brothers of her deceased husband did not take care of them. In the said suit, the plaintiff-petitioners filed an application under Order 39, Rules 1 and 2, C.P.C. read with Section 151 CPC, which was registered as I.A. No. 762 of 2012. Pursuant to the notice issued to the defendants-opposite

parties, though they entered appearance, did not submit any version. Therefore, ex parte order of status quo was passed on 13.9.2012 vide Annexure-4 and the same was extended from time to time till the plaintiff-petitioners filed an application on 8.4.2013 under Order 39, Rule 2A, CPC, registered as I.A. No. 293 of 2013 under Annexure-6 alleging that on 21.3.2013 the defendants-opposite parties have started digging foundation of the construction of the building over the suit land.

3. At this stage, before seeking assistance of the local police, to implement the order dated 13.9.2012 under Annexure-4 to the writ petition, the plaintiffs-petitioners Nos. 1 and 2 approached the Additional D.C.P. u/s 144(2), Cr.P.C. stating that the defendant-opposite parties, who are the 2nd party members in the said proceeding, are determined to make construction and have arranged men and materials on 15.2.2013 for continuing with the construction over the suit land. By order dated 16.2.2013 vide Annexure-7 the Addl. DCP directed the IIC, Airfield Police Station to prevent breach of peace and copy of the petition and a copy of the order passed by the learned Civil Judge (Senior Division), Bhubaneswar were sent to the IIC, Airfield Police Station along with the order dated 16.2.2013 for compliance. It appears that vide Annexure-8, the plaintiff-petitioner No. 1 approached the IIC, Airfield Police Station alleging that the defendants-opposite parties are proceeding with the construction and when she objected to the same, she is being threatened with dire consequences. Thereafter on 4.5.2013 vide Annexure-9, the plaintiff-petitioners filed an application seeking implementation of the order of status quo through the local police u/s 151 CPC, which has been registered as I.A. No. 387 of 2013. On being noticed, the defendants-opposite parties filed their objection in Annexure-10 stating, inter alia, that the plaintiffs-petitioners have taken recourse to Order 39, Rule 2A, C.P.C. alleging that there is disobedience of the order of status quo, which was passed ex parte and while refuting the assertions made by the plaintiffs-petitioners or calling upon the petitioners to strict proof of the averments, have urged that there is no necessity to direct the local police for implementation of the status quo order.

4. After hearing the contentions from both the sides, learned Civil Judge (Senior Division), Bhubaneswar dismissed the application filed by the plaintiffs-petitioners u/s 151, C.P.C. vide Annexure-11 in its order dated 17.5.2013, which is under challenge in this writ petition.

5. Mr. S.K. Pattnaik, learned Sr. Counsel appearing for the petitioners stated, that while entertaining the writ petition, this Court passed interim order in Misc. Case No. 11711 of 2013 on 31.5.2013 restraining the defendants-opposite parties from making any construction over the suit land till the next date. In spite of the restraint order, since the defendants-opposite parties proceeded with the construction, the plaintiffs-petitioners filed C.O.N.T.C. No. 772 of 2013 before this Court alleging violation of the interim order of this Court dated 31.5.2013. Further, the plaintiffs-petitioners also filed Misc. Case No. 13598 of 2013

incorporating the photographs showing the construction going on and this Court vide order dated 11.7.2013 directed the IIC, Airfield Police Station to implement the restraint order passed by this Court on 31.5.2013. It is further urged that the defendants-opposite parties filed show cause on 20.7.2013 in I.A. No. 762 of 2012 and also filed an application under Order 39, Rule 7, C.P.C. on 27.8.2013 to depute pleader commissioner pleading that casting of the roof of the building is essential, but the learned Civil Judge (Senior Division), Bhubaneswar rejected the application filed under Order 39, Rule 7, C.P.C. vide its order dated 17.9.2013 against which order, the defendants-opposite parties filed W.P. (C) No. 22757 of 2013, which has been dismissed vide order dated 25.11.2013 indicating that the defendants-opposite parties may file better application in the Court below and they shall not claim any equity, which shall be considered by the Court below in accordance with law. On 13.11.2013 the learned Civil Judge (Senior Division), Bhubaneswar passed final order in I.A. No. 762 of 2012 directing to maintain status quo and not to raise any further construction, against which the defendants-opposite parties have preferred F.A.O. No. 147 of 2013 before the learned District Judge, Khurda on 25.11.2013, which has been heard and posted for judgment to 5.2.2014. It is further urged by Mr. Pattnaik that the defendants-opposite parties having scant regards towards the orders passed by the learned Court below dated 13.9.2012, have clearly violated the order passed by this Court dated 31.5.2013. Therefore, the order dated 11.7.2013 directing the police to stop construction for implementation of the order dated 31.5.2013 has been rightly passed and therefore, the defendants-opposite parties are liable to be punished for committing contempt of Court. It is further urged that the defendants-opposite parties have deliberately violated the interim order of status quo in spite of their knowledge on the plea that final order is yet to be passed. Therefore, the ex parte order of the Civil Court under Order 39, Rules 1 and 2, C.P.C. would have no effect. Therefore, it is a fit case where this Court should quash the impugned order dated 17.5.2013 and direct the police for implementation of the order dated 13.9.2012 passed by the Court below. It is further stated that for violation of the order of the Civil Court, as well as of this Court, since separate contempt application being C.O.N.T.C. No. 772 of 2013 has been filed, the opposite parties should be dealt with sternly.

