

(2016) 01 OHC CK 0028
In the Orissa High Court
Case No : C.M.P. No. 418 of 2015

Meena Kumari Bhagat

APPELLANT

Vs

Kuntala Nayak and Others

RESPONDENT

Date of Decision : 18-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4, Section 151, Section 94

Citation : (2016) 01 OHC CK 0028

Hon'ble Judges : Biswanath Rath, J.

Bench : Single Bench

Advocate : U.C. Pattanaik, S.D. Mishra, S. Pattnaik, M.R. Sahoo and S.M. Rehan, Advocates, for the Appellant; Damodar Deo, Maheswr Deo, A.K. Mallick and Debadutta Dhal, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Biswanath Rath, J.—1. In filing this Civil Miscellaneous petition, the petitioner has assailed the impugned order dated 18.05.2012 passed by the Civil Judge (Senior Division) First Court, Cuttack in I.A. No. 311 of 2012 arising out of C.S. No. 138 of 2008 considering an application under Order 39 Rule 3, C.P.C. and while rejecting the said application, passed an order of status quo pending consideration of the I.A.

2. In assailing the impugned order, Mr. Pattnaik, learned counsel for the petitioner contended that when the trial Court rejected the application under Order 39 Rule 3, C.P.C, it had no jurisdiction to pass a further order of injunction in the nature of status quo in a dismissal case and it is in this circumstance, Mr. Pattnaik, learned counsel further contended that the impugned order is in excess of jurisdiction and should be interfered with by this Court.

3. Per contra, Mr. Deo, learned counsel for the Opposite party Nos. 1 to 6 opposing the submissions made by Mr. Pattnaik, learned counsel for the petitioner, raises a preliminary question of objection regarding maintainability of

this proceeding referring to the decisions in the case between A. Venkatasubbiah Naidu - vrs- Chellappan and others as reported in , AIR 2000(SC) 3032 as well as a decision of this Court in the case between Purna Chandra Digal v. Tube Digal & Sila Digal and another reported in 1992 (1) Current Civil Cases-483 and contended that in view of the provision for appeal against such order and keeping in view of Section 94 of the Code of Civil Procedure, this Civil Miscellaneous Petition is not maintainable and the matter should be dismissed as not maintainable.

4. There is no denial to the fact that the impugned order is an out come of consideration of an application under Order 39, Rule 3, C.P.C pending consideration of an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure. There is also no dispute that the order of status quo has been passed by the trial court even after rejecting the application under Order 39, Rule 3, C.P.C.

5. Looking to the disputes involved in the matter, this Court is now to consider as to whether this Civil Miscellaneous Petition is maintainable or not and further in the event the Civil Miscellaneous Petition is maintainable, then whether the trial court had any jurisdiction to pass an order of prohibition while dismissing an application under Order 39, Rule 3 of the Code of Civil Procedure.

6. In support of the case, on the question of maintainability, Mr. Pattnaik, learned counsel for the petitioner referring to a decision of the Hon"ble Apex Court in the case between Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal reported in AIR 1962-SC-527 contended that in view of the decision laid down by the Hon"ble Apex Court, the petitioner has no other alternate than to move this Court as the impugned order is passed in exercise of power under Section 151 of the C.P.C. In support of his case, on merit of the order, Mr. Pattnaik, learned counsel for the petitioner also referring to the very same decision submitted that in considering an application under Order 39, Rule 3 of the Code of Civil Procedure, the trial court had no jurisdiction to exercise the power under Section 151 of the C.P.C particularly when it decides to reject the application under Order 39, Rule 3 of the C.P.C.

7. In opposition, Mr. Deo, learned counsel for Opp.party Nos. 1 to 6 on the other hand taking resort to the decision of the Hon"ble Apex Court in AIR 2000(SC) 3032 and the decision reported in 1992 (1) Current Civil Cases-483 contended that in view of the ratio decided that the petitioner has a clear alternate remedy and therefore the present litigation is not maintainable.

