
(1986) 05 OHC CK 0014
In the Orissa High Court
Case No : Civil Revision No. 90 of 1981

Braja Mohan Naik and Others

APPELLANT

Vs

Chakradhar Patel and Others

RESPONDENT

Date of Decision : 16-05-1986

Acts Referred:

Citation : (1986) 2 OLR 180

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : R.N. Sinha, for the Appellant; S.S. Swain, for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—This revision is directed against the order passed by the learned Munsif, Kuchinda, permitting withdrawal of the suit under Order 23, Rule 1(3) of the CPC ("Code" for short).

2. Opposite party No. 1 claiming to be the adopted son of Ramakrushna Patel and his wife Shrimati Patel and further claiming under a registered deed of gift executed by Shrimati Patel in his favour on 25-10-1957 in respect of the suit property consisting of house, homestead and agricultural land initiated a proceeding u/s 145 of the Code of Criminal Procedure (Criminal Misc. Case No. 4 of 1975) in the Court of the Subdivisional Magistrate, Kuchinda, against the petitioners and the Predecessor-in-interest of opposite parties 2 to 8. In that proceeding, the suit property was attached u/s 145(1) and the parties were directed to establish their rights in a competent Court. Thereafter, he instituted Title Suit No. 4 of 1977 and averred in the plaint that being the adopted son of Ramakrishna Patel and his wife Shrimati Patel and on the basis of the registered deed of gift dated 25-10-1957 executed in his favour by Shrimati Patel, he had acquired title and possession in respect of the suitproperty. He prayed for declaration of his right, title and interest in respect thereof. He valued the suit for the purpose of Court-fee and jurisdiction at Rs. 200/- because, the suit was

purely of a declaratory nature and paid fixed Court-fee of Rs. 22. 50.

3. The petitioners and the predecessor-in-interest of opposite parties 2 to 8 in their written statement not only stoutly denied the claim of opposite party No. 1, but also claimed title and possession in respect of different parcels of the suit land on the basis of documents said to have been executed in their favour by Shrimati Patel. Besides, they raised two specific contentions which should be stated, because, they are relevant for disposal of civil revision. The first contention was that the suit was bad for non-joinder of parties, because, natural heirs of Ramakrishna Patel, namely, opposite parties 9 to 16 were not impleaded as parties to the suit. The second contention was that the market value of the suit property would be not less than Rs. 30,000/- and so the Court of Munsif, Kuchinda, has no pecuniary jurisdiction.

4. During the pendency of the suit, opposite parties 9 to 16 filed a petition under Order 1, Rule 10 of the Code. In that petition they denied the plaintiff's exclusive title and possession in respect of the suit property and called the deed of gift executed by Shrimati Patel in favour of opposite party No. 1 as a fraudulent and conditional one which was subsequently revoked. According to them, one Mahabhangi, sister of Ramakrushna Patel, inherited the suit property as the sole living heir. After her death intestate, opposite parties 9 to 16 inherited the suit property and are the rightful owners thereof. Therefore, they claimed to be added as defendants in the suit. By order dated 24-6-1980 the learned Munsif allowed the petition under Order 1, Rule 10 of the Code and directed opposite parties 9 to 16 to be added as defendants to the suit.

5. In due course, issues were settled, but before the suit could be taken up for hearing, opposite party No. 1 came up with a petition under Order 23, Rule 1(3) of the Code for withdrawal of the suit with liberty to institute a fresh suit in respect of the same subject-matter. Two grounds were set forth in the petition. First, after addition of opposite parties 9 to 16 as defendants in the suit, the plaint would require large scale amendments which will altogether change the character of the suit and second, mode of valuation of the suit will also change, in consequence of which, court-fee already paid would be improper. This petition was allowed by the impugned order.

6. Mr. R. N. Sinha, learned counsel appearing for the petitioners urged that non-joinder of necessary parties and under-valuation of the suit are not formal defects. So, on these grounds, it was not open to the learned Court below to have permitted withdrawal of the suit. He also pointed out that after the impugned order was passed, opposite party No. 1 has already instituted a suit and the averments in the plaint are identical with those in the earlier suit, except that, necessary parties were added. According to him, therefore, there was neither any necessity to permit withdrawal of the suit on facts nor according to law. This point requires careful examination.

7. Non-joinder of necessary parties is not a formal defect. It strikes at the root of

the suit, because, an effective and executable decree cannot be passed in the absence of the necessary parties to the suit. This is the settled-position of law as has been discussed in detail in *Khatuna and Another Vs. Ramsewak Kashinath*, a partnership firm and Another, . But in this case the question of non-joinder of necessary parties was a non-issue, because by order dated 24-6-1980 opposite parties 9 to 16 were added as defendants and whatever defect there might have been in the plaint was thereby removed. After they were added as defendants, there might have been necessity for opposite party No. 1 to allege some more facts or even add further prayers for consequential reliefs. But instead of making necessary amendments to the plaint, a petition for withdrawal of the suit was filed, which, in my opinion was premature. Non-joinder of necessary parties being one of the grounds of withdrawal of the suit, therefore, cannot be sustained.

8. In *A. I. R. 1919 Mad. 1071 (2)*, *Kannusami Pillai v. Jagathambal*, a Division Bench held that objection to a suit on the ground of jurisdiction and insufficient court-fees are analogous to formal defects. In suits where the subject-matter is grossly undervalued and the correct valuation exceeds the pecuniary jurisdiction of the Court in which it is instituted, the Court instead of permitting withdrawal of the suit with liberty to the plaintiff to bring a fresh suit on the same cause of action, should return the plaint to the plaintiff for presentation in the Court of competent jurisdiction. In *Atul Krushna Roy Vs. Raukishore Mohanty and Others*, , an almost identical view was taken and it was held that non-payment of proper court-fee is a formal defect within the meaning of Order 23, Rule 1 of the Code. In this case the suit was valued at Rs. 200/- and a fixed court-fee of Rs. 22.50 was paid. The petitioners and the predecessor-in-interest of opposite parties 2 to 8 raised objection to the mode of valuation and to the grossly low court-fee paid on the plaint. According to them, the value of the suit property was not less than Rs. 33,000/-and so the suit was grossly undervalued and a low amount of court-fee was paid by opposite party No. 1. Although undervaluation of the suit and consequent non-payment of proper court-fee are formal defects according to the principle laid down above within the meaning of Order 23, Rule 1 of the Code, yet, instead of permitting withdrawal of the suit on this ground, the learned Munsif after hearing both parties on this issue was competent to settle the valuation of the suit and the court-fee payable on the plaint and if the suit was beyond his pecuniary jurisdiction he was competent according to law to return the plaint for presentation to the Court of competent pecuniary jurisdiction. Instead of adopting this simple procedure which was available, the learned Munsif, in my view, exercised his discretion and jurisdiction illegally" by permitting withdrawal of the suit. Therefore, this ground cannot also be supported.

9. For the reasons stated above, the impugned order permitting withdrawal of the suit with liberty to institute a fresh suit on the same cause of action cannot be supported according to law. Instead of passing the impugned order, the learned Munsif ought to have directed opposite party No. 1 to amend the plaint

suitably and to dispose of the amendment petition after hearing both parties. That would have solved the problem of there being any defect in the plaint. Now that after vacation of the impugned order the suit will be revived, the learned Munsif shall keep in view the observations made above and without being influenced in any manner shall proceed according to law.

10. In the result, the civil revision is allowed and the impugned order is vacated. The parties are directed to appear in the Court of the learned Munsif, Kuchinda, on 23-6-1986 to receive directions. The lower Court records be sent back at once.