
(1998) 11 OHC CK 0032

In the Orissa High Court

Case No : Miscellaneous Appeal No. 185 of 1997

Madhusudan Sahu

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 03-11-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 24, Order 41 Rule 25, Order 41 Rule 27

Citation : (1999) 87 CLT 871 : (1999) 1 OLR 67

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

Bench : Single Bench

Advocate : Ashok Mukherjee, G. Mukherjee, P. Mukherjee, B. Mishra and J. Rath, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—The plaintiff has filed this appeal against the judgment of the District Judge, Puri, wherein the appellate Court after allowing the amendment of written statement set aside the judgment of the trial Court and remanded the matter to the trial Court for fresh disposal after framing new issue. It is obvious that the said judgment and order of remand was passed in purported exercised of authority under Order 41, Rule 23-A of the CPC (in short, the "C.P.C.").

2. The plaintiff-appellant had filed O.S.No. 17-of 1983 in the Court of the Civil Judge (Junior Division), Puri, for a decree of permanent injunction restraining the respondent, i.e. the State of Orissa, from raising any construction on the disputed land and from interfering with the possession of the plaintiff and encroaching upon any part of the disputed land. It is the case of the plaintiff that the disputed land originally belonged to Dakshinaparswa Math and was the "Amrutamanohi" land of Lord Jagannath and the Mahant of the Math was the marfatdar in respect of the land. It is claimed that after the plaintiff was inducted as tenant for horticultural purpose and tenancy was created by delivery of possession and acceptance of rent, a lease deed had been executed on

10.10.1938. It is further claimed that the plaintiff after the death of his father continued in possession by paying rent to the ex-landlord and after vesting of the ex-intermediary estate on 18.3.1974, the plaintiff continued as a tenant and such right was recognised in O.E.A. Misc. Case No. 276 of 1981. It is further claimed that while the plaintiff wanted to raise the boundary wall, he was obstructed by police officials who claimed right over the disputed land.

3. In the original written statement, the defendant denied the allegations made in the plaint and stated that the father of the plaintiff was not inducted as a tenant, nor any tenancy right had been created. It was also pleaded that the order in O.E.A. Misc. Case No. 276 of 1981 had been obtained fraudulently by influencing the Revenue Inspector and the plaintiff had no right over the disputed land.

4. The trial Court decreed the suit. Thereafter, appeal was filed by the present respondent after about eight years and the appellate Court condoned the delay in filing the appeal subject to payment of Rs. 500/- as cost. The present appellant challenged the aforesaid order of the appellate Court condoning the delay in Civil Revision No. 95 of 1996. The High Court while confirming the order of the appellate Court allowing condonation of delay, directed that a sum of Rs. 15,000/- should be paid to the plaintiff as cost. Subsequently, after the matter went back to the lower appellate Court, the defendant filed a petition for amending the written statement and also filed an application under Order 41, Rule 27, C.P.C., to admit certain documents relating to acquisition of land by the State, as additional evidence. Thereafter, the appellate Court allowed the amendment, set aside the judgment of the trial Court framing new issue and directed the trial Court to dispose of the suit afresh. Hence, the present appeal.

5. It has been contended by the learned counsel for the appellant that the appellate Court has not given any reason for allowing the amendment of the written statement and for remanding the case to the trial Court for fresh disposal. It has been further contended that by allowing the amendment, the lower appellate Court has practically made the suit for injunction infructuous, as the plaintiff will be forced to file petition for amendment claiming title and thus, the nature of the suit would be changed. It has been further contended that the amendment allowed after such a long delay has the effect of nullifying the judgment of the trial Court and as such, the amendment should not be allowed at the appellate stage. The learned counsel for the respondent has supported the decision and submitted that the amendment was necessary for complete adjudication of the dispute between the parties and since a new issue had been framed, it was necessary to remand the matter to the trial Court.

