

(2014) 09 OHC CK 0012
In the Orissa High Court
Case No : W.A. No. 466 of 2013

Arun Kumar

APPELLANT

Vs

N. Nirmala Devi

RESPONDENT

Date of Decision : 24-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, Order 2 Rule 2, Order 5 Rule 20, Order 7 Rule 11, Order 9 Rule 13
Constitution of India, 1950 — Article 226, 227

Citation : (2014) 09 OHC CK 0012

Hon'ble Judges : Amitava Roy, C.J;B.R. Sarangi, J

Bench : Division Bench

Judgement

Dr. B.R. Sarangi, J.—The plaintiff-writ petitioner has filed this appeal challenging the judgment dated 7.1.2013 passed by the learned Single Judge in W.P.(C) No. 11696 of 2013 dismissing the same on the ground of maintainability stating inter alia that order of rejection of a plaint being a decree, as defined u/s 2(2) of the Code of Civil Procedure, the same is appealable.

2. The pleaded facts as available on record indicate that the writ petitioner-appellant entered into an agreement for sale of a piece of land with one Niku Purna Chandra on 17.02.2000 whereunder said Niku Purna Chandra agreed to sell the piece of land measuring Ac. 1.00 bearing Plot No. 75/1 and 75/1/270 situated in village Khalliguda, Rayagada, covered by registered sale deed Nos. 1113/81, 1174/81, 1175/81 and 807/82, on payment of consideration of Rs. 18,00,000/-. As per the terms of agreement, said Niku Purna Chandra was to receive a sum of Rs. 1,72,000/- at the time of agreement, a sum of Rs. 1,00,000/- by 02.04.2000 and to receive the balance sale consideration within one year of the agreement subject to condition that he had no encumbrances over the property in question and had to show his clear title over the property free from all debts, if any, over the same and to make the property free from all encumbrances. The said Purna Chandra as a part of the sale consideration, received a sum of Rs. 1,22,000/- on the date of agreement, i.e. 17.03.2000, Rs.

90,00,000/- on 20.03.2000 and Rs. 60,000/- on 04.04.2000 thereby he has received a total sum of Rs. 2,72,000/-. Unfortunately, the vendor, Niku Purna Chandra could not comply his part of the agreement by providing the title deeds. On the other hand, he suppressed the fact that the title deeds were mortgaged with the State Bank of India and he had availed a loan by that. Since no title deeds were produced, in spite of repeated demands, the petitioner had to issue a notice on 22.03.2001 through advocate questioning his conduct of concealment of facts, deception and suppression of the fact of taking loan on the documents from the Bank. Therefore, the appellant instituted a criminal case for cheating and as per the terms of the agreement, the matter was required to be referred to arbitration in the event of dispute between the parties in connection with the sale transaction and accordingly, the matter was referred to arbitration to be adjudicated by an arbitrator, but the same having not progressed, the writ petitioner filed a Title Suit bearing No. 06/2004 in the court of learned Civil Judge (Sr. Division), Rayagada seeking direction to the Arbitrator for expedite disposal of the proceedings and alternatively for a decree for specific performance of contract besides other reliefs. The suit was initially filed against Niku Purna Chandra and on his death, respondent Nos. 1 to 4 were substituted in his place as legal heirs and representatives but there was no averment about the reference of the dispute to arbitration. The suit was registered as T.S. 26/2003. Before the suit was admitted the same was withdrawn with the permission to file a fresh suit on the selfsame cause of action and thereafter T.S. 06/2004 was filed. To that extent, an averment was also made in the plaint in Para-24.