With regard to the maintainability of the writ petition, Mr. Pattnaik relies upon the judgments of the apex Court in Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others, , Sitaram @ Mahendra Ghosh v. Sri Antaryami Mohapatra and 18 others, >2003 (II) OLR 409, Surya Dev Rai Vs. Ram Chander Rai and Others, , Abdul Sukhure Bhai Vs. Durai Kuppuswamy, , Subal Kumar Deb v. Purna Chandra Giri, >1989 (I) OLR 389, Dinamani Debi Vs. Paramananda Choudhury and Another, , Durga Prasad Vs. Naveen Chandra and Others, , and K. Jagdish Ponraj, G. Chandrashekar Reddy and Francis Selvaraj Vs. A. Muniraju, Rathnamma, M. Pushpa and Ramakrishnappa, .

6. Mr. S.K. Dash, learned Counsel for the opposite parties stated that in I.A. No. 387 of 2013 filed u/s 151 CPC, the opposite parties have filed their show cause

stating that the I.A., is not maintainable as the petitioners have not approached the Court with a clean hand and as such, there is no necessity for issuance of direction by the Court to the Air Field Police Station, because the order of status quo passed is an ex parte order when the opposite parties have not submitted their show cause. Apart from the same it is stated that since the petitioners have already filed application under Order 39, Rule 2A, C.P.C. against the opposite parties relating to suit land making allegation that they have already violated the order of status quo passed by this Court and when the violation proceeding is pending against the self same property, there is no necessity to give further direction to the concerned IIC, Airfield Police Station for implementation of status quo order passed by this Court in I.A. No. 762 of 2012 and therefore, he seeks for disposal of the I.A. No. 387 of 2013.

Mr. Dash further strenuously urged that against an order passed u/s 151 CPC, no writ lies rather remedy u/s 115, C.P.C. is available. Therefore, the writ petition is not maintainable. To substantiate his contention, he has relied upon the judgments of Abdul Sukhure Bhai v. Durai Kuppaswamy, AIR 2006 Madras 186, Subal Kumar Dey Vs. Purna Chandra Giri and Others, , Kochupennu Ambujakshi and Others Vs. Veluthakunju Vasu Channar and Others, , Jage Ram v. Hari Singh, >2001 (3) CCC 635 (P & H), Dinamani Debi Vs. Paramananda Choudhury and Another, , Durga Prasad Vs. Naveen Chandra and Others, and K. Jagdish Ponraj, G. Chandrashekar Reddy and Francis Selvaraj Vs. A. Muniraju, Rathnamma, M. Pushpa and Ramakrishnappa, .

7. On consideration of the rival contention of the parties and the materials on record, it appears that while passing the impugned order in Annexure-11, the learned Court below took note of the fact that by an interim ex parte order dated 13.9.2012 in I.A. No. 762 of 2012 under Order 39 Rules 1 and 2 C.P.C. both the parties were directed to maintain status quo over the suit property. The said I.A. No. 762 of 2012 has not yet been finally heard and decided. With regard to the allegation of the petitioners that the opposite parties by violating the order of status quo, carried on construction work over the suit land, Mr. Dash submitted that no material is available or documents filed by the petitioners to establish the same. He submitted that true picture would emerge after hearing the parties by the learned Court below and therefore, it would be premature and dangerous to enforce ex parte order of status quo, and thus, the learned Court below has rightly refused to invoke jurisdiction u/s 151 C.P.C. regarding intervention of police in the matters concerning the civil dispute.

