

(1963) 11 OHC CK 0003

In the Orissa High Court

Case No : Civil Revision No. 195 of 1963

Banamali Sashmal and Others

APPELLANT

Vs

Naru Patra and Others

RESPONDENT

Date of Decision : 26-11-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1, Order 16 Rule 1A, Order 16 Rule 7, Order 16 Rule 7A

Citation : (1964) 30 CLT 63

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : R.N. Sinha, for the Appellant; J.M. Mitter, L.K. Dasgupta, S.S. Basu and S.N. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—Defendants 1 to 7 are the Petitioners. It is unnecessary to traverse all the facts involved in the pleadings as these are unnecessary for the discussion on the question in issue. The undisputed fact is that Defendant No. 8 was present in Court on 18-7-1963 when the witnesses of Defendants 1 to 7 were being examined after the close of the Plaintiffs case. Defendants 1 to 7 filed an application asking for examination of Defendant No. 8 as a witness on their behalf as she was present in Court. It is not disputed that neither on that date nor on any previous date the name of Defendant No. 8 was mentioned in any of the list of witnesses. The learned trial Court dismissed this application holding that as Defendant No. 8's name was not mentioned in any of the lists of witnesses, she could not be permitted to be examined as a witness for Defendants 1 to 7. The civil revision has been filed against this order passed on 18-7-1963.

2. The only point for consideration is whether Defendant No. 8 could be examined by the Court on the date of hearing in the aforesaid circumstances. Order 16, Rule 1, Code of Civil Procedure, prescribes that at any time after the

suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents. Admittedly no summons had been taken for examination of Defendant No. 8. Rule 1-A says that where any party to the suit has at any time of or before the day fixed for the hearing of the evidence, filed in the Court a list of persons either for giving evidence or for producing documents the party may without applying for summons under Rule 1, bring any such person, whose name appears in the list to give evidence or to produce documents. This rule indicates that if the name of any witness is already mentioned in the list, then the party can examine such witness on his own right without applying for 1 summons under Rule 1. Admittedly the name of Defendant No. 8 was not included in any of the lists filed by Defendants 1 to 7. Mr. Sinha, however, contends that the application filed by him in which the name of Defendant No. 8 was given as a witness to be examined may be treated as a list of witnesses. I am unable to accept this argument. The purpose of these rules is that the opposite party would get full opportunity of knowing the witnesses to be examined by the other side. The application filed for examination of a particular witness would, for the first time, give notice of such fact to the other side. Such application is not therefore contemplated to come within the meaning of "list of witnesses". Order 16, Rule 7 A prescribes the circumstances under which summonses can be handed over by the Court to the party for service on witnesses. Admittedly in this case Defendants 1 to 7 did not take resort to the provisions of Order 16, Rules 1, I-A and 7-A. The only other provision under which Defendant No. 8 can be examined as a witness in the Court is Order 16, Rule 7, which lays down that any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power. Mr. Mitter contends that this power can be invoked only if the Court requires that a particular evidence is to be given. In this case the Court did not require Defendant No. 8 to be examined as a witness and Order 16 Rule 7, has therefore no application.

3. It is necessary to examine the scope of Order 16, Rule, 7. The language is "any person present in Court may be required by the Court". The requirement must necessarily be with reference to the issue involved in a suit. This residuary power has been vested in the Court to do substantial justice between the parties in cases where a party is precluded from examining a particular person or tendering document on account of his own laches. In each case the Court must examine whether it would exercise this power in favour of a party to do substantial justice and in that context it must also examine the laches and the reasons for the laches of the parties. If a particular witness or a document is very much essential for the decision of the suit, the Court may allow such person to be examined or the document to be produced by awarding heavy costs in favour of the opposite party. In this case the Court has not applied its mind to the provisions of Order 16, Rule 7. Defendants 1 to 7 claim their title on the basis of a purchase from the husband of Defendant No. 8 by a registered sale-

deed. Whatever be the merit of the case, Defendant No. 8 is an essential witness for Defendants 1 to 7 when liar husband is dead. If after taking into consideration this fact the trial Court would still say that it would not exercise its discretion, in favour of Defendants 1 to 7, it might be difficult for the High Court in its revisional power to interfere with such an order by saying that the jurisdiction was exercise with material irregularity. In this case, however, it is obvious that the lawyer for Defendants 1 to 7 being himself ignorant of the provisions of Order 16, Rule 7, never placed them before the Court. While the counsel on one hand is responsible for placing before the Court all material provisions, it is also incumbent upon the Court to know what powers it itself has. The Court had a jurisdiction under Order 16, Rule 7. He was not aware of such jurisdiction and failed to exercise that jurisdiction. The High Court would be fully justified to interfere with such order on account of failure to exercise its jurisdiction. Mr. Mitter placed the petition for examination of Defendant No. 8 and contended that there was absolutely no mention in the petition about Order 16, Rule 7. This is so. But as I have already said, it was incumbent upon the Court to examine whether it had got jurisdiction to allow such a petition. Failure on the part of a party to bring a particular provision to the notice of the Court would neither confer nor take away the jurisdiction. I am satisfied that in the circumstances of this case, the learned trial Court should have permitted examination of Defendant No. 8 as a witness when she was present.

4. That apart, if the Court had some judicial experience, it should not have allowed so much of its time to have been wasted leading to unnecessary expenses on the part of the parties by taking such a technical view. Defendant No. 8 was present in Court when the witnesses of Defendants 1 to 7 were under examination. From the admitted pleadings, Defendant No. 8 figures very prominently as her husband had conveyed title to Defendants 1 to 7. In such circumstances, the discretion of the Court is bound to err on the side of the application made by Defendants 1 to 7. I am satisfied that the learned Judge never applied his mind to the facts of this case and dismissed the application without looking to the law.

5. In the result, the Civil Revision is allowed and the order of the learned Munsif dated 18-7-1963 is set aside. He is to examine Defendant No. 8 as a witness for Defendants 1 to 7 on a date fixed soon after the receipt of the records.

6. The Petitioners must however pay the costs to opposite parties 1 and 2 for the reasons that their counsel did not bring to the notice of the Court that it had power under Order 16, Rule 7 to allow such an application and they took dilatory step; for the examination of Defendant No. 8. Taking everything into consideration, a consolidated sum of Rs. 50/- (Rupees fifty) would be sufficient towards costs. Unless this amount of Rs. 50/- is paid on the date of hearing when Defendant is to be examined, this application would be taken to have been dismissed without further reference to the Bench.

Revision allowed.