3. Respondent No. 3-N. Sushila Devi, the widow of late Niku Purna Chandra filed her written statement. In the written statement she had contended that the suit properties were the self acquired properties of late Niku Purna Chandra and she candidly admitted in the written statement that the original opposite party No. 1, who was defendant no. 1 had business and due to failure in his business he faced financial crisis and with regard to the suit transaction she contended that she had no knowledge. Since the respondents did not appear in spite of notice, steps were taken under Order-V Rule-20 C.P.C. by publishing notice in the newspaper, The Indian Express. Consequent upon that, respondent No. 3 appeared and contested the suit stating that she came to know about the suit from newspaper publication. Respondent No. 4-N. Pramila also filed a petition before the learned trial court to permit her to contest the suit as she came to know about the suit from newspaper publication. The said petition also allowed to the extent that she might contest the suit but shall not be permitted to file written statement. Both respondent Nos. 3 and 4 contested the suit and finally the suit was decreed allowing the prayer of the writ petitioner-appellant for specific performance of contract. Thus the suit was decreed on contest against respondent nos. 3 and 4 while it was decreed ex parte against respondent Nos. 1 and 2 and was dismissed against respondent No. 5, who was the Arbitrator and did not contest the suit.

The appellant besides filing an application for execution of the decree before the

learned Single Judge, also filed a caveat before this Court expecting an appeal. Admittedly an appeal was filed which was numbered as R.F.A. 115/2006 to which the caveat petition of the appellant was tagged, but without moving any interim application therein, another appeal being R.F.A. No. 133/2006 was filed and behind the back of the appellant, the matter being moved, an interim order was obtained. The appellant having come to know such fact brought it to the notice of this Court and this Court on the prayer of the appellant permitted to withdraw R.F.A. 133/2006.

At this point of time respondent Nos. 1 and 2 filed an application bearing CMA No. 16/2006 under the provisions of Order 9 Rule 13 of C.P.C. to set aside the decree passed against them ex parte on the ground that they did not have any notice of the suit. Apart from that the appellant also filed an application to dismiss the case as not maintainable in view of the fact respondent Nos. 1 and 2 in their application stated that they had no knowledge and the ex parte decree was passed against them in T.S. No. 06/2004 whereas respondent No. 1 did file a Vakalatnama engaging the same Advocate who had filed power to contest on behalf of the other defendants in the suit and as such respondent Nos. 1 and 2 had no independent and separate right over the suit land and as their claim was on the basis of the fact that they were the legal representatives of the original defendant Niku Purna Chandra. Therefore, adjudication of the application under Order-9 Rule-13 C.P.C. at the instance of some of the legal representatives was not maintainable when an appeal against the judgment and decree was pending before this Court and as such no orders were passed on the petition which was pending adjudication before the trial court and in the First Appeal before this Court.

4. Respondent Nos. 1 and 2 filed an application under Order-18 Rule- 17 C.P.C. stating inter alia that they were employees in USA and were staying in USA. They came back to India on 24.06.2007 and had also to go back on 09.07.2007 to USA and prayed for recording their deposition before the actual hearing. The appellant filed objection to the said petition under Order-18 Rule- 17 C.P.C. contending that the petition was not maintainable as no suit was pending for recording such evidence thereby provisions of Order-18, Rule-17 C.P.C. could not be taken resort to. But the learned Civil Judge without appreciation the matter in proper perspective simply passed an order on 11.07.2007 permitting the witnesses to be examined holding that records were not necessary as the hearing was not going to be closed.

5. Assailing the said order dated 11.07.2007, the appellant filed W.P.(C) 9972/2007. On 26.07.2012 when the matter was taken up, the same was disposed of quashing the order dated 11.07.2007 passed by the trial court. The trial court was also directed to dispose of the applications filed by the appellant questioning the maintainability of the application, before the disposal of the application under Order-9 Rule 13 C.P.C. Lower court records were also directed to be sent back to that court. The application bearing CMA No. 16/2006 was