8. Against the impugned order in Annexure-11 passed in I.A. No. 387 of 2013 u/s 151 C.P.C. as per valuation of the suit, revision lies to the Court of learned District Judge. However, the petitioners invoking the extraordinary jurisdiction of this Court, during the summer vacation, approached this Court. If at all this Court granted any interim protection that should have been concluded after reopening of the Civil Courts and more so in the writ petition this Court directed the petitioners to delete of IIC, Airfield Police Station who has been impleaded as

opposite party No. 5 considering the fact that order of status quo passed by learned Court below was operating. The Vacation Court passed an order restraining the opposite parties from making construction over the suit land and posted the case for next hearing after the vacation. Taking advantage of the situation, the petitioners on the date of next hearing urged that violating the prohibitory order, the opposite parties are still carrying out the construction work. This clearly indicates that what the petitioners could not have achieved by approaching directly, now they have got it indirectly. In other words, the final relief claimed has been granted in the writ petition through interim order and at this stage, these opposite parties had approached the learned Court below for deputing a pleader commissioner for inspection of the suit land but the same was rejected. Assailing the said order, the opposite parties preferred W.P. (C) No. 22757 of 2013. But for interim order passed by this Court in the present writ petition, the petitioners could further be able to persuade the learned Court below to finally dispose of the application for ad interim injunction filed under Order 39, Rules 1 and 2, C.P.C. by restraining the opposite parties from making construction over the suit land for which there was no prayer in it. But this Court by order dated 25.11.2013 disposed of W.P. (C) No. 22757 of 2013 taking into consideration the fact that casting of roof is urgent and construction materials are going to be damaged and because of the order of status quo, centering work is affected by white ants and the rods already spread over for roof casting are affected by rust. This Court observed that in case the opposite parties file better application in the Court below indicating therein that they shall not claim any equity, the Court below shall consider and dispose of the same in accordance with law by giving opportunity of hearing to the parties.

9. As the application for ad interim injunction has been disposed of by order dated 15.11.2013 directing the parties not to raise any further construction and the said order is assailed in F.A.O. No. 147 of 2013 before the learned District Judge, Khurda in terms of the observation made by this Court, these opposite parties filed an application for inspection of the suit land with undertaking that they shall not claim any equity in case they are allowed to complete the construction. Learned 2nd Addl. District Judge, Bhubaneswar rejected the said application on mere technicality by observing that these opposite parties should have moved the learned trial Court as directed by this Court.

10. In Abdul Sukhure Bhai (supra), the Madras Court has framed guidelines for granting police help in exercise of powers u/s 151 C.P.C. In para. 13, the apex Court has observed as follows:

13. The lower Courts are frequently confronted with the question of issuing police protection. Since the issuance of police aid is often raised in one way or other, by the lower Courts it is appropriate to issue the following guidelines:

In appropriate cases, Civil Court has the power to issue suitable directions to police officials as servants of law to extend their aid and assistance in the execution of decrees and orders of Civil Courts or in implementing an order of

injunction passed by it >(1992) TLNJ 120).

Ordering police protection has got serious consequences, impinging on the rights of the parties.

Police aid is not to be granted simultaneously with an order of injunction.

In cases where the lower Courts order police protection/police aid in the execution of decrees and orders of the Civil Courts or in implementing an order of injunction passed by it, the Court is to record reasons as to how and why the case is the appropriate case to order police aid and for what purpose the police aid is ordered.

Police protection/police aid may not be ordered by a non-speaking order. Order of Court for police aid might give room for the parties to take law into their own hands. The party having the order of Court for police aid, might try to disturb the status quo either by trying to take possession or trying to dispossess the opponent.

Order of the Court for police protection is to specifically indicate in precise terms the purpose for which police protection is ordered.

In the said case, the High Court of Madras allowed the revision application filed u/s 115, C.P.C. setting aside the order directing police help in exercise of power u/s 151, CPC.

11. This Court in Subal Kumar Dey (supra) referring to the judgment of Andhra Pradesh High Court in Rayapati Audemma Vs. Pothineni Narasimham, , while deciding a question whether direction to the police for implementation of the order of temporary injunction can be given by a Court in exercise of the inherent powers u/s 151, C.P.C. has held as follows:

Inherent power is wide in its nature to protect the interest of the parties in a given case. It is not a power to be exercised for implementation of an order of the Court. Where violation of the order would be so prejudicial to a party that remedies or penalty for violation of the order available under the statute would not be sufficient, inherent power may be exercised. Therefore, a Court is to be careful before taking external help of police for implementation of the order.

12. In Kochupennu Ambujakshi (supra) the High Court of Kerala has held that only final order passed under Order 39, Rules 1 and 2, C.P.C. can be enforced with assistance of police and not interim ex parte order.

