
(2008) 03 OHC CK 0069
In the Orissa High Court

Khirod Chandra Dash and Others

APPELLANT

Vs

Bimal Dash and Others

RESPONDENT

Date of Decision : 14-03-2008

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2008) 106 CLT 109 : (2008) 2 OLR 211

Hon'ble Judges : Indrajit Mahanty, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Indrajit Mahanty, J.—The Petitioners in this writ application seek to challenge an Order Dated 22.12.2007 passed by the Civil Judge (Jr. Divn.), Salipur, in Civil Suit No. 23 of 2005, by which order the Learned Civil Judge, accepted the filing of a counter claim raised by defendants 5 to 7 (Opp. Parties 1 to 3 herein) against defendants 1 to 4 (who are Petitioners in this writ application).

Learned Counsel for the Petitioners prays for exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution in the present case since the subordinate Court has assumed a jurisdiction which it does not have and/or exercised jurisdiction in a manner not permitted by law resulting in failure of justice and great injustice to the case of the present Petitioners.

2. The brief facts leading to filing of the present case are that Opp. Party No. 4, as Plaintiff has filed C.S.No. 23 of 2005 before the Civil Judge (Jr. Divn.), Salipur and has impleaded present Petitioners as defendants 1 to 4 in the said suit. Opp. Parties 1 to 3 have been impleaded as defendants 5 to 7 in the said suit, wherein, the Plaintiff has made a prayer seeking grant/declaration. of easementary right of passage in respect of H. Plot No. 329 belonging to the Petitioners and H. Plot No. 328 belonging Opp. Parties 1 to 3. It is averred that the present Petitioners filed their written statement denying the claim of the Plaintiff (Opp. Party No. 4) whereas defendants 5 to 7 (Opp. Parties 1 to 3) have

filed a separate written statement supporting the claim of the Plaintiff. Further, in the said suit, three witnesses including the Plaintiff were examined and cross-examined and at the said stage of the suit, defendants 5 to 7 filed a counter claim under Order 8, Rule 6A CPC claiming a right of easement in respect of H. Plot No. 329 belonging to defendants 1 to 4 (Petitioners herein). That petition under Order 8, Rule 6A filed by Opp. Parties 1 to 3 was contested and came to be allowed by the Civil Judge vide the impugned Order Dated 22.12.2007 under Annexure-5 to the Writ Petition.

3. Mr. Das, Learned Counsel for the Petitioners submits that Opp. Parties 1 to 3 (defendants 5 to 7) being co-defendants in the suit, they have no locus standi to file a counter claim against defendants 1 to 4 i.e. the present Petitioners. In support of his contention, Mr. Das has placed reliance upon a Judgment of Punjab & Haryana High Court in the case of Kulwant Singh Vs. Gurcharan Singh and Others, , and a Judgment of a constitutional Bench of the Hon"ble Supreme Court in the case of Pannalal Vs. State Bombay and Others, .

4. Mr. Jena, Learned Counsel for Opp. Parties 1 to 3 while supporting the impugned order has placed reliance upon a Judgment of this Court in the case of Lingaraj Saraf Vs. Akhaya Kumar Saraf and Others, which was also relied upon by the Trial Court) and submitted that a counter claim by one defendant against a co-defendant is maintainable. He submitted that by permitting the counter claim to be raised, the same land in question is also involved in the present suit counter claim by the co-defendants in the present suit has been lawfully accepted since it would result in finally adjudicating the matter inter se between all the parties and has been allowed with the object of avoiding multiplicity of cases.

5. I have gone through the impugned order and the citations relied upon by the rival parties. The Judgment of this Court rendered in the case of Lingaraj Saraf (supra) was passed in the context of a partition suit. In paragraph-10 of the said Judgment, the contention that a counter claim by one defendant against a co-defendant is not legally maintainable, was considered by this Court by placing reliance on a decision of the Constitutional Bench in the case of Panna Lal (supra) this Court reiterated the observations made therein to the effect that in "exceptional cases cross-objection can be decided among the co-defendants/co-Respondents". In the said case being dealt with by this Court, the defendant No. 1 had set up the plea that the share allotted in the partition of 1939 was exclusively his share and that neither defendant No. 2 nor his father Sadhu had any interest or claim in that share. Defendant No. 2 with the permission of the Court impleaded himself as a party under Order 10, Rule 1 CPC and raised a counter-claim that he has a share in the joint family property and that the said share be given to him. In such a situation, this Court came to a finding that the claim of Defendant No. 2 was maintainable as otherwise no final adjudication about the right of the parties was possible and would have entailed in multiplicity of proceeding.

