
(1985) 04 OHC CK 0025
In the Orissa High Court
Case No : Civil Revision No. 50 of 1983

Kanhu Charan Pradhan and Others

APPELLANT

Vs

Banambar Pradhan and Another

RESPONDENT

Date of Decision : 27-04-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 24

Citation : AIR 1986 Ori 213

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : P.V. Ramdas, for the Appellant; A.K. Sahoo, for the Respondent

Judgement

G.B. Patnaik, J.—Plaintiffs are the petitioners challenging the order of the Additional Subordinate Judge, Puri, allowing an application filed under Order 9, Rule 13 of the CPC (hereinafter referred to as the "Code").

2. O. S. No. 10/95 of 1981/79-I was decreed ex parte on 30-3-1981 and an application to set aside the said ex parte judgment and decree was filed under Order 9, Rule 13 of the Code on 12-7-1982. In the said application, defendant No. 1 asserted that the suit was originally pending in the Court of the Subordinate Judge, Puri, but it was transferred to the Court of the Additional Subordinate Judge on 5-2-1981, but no notice of such transfer was given to the defendants, nor the defendants' counsel intimated the said fact. As a result, the defendants has no knowledge about the said transfer. Consequently, the defendants were set ex parte on 30-3-1981 and the suit was decreed ex parte. It was further asserted by the defendants that on account of mental imbalance, the defendants could not appear and take part in the proceedings and, therefore, their absence was not wilful.

3. The plaintiffs denied the assertions made in the application for restoration and contended that the defendants were fully aware about the transfer of the suit from the file of the Subordinate Judge to that of the Additional Subordinate

Judge and defendant No. 1 was present and has filed hazira on several subsequent dates before the defendants were set ex parte on 30-3-1981. Further, the defendants' default was wilful and merely to prolong the litigation. The plaintiffs also averred that the application for restoration was barred by limitation.

4. The learned Addl. Subordinate Judge rejected the contention of defendant No. 1 that his mental imbalance stood on his way of taking part in the proceedings. On the second count, however, he came to the conclusion that absence of notice of transfer of the suit vitiated the ex parte decree. On the question of limitation, the learned Additional Subordinate Judge did not take up that issue for consideration since the advocate appearing for the plaintiffs did not press the same at the time of arguments.

5. Mr. P. V. Ramdas, the learned counsel for the petitioners, contends that the view of the Subordinate Judge that the transferee Court or the transferor Court must give notice of the transfer to the party concerned and failure to give such notice would vitiate the proceeding, is not sustainable in law and the decisions relied upon by the learned Additional Subordinate Judge do not apply to the facts and circumstances of the present case. He further submits that u/s 3 of the Limitation Act, the Court has a duty to take up the issue of limitation and, therefore, non-pressing of the same by the counsel will not make a petition, which is barred by the law of limitation, valid.

Mf. A. K. Sahoo, the learned counsel for the opposite parties contends that the ex parte decree having been set aside by the trial Court in exercise of its discretion, this Court should not interfere with the same in exercise of revisional jurisdiction.

6. I find much force in the contention of Mr. Ramdas and in my view the two decisions relied upon by the learned Additional Subordinate Judge have no application to the present case. In the case of Krishnaji Mahadeo Bapat Vs. Wamanrao Balwantrao Shinde and Another, the suit was originally pending in the Court of the Civil Judge at Chiplun. Thereafter by an order of the District Judge, it was transferred to the Court of the Civil Judge at Khed. Relying on the provisions of Order 3, Rule 4, Code of Civil Procedure, the learned Judge came to, the conclusion that if the suit or proceeding is transferred from one Court to a totally distinct Court, the authority of an advocate in the original Court would come to an end. In the case of Kishore Kumar Agrawal Vs. Basudeo Prasad Gutgutia and Another, the transfer order passed by District Judge, Monghyr, in exercise of his power u/s 24 of the CPC transferring the suit from the Court of the Subordinate Judge, Monghyr to the Court of the Subordinate Judge, Jamui. In that context, the learned Judge observed : --

".....In every case of transfer the transferor Court is duty bound to send a separate notice to each party in respect of the transfer of the case. The transferor Court is required to send the notices for the simple reason that the party has to appoint a new lawyer in the transferee Court. It is for this reason it

is incumbent upon the transferor Court to send a notice of transfer to each party in a suit....."

The ratio of this case has no application where administratively a suit is transferred from one Court to the other at the same station for convenience. The transfer in this case was from the Court of the Subordinate Judge to that of the Additional Subordinate Judge. The defendant was appearing through counsel in the Court of the Subordinate Judge at Puri and the case stood transferred to the court of the Additional Subordinate Judge at Puri. There was no requirement of engagement of a new lawyer. The Court of the Additional Subordinate Judge at Puri will not come within the expression "a totally distinct Court" as used in the Bombay case (*supra*) nor is the transfer in this case made to a place of which the parties cannot be said to be aware of. Such transfer is usually made when either the original Court is over-burdened or any other Court does not get any work for the day. In my view, the two decisions relied upon by the learned Additional Subordinate Judge cannot have any application to the facts and circumstances of the case. Consequently, the conclusion of the Additional Subordinate Judge is not sustainable.

7. So far as the question of limitation is concerned, the plaintiffs counsel himself did not press this point. This question also involves several other facts and I think it is not proper for me to entertain this question in this revision.

8. Even though I have held that the conclusion of the learned Additional Subordinate Judge on the question of requirement of a notice from the transferor Court is not sustainable, yet on bigger principle, I am not inclined to interfere with the order of the Addl. Subordinate Judge. The Additional Subordinate Judge having set aside an *ex parte* decree and having permitted the party-defendant to contest the suit, it would be wholly inequitable for the High Court to interfere with the said order. The High Court in exercise of its revisional jurisdiction u/s 115 of the Code does not interfere with an order of the lower Court where real and substantial justice has been done even though the order may not be sustainable in law. I am firmly of the opinion that by the impugned order substantial justice has been done and consequently, I refrain from interfering with the said order in exercise of the power u/s 115 of the Code, but at the same time, I find that the *ex parte* decree has been set aside without any terms as to costs. In my opinion, the learned Additional Subordinate Judge should have awarded costs against the defendant for his non-appearance on the date when the suit was taken up for hearing. While, therefore, I refrain from interfering with the order of the Additional Subordinate Judge, I hold that the said order would be effective only on condition that the defendants-opposite parties pay to the plaintiffs-petitioners costs of Rs. 200/- (two hundred) within two weeks after the Courts reopen after summer vacation. It is made clear that payment of the costs, as aforesaid, shall be condition precedent to implementation of the order of the Additional Subordinate Judge setting aside the *ex parte* decree.

9. Subject to the aforesaid observation this Civil Revision is dismissed. There

would be no order for costs in this revision.