disposed of by order dated 24.12.2012 allowing the same. The appellant being aggrieved by the said order of the learned Civil Judge (Sr. Division), Raygada filed a revision petition bearing CRP 01/2013 which is pending adjudication. In the meantime, the suit which was restored at the instance of respondent Nos. 1 and 2, they also filed written statements without signatures and without supporting the same by affidavit on 24.01.2013. On 08.02.2013, they filed fresh written a statements along with an application to allow them to substitute the same with those filed on 24.01.2013. The written statements were rejected by the learned trial court. Again they filed written statements along with an application for condonation of delay. Copies of written statements along with a copy of the petition to accept the same where the averments made in paragraph-24 had not been specifically denied in the written statements which are yet to be accepted. Respondent Nos. 1 and 2 before acceptance of their written statements filed an application under Order-2 Rule-2 and Order-7 Rule-11, CPC to reject the plaint. In the application they contended that they applied for copy of the extract of the suit register and found that the earlier suit C.S. 26/2003 was filed on 23.12.2013 and was disposed of on 26.03.2013, but the copy of the plaint and order sheets could not be obtained by them as reportedly they were not traceable. On 29.04.2013 the appellant filed an objection to the said petition along with an application to call for the records of T.S. 26/2003 which was consigned to Record Room along with an application to advance the case for orders on the petition. Respondent Nos. 1 and 2 filed their objection to the said petition to call for records. Though the petition to call for records was taken up on 29.04.2013, the matter was directed to be taken up on 30.04.2013 and no orders on the said petition were passed. Learned court by order dated 30.04.2013 allowed the application under Order-2 Rule-2 C.P.C. by simply holding that the appellant was precluded from filing the suit against which order the appellant filed W.P.(C) 11696/2013 before this Court.

6. Pursuant to notice, respondent Nos. 1 and 2 appeared before the learned Single Judge and contended that the learned trial court concluded that the appellant was precluded from filing the suit by erroneously placing the burden on the appellant, when admittedly the appellant in the plaint itself made an averment of withdrawal of the previous suit and filing of a fresh suit being permitted to do so by the court, which fact was never denied and further contended that the order dated 30.04.2013 did not whisper about the petition filed to call for the records. It was also brought to the notice of the learned Single Judge that the learned court below took into consideration all the averments made in the written statement which were not even accepted while passing the order dated 30.04.2013 holding that the earlier suit itself was not admitted at the time the same was withdrawn.

7. In course of hearing of the writ petition, question of maintainability of the said writ petition was urged before the learned Single Judge, but the learned Single Judge held that the trial court in the impugned order did not exercise its power under the provisions of Order-7 Rule- 11 C.P.C. and rather exercised the power

under Order 2 Rule 2 of the C.P.C. by observing that the appellant was precluded from bringing out another suit and the order passed under Order 2 Rule 2 C.P.C. being a decree, the writ petition was not maintainable, the order being an appealable one. The decree within the meaning of Section 2(2) C.P.C. was appealable one and accordingly dismissed the writ petition alternative and efficacious remedy being available, and hence this Writ Appeal.

8. In Course of hearing, preliminary objection was raised by Mr. C.A. Rao, learned Sr. Counsel for the respondents with regard to maintainability of the Writ Appeal stating inter alia that the order impugned i.e. the judgment passed by the learned Single Judge being one under Article 227 of the Constitution of India, the Writ Appeal is not maintainable against the said judgment. To substantiate his contention on the question of maintainability of the Writ Appeal, he has relied upon the judgments in Paradeep Phosphates Ltd. Vs. State of Orissa and Others, , Chunta Nayak and fifty Ors. Vs. State of Orissa and Others, , Mahammed Saud and Others Vs. Dr. (Maj) Shaikh Mahfooz and Another, , Rasamani Dei Vs. Naba Kishore Acharya and Another, and Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil,

9. Per contra, Mr. S.P. Mishra, learned Sr. Counsel appearing for the appellant, relied upon the judgment in Radhey Shyam and Another Vs. Chhabi Nath and Others, in which reliance has also been made to the case of Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another, and T.C. Basappa Vs. T. Nagappa and Another, , Shahu Shikshan Prasarak Mandal and Another Vs. Lata P. Kore and Others,

10. On query being made by this Court, learned counsel appearing for the parties agreed for hearing of the Writ Appeal on the question of maintainability first. Consequently the Writ Appeal was heard on the question of maintainability.