6. Hon"ble supreme Court in the case of Panna Lal (supra) have clearly laid down the law in paragraph-18 of the Judgment which is quoted herein below:

18. In our opinion, the view that has now been accepted by all the High Courts that Order 41 Rule 22 permits as a general rule, Respondent 2 prefer an objection directed only the Appellant and it is only in exceptional cases such as where the relief sought against the Appellant in such an objection is intermixed with the relief granted to the other Respondents, so that the relief against the Appellant cannot be granted without the question being reopened between the objecting Respondent and other Respondents, that an objection under Order 41 Rule 22 can be directed against the other Respondents, is correct. Whatever may have been the objection under the old s. 561, the use of the word "cross objection" in Order 41 Rule 22 expresses on mistakably the intention of the Legislature that the objection has to be directed against the Appellant. As Rajamannar, C.J. said in Vadlamudi Venkateswarlu and Another Vs. Ravipati Ramamma and Another,

The Legislature by describing the objection which could be taken by the Respondent as a "cross objection" must have deliberately adopted the view of the other High Courts. One cannot treat an objection by a Respondent in which the Appellant has no interest as a cross-objection. The appeal is by the Appellant against a Respondent. The cross-objection must be an objection by the Respondent against the Appellant.

We think, with respect that these observations put the matter clearly and correctly that the Legislature also wanted to give effect to the views held by the different High Courts and that in exceptional cases as mentioned above an objection can be preferred by a Respondent against a co-Respondent is indicated by the substitution of the word "Appellant" in the third paragraph by the word "the party who may be affected by such objection."

From the aforesaid directive of the Supreme Court, it would be clear that as a general Rule under Order 41, Rule 22, a Respondent has authority to prefer an objection only against the Appellant. Therefore, it is clear that as a general Rule, a Respondent does not have a right to file a claim against a co-Respondent. The Apex Court has further held that it is only in "exceptional cases" such as (1) where the relief sought against the Appellant in such an objection is intermixed with the relief granted to the other Respondents, so that the relief against the Appellant cannot be granted without the question being reopened between the objecting Respondent and other Respondents. It is only in such circumstances that an objection under Order 41, Rule 22 can be directed against other Respondents and not in any other.

7. It would be clear from the facts of the present case that no such "exceptional case" has been made out by defendants 5 to 7 in their pleadings to maintain their counter claim against defendants 1 to 4. The mere factum that the land to which the counter claim related formed part of the plaint schedule land therefore,

was required to be adjudicated by the Civil Court, is not sufficient ground for the purpose of treating the present case as "exceptional case" as contemplated by the Apex Court in the aforesaid Judgment. Further it is clear from the facts of the present case that the relief sought for in the present counter claim is not against the Plaintiff at all and therefore, there is no possibility of any intermixing of relief granted to other defendants, if any. Apart from this, it is further clear that if defendants 5 to 7 have any grievance against defendants 1 to 4 and/or seek declaration of any right vis-a-vis inter se between the said parties, it is open for such a defendant to file a separate suit for adjudication of their rights and in the event such a suit is filed, there is no possibility of the question that has been raised in the present suit of being re-opened once again for adjudication. The facts and pleadings of the present case and the evidence obtained herein would determine the outcome of the present case and likewise, in the event defendants 5 to 7 file a suit seeking similar relief, the outcome and the result of the said suit would depend on the pleadings and evidence in the said suit. In other words, there is no chance of the same question being raised in the present suit of being re-opened in any later suit that may be filed by the defendants against the co-defendants.

8. It appears from the impugned Judgment that the Trial Court has placed reliance upon the "placitum" of the Judgment it has relied upon. It needs to be noted that there is every likelihood of being misled if reliance is placed on placitum of a Judgment, Instead of perusing and understanding the Judgment sought to be relied upon.

9. On consideration of the facts and law as discussed above, I am of the clear view that in the present case, by accepting the counter claim filed by defendants 5 to 7 against defendants 1/4, the Trial Court has sought to assume a jurisdiction which it does not have and/or has exercised jurisdiction in a manner not permissible in law, thereby clearly causing great injustice to the interest of defendants 1 to 4 who are Petitioners herein.

10. Mr. Bhuyan, Learned Counsel appearing for Opp. Party No. 4 raised a contention about the maintainability of the present Writ Petition. He further submitted that a writ of Certiorari is not maintainable against the impugned order. In the case of Surya Dev Rai Vs. Ram Chander Rai and Others, , in paragraph- 38, the Hon"ble Supreme Court has laid down the scope of exercising supervisory jurisdiction under Article 227 of the Constitution and I am of the view that issues raised in the present case are such as to give justification to exercise such writ jurisdiction, since clearly the subordinate Court has assumed the jurisdiction which it does not possess and/or has failed to exercise the jurisdiction which it does have and/or has failed to exercise the jurisdiction in a manner permissible in law resulting in a clear failure of justice or grave injustice against defendants 1 to 4 (Petitioners herein).

11. Accordingly, the said objection is over ruled.

12. In view of the discussions made above, the writ application is allowed and the Order Dated 22.12.2007 passed in C.S. No. 23 of 2005 by the Civil Judge (Jr. Divn.), Salipur is quashed.