

(2005) 07 OHC CK 0046

In the Orissa High Court

Case No : Regular Second Appeal No. 195 of 2002

Mrs. Reeta Mohanty

APPELLANT

Vs

Antaryami Pattnaik

RESPONDENT

Date of Decision : 23-07-2005

Acts Referred:

Citation : (2006) 101 CLT 338 : (2005) OLR 848 Supp : (2006) 66 SCL 49

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : B.H. Mohanty, D.P. Mohanty, B. Das, T.K. Mohanty and D.K. Pradhan, for the Appellant; S.S. Das, B. Mohanty, B.M. Patnaik, R. Sharma, S. Singh Samant and A. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—Plaintiff is the appellant before this Court against a reversing judgment.

2. Though this matter was listed for admission, the contesting respondents entered appearance and prayed for disposal of the appeal at the stage of admission. Accordingly, learned Counsel for the appellant as well as the respondent No. 1 who is the main contesting respondent were heard. Since the matter was argued at length by the learned Counsel appearing for both the parties, I consider it necessary to analyse the case of both the parties in order to find out as to whether or not this second appeal involves any substantial question of law to be decided.

3. The appellant had filed the suit for permanent injunction restraining respondent No. 1 from effecting any structural change in the management by allowing any outsider in the company in any capacity whatsoever, from misrepresenting the Court that the defendants 2 to 5, i.e., the financial institutions that the appellant had ceased to be a lifetime Director of the company, from alienating the suit properties to the outsiders and restraining the

financial institutions from according statutory recognition to any outsider in any capacity whatsoever in the management of the company till the outstanding dues are liquidated in full and the company is free from any encumbrances.

4. The case of the plaintiff-appellant is that she is the founder and permanent lifetime Director of a hotel named "M/s. Hotel Aristocrat Pvt. Ltd." located in Paradeep. The hotel commenced operation with effect from April, 1984 with the financial assistance received from two financial institutions, namely, Orissa State Financial Corporation (in short, "OSFC") and IPICOL. The appellant being a housewife entrusted the entire management of the hotel to respondent No. 1 who happens to be the brother of her husband and having full trust in him never checked the accounts, occupancy position or the financial affairs of the hotel. Taking advantage of the situation, respondent No. 1 started manipulating the accounts and defaulted in making payment of the instalments of the financial institutions, as a result of which the OSFC seized the hotel on 13-8-1993. The appellant had no other way except approaching this Court by filing a writ application and by order of this Court, she had to deposit Rs. 6,00,000 (Rupees six lakhs) at the first instance in order to prevent the financial institutions from making negotiations to sell away the valuable properties of the company to third parties. Thereafter, the appellant took steps for clearing the loan liability gradually in phased manner as directed by this Court and without the knowledge of the appellant, respondent No. 1 entered into an agreement with the financial institutions containing stipulations with regard to the higher rate of interest with retrospective effect. This conduct of respondent No. 1 burdened the hotel with additional pecuniary liabilities. After payment of the instalment dues relating to first two quarters of 1996, the OSFC again seized the hotel on 11-9-1996 on the ground that there was default in payment of two consecutive instalments and as a result, there was a total outstanding dues of Rs. 88,00,000 (Rupees eighty-eight lakhs). The appellant again approached this Court in a writ application and offered to pay the outstanding dues within a stipulated time. The further allegation of the appellant is that till 15-5-1994 he was the director and subsequently there had been no structural change in the management of the company. When she started taking active interest in the management of the company and resisted entry of outsiders into the Board of Management, respondent No. 1 fabricated documents to show that the appellant had resigned from the board of directors. Due to such conduct of respondent No. 1, she filed the suit for the relief as stated above.

5. Respondent No. 1 who was defendant No. 1 in the suit filed written-statement denying all the allegations made in the plaint. It was further stated in the written-statement that the plaintiff-appellant was shown as a lifetime Director in the Articles of Association of the company but she voluntarily resigned on 9-2-1994 from the Board of Directors of the company and transferred her share to one inducted Director, namely, Nidhi Sudan Behera on a consideration of Rs. 7,50,000 (Rupees seven lakhs and fifty thousand). Out of the said amount, she received a sum of Rs. 1,50,000 (Rupees one lakh and fifty thousand) by way of a demand

draft on 9-4-1994 and the balance amount was received by her in cash. The resignation tendered by her on 9-2-1994 was taken up in the Board meeting held on 9-3-1994 and the Board resolved to accept the same. Having resigned from the Board and transferred her share in the company for consideration, she has no right to file the suit to restrain the respondent No. 1 from admitting any other person as director of the company. The further case of the defendant-respondent No. 1 is that the appellant prior to her resignation had 16 per cent of share in the company which she had transferred. However, she having accepted the consideration money raised an issue with regard to her resignation by entering her name in Form No. 32 which was with her appointing one S.N. Nayak, a nominated Director of IPICOL in place of the previous director Mr. A. Parija, who had also been nominated by IPICOL. She did that with the purpose to show that she has been re-appointed as the Director of the company with effect from 25-7-1994. An objection was raised by respondent No. 1 before the Registrar of Companies and it was found that the Form No. 32 used by the appellant was a forged one and, therefore, the matter was referred to the Regional Director, Eastern Region, Calcutta.