8. Before proceeding to the maintainability of the present application looking to the tenure of the order, this Court makes it clear that the impugned order is passed in exercise of power under Section 151 of the C.P.C and the trial court has dismissed the application under Order 39, Rule 3 of the C.P.C and therefore there is no scope for Appeal and the present petition is very much maintainable. Perused the decisions cited at the Bar. Looking to the decision reported in AIR

1962-SC-527, this Court finds under the observation of the Hon"ble Apex Court in paragraph-53 of the said decision that there is a clear bar for exercise of inherent jurisdiction in exercise of power under Section 151 of the C.P.C particularly while considering an application under Order 39, Rule 3, C.P.C. In presence of a clear provision under the Code, this Court finds since the trial court was considering an application under Order 39, Rule 3 of the C.P.C, the consideration of the trial court should have been within the provision of Order 39, Rule 3 of the C.P.C and in view of exercise of power under specific provision under the Code, the trial court had no scope to exercise the power under Section 151 of the Code. In this view of the matter, this Court finds the decision cited (Supra) supports the submission of Mr. Pattnaik, learned counsel for the petitioner.

9. Now coming to the decision cited by Mr. Deo, learned counsel for Opp.party Nos. 1 to 6, after perusing the judgment vide , AIR 2000 SC 3032, this Court finds in view of the fact and situation available in both the cases, remained altogether different and the said decision is not applicable to the case at hand. Similarly looking to the decision cited by Mr. Deo vide 1992(I) C.C.C-483, this Court finds that this Court in deciding a dispute as to whether appeal lies in an order arising out of application under Order 39, Rule 3, C.P.C. in paragraph-4 of the said judgment held as follows:

" xxx xxxxx xxx

Right of appeal is a creature of the statute. Unless such right is vested in a party by law, there is no scope for an appeal. When a party makes an application for an ex parte order of temporary injunction, order refusing to exercise discretion is disposal of such application only. Application under Order 39, Rules 1 and 2 remain as they are without being considered. Therefore, in cases where application under Order 39, Rule 3, C.P.C is considered and Court considers the application for injunction ex parte and passes an ex parte order of temporary injunction, it consists of two parts. One part is relating to satisfaction that it is a fit case for passing ex parte order and the other, the ex parte order itself. That part of the order where ex parte temporary injunction is passed, an appeal lies. It has been held by this Court in Padmanav Das and others v. Dhableswar Satpathy that an ex parte order of injunction is to be considered as an order passed under Rule 1 and Rule 2 of Order 39, C.P.C and as such, an appeal lies under order 43, Rule (r) C.P.C., where a Court declines to consider such an application before issue of notice, such an order is not an order under Order 39, Rule 1 or 2, C.P.C. Accordingly, no appeal lies against such an order. My view is supported by a decision of this Court reported in Naliniprava Patnaik and another v. Smt. Jyotirmayee Das and others.

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10. In the case at hand, the trial court has rejected the application under Order 39, Rule 3, C.P.C. Hence the decision referred to hereinabove rather supports the

petitioner's case. Further considering the submissions placed by Mr. Deo that in view of the interlocutory order passed by the trial court, petitioner still has a chance to file a petition to the very same court for discharge, variation or setting aside of the order of injunction. This Court after going through the provision contained under Order 39, Rule 4 of the C.P.C is of the view that Rule 4 of Order 39 is applicable only in the contingency in the event allowing an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure or under Order 39, R.3 of the C.P.C. In the present case, from the impugned order, this Court finds the trial Court has rejected the application under Order 39, Rule 3 of the C.P.C and the contingency under Order 39, Rule 4 of the C.P.C is not available for the petitioner.

11. In view of the discussion made herein above, the observations made and following the ratio involved in A.I.R 1962-S.C-527 as well as in 1992 (I) C.C.C-483 this Court while finding the Civil Miscellaneous Petition maintainable as against the impugned order, further finds the grant of interim order of status quo even after rejecting the application under Order 39, Rule 3 of the Code of Civil Procedure is per se illegal and therefore while interfering in the impugned order, this Court sets aside the impugned order. Further since the application under Order 39, Rules 1 and 2 of the Code of Civil Procedure is pending consideration of the trial court and since all the parties are contesting in the court, this Court directs the trial court to consider the application under Order 39, Rules 1 and 2 of the Code of Civil Procedure at the instance of the plaintiff by giving opportunity of hearing to the respective parties and take a decision thereon within a period of three weeks from today.

12. Parties are directed to produce the copy of this order before the trial court for his proceeding in the matter.

13. Civil Miscellaneous Petition stands allowed with the observation and direction made hereinabove.