6. The learned counsels for the parties have cited several decisions relating to scope of amendment at the appellate stage, but in view of the order proposed to be passed, it is unnecessary to refer to all the decisions cited. In the decision reported *Pandit Ishwardas Vs. State of Madhya Pradesh and Others*, it was observed :

".....There is no impediment or bar against an appellate Court permitting amendment of pleadings so as to enable a party to raise a new plea. All that is necessary is that the appellate Court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking, such amendment and, if made at the appellate stage, the reason why it was not sought in the trial Court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But there is no prohibition against an appellate Court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court."

It is apparent from the judgment of the appellate Court that it has not considered the various principles relating to amendment of written statement. The entire discussion of the appellate Court on the question of amendment is contained in paragraph-10 of the judgment and needless to point out that nothing has been discussed relating to permissibility of amendment of the written statement at the stage of appeal and the appellate Court has been swayed away by the fact that the High Court had earlier confirmed the order relating to condonation of delay and had directed payment of Rs. 15,000/- as cost. As observed by the Supreme Court, there is no doubt that the amendment of pleadings can be permitted even at the appellate stage. However, the well-known principles relating to such amendment must be considered. A perusal of the judgment of the appellate Court clearly indicates that there has been singular lack of application of mind on the part of the appellate Court. Needless to point out that the order of amendment appears to have been passed mechanically. It is, therefore, necessary that the question of amendment should be considered afresh by the appellate Court keeping in view the relevant principles of law. It is not necessary to burden this judgment with the various decisions on this aspect, as it is expected that when the matter is reconsidered, the learned counsels for both parties would cite relevant decisions.

7. The judgment of remand to the trial Court for fresh disposal after setting aside the judgment of the trial Court itself is vulnerable. Order 41, Rules 23-A and 25, C.P.C. contemplate situations where the matter can be remanded to the trial Court. Order 41, Rule 23, C.P.C. is obviously inapplicable as the judgment of the trial Court was not on the basis of a preliminary point. In the present case, the order of remand is apparently under Order 41, Rule 23-A, C.P.C. Order 41, Rule 23-A contemplates that where the appellate Court considers a re-trial to be necessary, the matter may be remanded. On the other hand, Order 41, Rule 25, C.P.C. contemplates that the appellate Court while retaining the appeal may remit certain issues to the trial Court. In the present case, the judgment of the lower appellate Court does not indicate as to why the procedure contemplated under Order 41, Rule 25, C.P.C. was not followed. A combined reading of Order 41, Rules 23-A, 24 and 25, C.P.C. makes it clear that when an appellate Court

after setting aside judgment considers a retrial to be necessary, it may follow the procedure under Order 41, Rule 23-A, C.P.C. Where, however, the evidence on record is sufficient to dispose of the appeal, procedure under Order 41, Rule 24, C.P.C. is to be followed and endeavour is to be made by the appellate Court to dispose of the appeal on the basis of existing materials on record, even though new issues may be framed. On the other hand, Order 41, Rule 25, C.P.C. contemplates that the appellate Court need not set aside the entire judgment and while remanding the matter to the, trial Court, it may refer certain issues to the trial Court so that appropriate finding can be submitted by the trial Court and thereafter, the entire matter can be disposed of by the appellate Court.

In the present case, the appellate Court even after allowing amendment and framing a new issue could have conveniently referred the said issue to the trial Court for determination so that necessary finding could have been submitted by the trial Court before the appellate Court. Remand of the entire case to the trial Court would definitely result in further delay in disposal of the matter.

8. for the aforesaid reasons, I allow the present appeal. It is made clear that the direction to the, appellate Court to dispose of the matter afresh is not to be taken as indicative of expressing any opinion on merit of the contentions raised in appeal and all the questions raised including the question of amendment of written statement and adducing additional evidence should be considered in an open mind without being influenced by any of the observations on the factual aspects of the matter. The parties are directed to appear before the appellate Court on 23rd November, 1998. No costs.