6. On the basis of the aforesaid pleadings of the contesting parties, the trial court framed as many as seven issues and on consideration of the oral and the documentary evidence, decreed the suit. It was found by the trial Court that the resignation of the plaintiff-appellant and transfer of share pleaded by the defendant-respondent No. 1 have not been proved conclusively. Referring to Exts. 3, 7, 8, 12 series and 16, the trial court held that the plaintiff-appellant is continuing in the office of the Director. The trial court also found that the suit for injunction simpliciter in absence of any prayer for declaration is maintainable. The trial court also drew adverse inference because of non-examination of defendant No. 1.

7. The lower appellate Court reversed the findings of the trial court and allowed the appeal. On analysis of the evidence, the lower appellate Court found that though the plaintiff alleged fabrication of document by defendant No. 1, there has been no averment in the plaint indicating the specific document where the alleged fabrication has been made. The lower appellate Court also found that the plaintiff-appellant had submitted voluntary resignation and the same had been accepted by the Registrar of Companies and as such, she had lost her right to continue as Director. In this connection, the lower appellate Court also referred to Ext. F and found that the plaintiff had admitted in the said document about her voluntary resignation from directorship of the company. The lower appellate Court also found that the plaintiff also transferred her share for consideration.

8. In this appeal, several grounds have been taken challenging the finding of the lower appellate Court and on perusal of the said grounds it appears that most of the grounds relate to finding of fact. Shri B.H. Mohanty, learned Counsel for the appellant, submitted that the main question involved in the suit is as to whether the plaintiff-appellant had transferred her share in the company for consideration

and whether she had resigned from the directorship of the company. In order to come to a conclusion, it is necessary to refer to the oral and the documentary evidence adduced on behalf of the parties. Though Shri Mohanty argued at length on facts of the case, referring to several documents, he could not place any substantial question of law to be decided in this appeal. However, this appeal having been argued at length by the learned Counsel for the contesting parties, I proceed to examine the aforesaid question with reference to the evidence available on record.

9. The averments made in paragraph 16 of the plaint are relevant for the purpose of this case. It is stated in the said paragraph that the mischievous and malicious action on the part of the defendant No. 1 to fabricate a case against the plaintiff that she had resigned from the Board of Directors by manufacturing certain documents for being utilised by defendant Nos. 2 to 5 is a cause adequate enough for the plaintiff to go to trial and establish the truth. As is evident from the said averment, there is no specific pleading as to what document has been manufactured indicating resignation of the plaintiff from the Board of Directors of the company. In paragraph 31 of the written statement filed by defendant No. 1, it has been specifically averred that though the name of the plaintiff had been indicated as a Lifetime Director in the Articles of Association of the company, she had voluntarily resigned on 9-2-1994 from the directorship and transferred her share in favour of an inducted Director Shri Nidhi Sudan Behera on receipt of consideration of Rs. 7,50,000 (Rupees seven lakhs and fifty thousand). It is also averred that the resignation tendered by the plaintiff on 9-2-1994 was taken up by the Board in its meeting on 9-3-1994 and the Board resolved to accept the resignation. In view of the above pleadings, the burden was on the plaintiff to prove that a document had been fabricated showing her resignation from the directorship of the company. In this connection, reference be made to the evidence of the plaintiff who has examined herself as P.W. 3. In paragraph 10 of her deposition, she has stated that she came to know on a telephonic call from one IPICOL engineer regarding sale of shares to one Nidhi Sudan Behera in March, 1994. Then she rushed to IPICOL House and on enquiry came to know that defendant No. 1 had submitted documents for administrative approval of Nidhi Sudan Behera's induction in the company as a director. She also learnt that defendant No. 1 has also moved the OSFC in an application for her removal as a Director. In the cross-examination, confronted with Ext. 16 (earlier marked "X") she admitted that, that is the letter relating to her resignation and in paragraph 32 of her deposition, she admitted that the letter dated 9-2-1994 marked as Ext. B is the letter relating to her resignation from directorship. In paragraph 41 of her deposition, she had also admitted that after 9-3-1994 she had not attended any meeting of the Board of Directors. Faced with the above evidence, Shri B.H. Mohanty, learned Counsel for the appellant, referred to certain other documents to show that the plaintiff-appellant was continuing as a director of the company even after 9-3-1994. Shri Mohanty referred to documents such as Ext. 12 series and contended that if the plaintiff