11. Mr. C.A. Rao, learned Sr. Counsel appearing for the respondents referred to Article 226 of the Constitution of India which deals with the power of High Courts to issue certain writs and Article 227 with regard to power of superintendence over all courts by the High Court. Under Article 226, the jurisdiction is original. It exercises jurisdiction, to issue to any person or authority including in appropriate cases to any government, any directions, orders or writs, for enforcement of any of the rights conferred by Part-III and for any other purposes. But under Article 227, the High Courts have powers of superintendence over all courts and tribunals or administrative authorities. He further submitted that the remedy provided under Article 226 is a remedy against the violation of the rights of citizen by the State or statutory authorities. On the other hand, Article 227 dealt with power of superintendence conferred on High Courts and said power is restricted to the courts and tribunals. Thereby, the orders passed by a Civil Court is not amenable to the writ jurisdiction of the Court under Article 226 of the Constitution and such orders are open to challenge by invoking the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India. Therefore, the Writ Appeal was one under Article 227 of the Constitution of India

and the learned Single Judge exercised the supervisory jurisdiction under Article 227. It is further stated that under Letters Patent Clause-10, no appeal lies against the order passed by a learned Single Judge in exercise of supervisory jurisdiction of the Court.

12. In *Paradeep Phosphates Ltd. case* (supra), it has been held that no appeal under the letters patent would be maintainable against the order of a learned Single Judge of High Court which is passed in exercise of supervisory jurisdiction under Article 227 of the Constitution. Referring to Section 100A, C.P.C. (as amended), it has been further held that a writ application filed against an order of a Civil Court is under Article 227 of the Constitution of India in which High Court either by a learned Single Judge or by a Division Bench exercises the supervisory jurisdiction under the said Article 227 of the Constitution.

13. In *Chunta Nayak and fifty others case* (supra), this Court referring to the judgment in *Naresh Shridhar Mirajkar case* (supra) held that no writ of certiorari lies against the Civil Court. Therefore, the learned Single Judge could have, if at all, exercised jurisdiction, only under Article 227 of the Constitution of India. The jurisdiction under Article 227 is only a supervisory jurisdiction and no appeal lies against exercise of such jurisdiction by a learned Single Judge before a Division Bench. The High Courts of Calcutta, Madras, Allahabad, Punjab and Haryana, Kerala and Jammu and Kashmir have taken the same view. Clause-10 of the Letters Patent for the High Court of Orissa is seen to be in pari materia with Clause-10 of the Letters Patent for the High Courts of Calcutta and Madras. But this Court though took note of the said fact, ultimately did not decide the said question and proceeded in a different manner.

14. In *Mahammed Saud and Ors. Case* (supra), a Full Bench of this Court considered the effect of section 110A amendment by Act 22 of 2002 wherein referring to non-obstante clause, right of appeal on the date of commencement of lis is superseded and this Court held that no further Letters Patent Appeal shall lie against any order/judgment/decreed passed in an appeal by a Single Judge of a High Court irrespective of the provision for the same under Letters Patent for the High Court or any instrument in vogue having the force of law. In addition to the same, the Full bench of this Court took into consideration the question of maintainability of the appeal against the judgment passed by the learned Single Judge under Article 226 and 227 of the Constitution of India, 1950 under sub-para (3) of paragraph-47. It appears from the said Full Bench Judgment that though reference was made to *Surya Dev Rai case* (supra) this Court did not make any observation thereon. The Full Bench simply recorded the facts and contentions of the parties that the provisions of CPC were not applicable to Writ Appeal and there was no power for entertaining the Writ Appeal against the judgment/order/decreed passed by a learned Single Judge.

15. In *Rasamani Dei case* (supra), this Court held that in a Letter Patent Appeal under Clause-10, the order passed by the Civil Court is not amenable to writ jurisdiction of this Court under Article 226 of the Constitution. Rather, such order

may be open to challenge by invoking supervisory jurisdiction of High Court under Article 227 of the Constitution. Therefore, the writ application filed by the appellant was one under Article 227 of the Constitution of India and the learned Single Judge exercised the supervisory jurisdiction under said Article to hold that no appeal against an order of learned Single Judge passed in an application under Article 227 of the Constitution of India would lie under the Letter Patent to a Division Bench. This view has been expressed in paragraphs- 5 and 6 of the said judgment and ultimately this Court dismissed the Writ Appeal on the ground of maintainability.