13. In Jage Ram (supra), the Punjab and Haryana High Court has held that if a party has already taken recourse to Order 39, Rules 2A, C.P.C. alleging violation of order of status quo, the order granting police help for implementation of the status quo order is not permissible reason being when the order of status quo is passed, the possession is in fluid stage and it is not finally decided as to which of the party is in possession. To establish the fact, the parties are required to lead evidence in support of their respective contentions. If one of the parties violates

the order of status quo, remedy available is to file application under Order 39, Rule 2A, C.P.C. or to file contempt application. Therefore, in exercise of the powers u/s 115, CPC, the High Court of Punjab and Haryana has set aside the order granting police help in order to maintain status quo.

14. In *Dinamani Deb* (supra), the Full Bench of this Court held that no appeal lies against the order passed u/s 151 C.P.C. but a revisional application can be filed before the High Court against such an order u/s 115, CPC.

15. In *Durga Prasad* (supra), the apex Court has held that no writ petition is maintainable when alternative remedy u/s 115, C.P.C. is available. In *Shiv Shakti Co-operative Housing Society* (supra) the apex Court has held that revision will not be maintainable in interlocutory matters where the order had it been passed in favour of the revision petitioners would not have the effect of deciding the suit or other proceedings. Referring to the said judgment, this Court in *Sitaram alias Mahendra Ghosh v. Sri Antaryami Mohapatra*, >2003 (II) OLR 409 has held that civil revision at the instance of a litigant would be maintainable.

16. Referring to *Suryadev Rai* (supra), it is argued by Mr. S.K. Pattnaik, learned Senior counsel for the petitioners that in spite of amendment to Section 115, CPC, excluding the jurisdiction of the High Court to entertain a revision under this section in the matters of interlocutory orders passed by Courts subordinate to High Courts, the jurisdiction of the High Court under Articles 226 and 27 of the Constitution is not affected in any manner.

17. Considering the aforesaid proposition of law and applying the same to the present facts of the case, it appears that admittedly, application under Order 39, Rules 1 and 2, C.P.C. is pending for consideration. While entertaining such application, the learned Court below has passed ex parte interim order granting status quo. To implement the said status quo order, the petitioners have filed an application u/s 151 C.P.C. registered as I.A. No. 387 of 2013 where the learned Court below has refused to grant police help, thereby the learned Court below has disposed of the application filed u/s 151, CPC. Against the final order passed u/s 151 C.P.C. no writ lies, rather the order itself is revisable one in view of the judgment in *Durga Prasad* in *Kochupennu Ambujakshi and others*, (supra) and in *Dinamani Debi* (supra).

18. Now the question, which comes for consideration is if there is violation of the status quo order, remedy is available under the CPC to file an application under Order 39, Rule 2A, CPC. Instead of doing so, contempt application bearing C.O.N.T.C. No. 772 of 2013 has been filed, which is also not maintainable. In *R.N. Dey and Others Vs. Bhagyabati Pramanik and Others*, , it is held that the weapon of the contempt is not to be used in abundance or misused. Normally it cannot be used for execution of decree and implementation of an order for which alternative remedy in law is provided for. Therefore if the remedy is available under Order 39, Rule 2A and Section 151 C.P.C. for violation of injunction order then the contempt application is not maintainable. The said principle has also

been followed in K. Jagdish Ponraj and others {supra}. When the order has been passed in an application under Order 39, Rules 1 and 2 C.P.C. granting ex parte status quo order, the same is in fluid stage and therefore, the learned Court below is justified in rejecting the application filed u/s 151 C.P.C. for implementation of the order of status quo. Admittedly, no order has been passed in an application under Order 39, Rule 2A, CPC. Therefore, any application filed to implement the ad interim order of status quo, should not have been entertained as the proceeding is still pending for consideration. If there is violation of the status quo order, then remedy lies under the CPC to file an application under Order 39, Rule 2A, C.P.C. keeping in view the ratio of the judgment in Rayapati Audemma, R.N. Dey and others (supra).

19. In view of the aforesaid facts and circumstances and the law governing the field, this Court is of the view that no illegalities or irregularities have been committed by the Court below in rejecting the application filed u/s 151, C.P.C. for taking police assistance for implementation of the ex parte order passed by that Court. Accordingly, the writ petition fails and the same is dismissed.

As remedy is available under Order 39, Rule 2A, CPC, the Contempt Application is also not maintainable. Accordingly, C.O.N.T.C. No. 772 of 2013 is dismissed.