had resigned from the directorship, there was no reason for her to pay the instalments of the OSFC even after her resignation was accepted. Ext. 12 series are the receipts showing payments to OSFC on behalf of Hotel Aristocrat Private Limited ranging between September, 1993 and September, 1994. True it is, the receipts indicate the payments of instalments of different amounts on different dates in between September, 1993 and September, 1994, but nothing has been placed before the Court to show that the payments had been made by the plaintiff herself. Ext. 12/c and Ext. 12/d relate to the period after 9-3-1994. Referring to Ext. 12/c, it was contended by Shri Mohanty that the amount paid to OSFC towards instalment had been paid from the account of the plaintiff. Learned Counsel for the respondent No. 1, in this connection, drew attention of the Court to the deposition of the plaintiff made in paragraph 35. The plaintiff in her deposition has stated that she has got one clinic and she owns the said clinic which runs in the name of Rita Clinic. She has also stated that she had obtained loan to run the clinic in her name and the entire building was completed and equipments were purchased for an amount of Rs. 7,00,000 (Rupees seven lakhs) and the said amount has been obtained as loan. Referring to the said deposition, it was contended by the learned Counsel for the respondent No. 1 that the payment made to SFC from her account are towards payment of instalments of Rita Clinic and not for Hotel Aristocrat Private Limited. Though the said receipts indicate that payments were made towards instalment dues of M/s. Hotel Aristocrat Private Limited, a doubt arises as to whether the said amount had been paid by the plaintiff towards the outstanding dues of the hotel in view of her admission in the deposition that she had submitted a letter of resignation on 9-2-1994. Apart from the above, from Ext. 2 it appears that under the provisions of the Companies Act, Form No. 32 was submitted in May, 1999 wherein it is indicated that the plaintiff ceased to be a director of the company with effect from 9-3-1994 because of resignation. Ext. 3 is another document of November, 2001 in Form No. 32 under the Companies Act which indicates that the plaintiff had been re-appointed as Director of the Company with effect from 25-7-1994. These two documents were exhibited on behalf of the plaintiff. Ext. 2 clearly indicates that she had resigned and Ext. 3 clearly indicates that Form No. 32 was submitted to show that she had been re-appointed. Therefore, the stand taken by defendant No. 1 that the plaintiff had resigned from the directorship gets support not only from the evidence of the plaintiff but also from the aforesaid documents Exts. 2 and 3. Therefore, I do not find any reason to disagree with the finding of the lower appellate Court that the plaintiff had resigned from the directorship of the company.

10. Having held that the plaintiff-appellant had resigned from the directorship of the company, the next question that arises for consideration in this appeal is whether the plaintiff-appellant has again been inducted as a director of the Company. Shri B.H. Mohanty, learned Counsel for the appellant, placed reliance on Ext. 3 and submitted that the said document clearly indicates that the plaintiff was re-appointed as a director of the company with effect from 25th of July,

1994. The case of the plaintiff is that she had never resigned from company as a director and that she continued to be a director of the company till filing of the suit. The Memorandum and Articles of Association of the company clearly prescribes that the qualification of a director shall be holding of shares of nominal value of Rs. 10,000 (Rupees ten thousand) in the company. There is no dispute that at the time of formation of the company, the plaintiff-appellant was appointed as a Director having shares worth Rs. 10,000 (Rupees ten thousand). Since the specific stand of the plaintiff is that she had never resigned from the company and continued to be a director, she should have produced the share certificate before the Court in order to prove that she is continuing as a director of the company. Having not produced any share certificate issued in her favour, the plea of the defendant-respondent No. 1 that she had transferred her shares in favour of one Nidhi Sudan Behera appears to be acceptable. Moreover, if she had been re-appointed as a director of the company as per Ext. 3, she should have produced documents to show that she had again purchased shares of the company for being a director. No such documents have also been produced by the plaintiff to prove that she was re-appointed as a director of the company.

11. In view of the findings arrived at, it is clear that while continuing as a director the plaintiff had resigned from the directorship of the company by selling her shares in favour of one Nidhi Sudan Behera and she had never been re-appointed as a director thereafter. Therefore, she cannot maintain the suit against the defendant-respondent No. 1 claiming herself to be a director of the company. Hence, she has miserably failed to prove that she was a director of the company on the date of filing of the suit.

12. The only other question raised by the learned Counsel for the appellant is with regard to the examination of the Power-of-Attorney holder of defendant-respondent No. 1. It was contended by Shri Mohanty that the defendant No. 1 should have examined himself and his Power-of-Attorney having been examined in Court, the trial court has rightly drawn adverse inference against defendant No. 1. In this connection, he also relied on some decisions of this Court as well as the Apex Court. I have not referred to the aforesaid decisions as the said question has become irrelevant for the purpose of this case having held that the plaintiff-appellant has failed to prove that on the date of filing of the suit she was continuing as a director of the company.

13. In view of the findings above, I do not find any substantial question of law involved in this second appeal to be decided. Accordingly, the second appeal stands dismissed. There shall, however, be no order as to costs.