16. Much reliance has been placed on the judgment of the apex Court in *Surya Dev Rai* case (supra) wherein the apex Court in paragraphs 4 and 7 held as follows:-

4. Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

7. The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceeding xxx xxx xxx."

17. Subsequently, in *Shalini Shyam Setty and Anr.* case (supra) in paragraphs- 78 to 82, the apex Court considered the applicability of Article 226 and 227 of the Constitution and came to the following findings:-

78. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases High Courts, in a routine manner, entertain petition under Article 227 over such disputes and such petitions are treated as writ petitions.

79. We would like to make it clear that in view of the law referred to above in

cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown, that a private individual is acting in collusion with a statutory authority.

80. We may also observe that in some High Courts there is tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in *Surya Dev Rai Vs. Ram Chander Rai and Others*, and in view of the recent amendment to Section 115 of the CPC by CPC (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 of CPC has been curtailed. In our view, even if the scope of Section 115, CPC is curtailed that has not resulted in expanding High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

81. As a result of frequent interference by Hon''ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice.

82. This Court hopes and trusts that in exercising its power either under Article 226 or 227, Hon''ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest Courts of justice within their jurisdiction will adhere to them strictly.

18. As it appears from the above findings, the apex Court observed that in some High Courts there is tendency of entertaining petitions under Article 227 of the Constitution by terming the same as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio decided in *Surya Dev Rai* case (supra) in view of the amendment to Section 115 of the CPC. It is urged that as a result of the amendment, scope of Section 115 of CPC has been curtailed and that expanded the High Court's power of superintendence. Therefore, it was further held that in exercising its jurisdiction, High Court must follow the regime of law.

19. In *Radhey Shyam and another* (supra), the judgment of *Surya Dev Rai* case (supra) has been distinguished. In paragraphs-32 and 33, the apex Court held as follows:

32. The essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in *Surya Dev Rai* and with that we have no disagreement. But we are unable to agree with the legal proposition laid down in *Surya Dev Rai* that judicial orders passed by a civil court can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari. We are of the view that the aforesaid proposition laid down in *Surya Dev Rai*, is contrary to the ratio in *Mirajkar* and the ratio in *Mirajkar* has not been overruled in *Rupa Ashok Hurra*.

33. In view of our difference of opinion with the views expressed in *Surya Dev Rai*, matter may be placed before His Lordship the Hon''ble the Chief Justice of India for constituting a larger Bench, to consider the correctness or otherwise of the law laid down in *Surya Dev Rai* on the question discussed above.

20. In *Shahu Shikshan Prasarak Mandal and Anr. case (supra)* in paragraphs-11 and 12, the apex Court held as follows:

"11-12. In the present matter apart from the fact that the petition is labelled under Article 226 of the Constitution of India, it is clear that the grounds raised in the petition suggest that the petition is not only under Article 227 but also under Article 226 of the Constitution. It is to be seen that in the grounds raised against the order of the Tribunal, it is specifically suggested that the order passed by the Tribunal was arbitrary, unreasonable, unjust and perverse. The further complaint made against the Tribunal's order pertain to failure on the part of the Tribunal to appreciate certain facts and eventualities thereby complaining non application of mind on the part of the Tribunal. Complaint has also been made against the approach of the Tribunal and it is suggested that the said approach was perverse. After reading the writ petition we are convinced that the contentions raised and the facts stated in the petition justify the respondent herein to file an application both under Articles 226 and 227 of the Constitution of India."

21. In view of the conflicting decision of the apex Court, since the matter has been referred to a larger Bench for consideration in *Radhey Shyam* and another case (*supra*) to decide the question with regard to the proposition laid down in *Surya Dev Rai case (supra)* vis-?-vis *Naresh Shridhar Mirajkar case(supra)*, at this stage, it is not appropriate to express any verdict with regard to maintainability of the writ petition until the same is resolved by the larger Bench. Therefore, at this stage we refrain from making any observation. Consequently, the matter should await the decision of the apex Court.