

(2017) 03 OHC CK 0071

In the Orissa High Court

Case No : 48 of 2009

**M/s.Kalinga Utkal Buildwell Private Ltd. Vs Orissa Textile and Steels
Employees,?Nayabazar, Cuttack & Others**

Date of Decision : 08-03-2017

Acts Referred:

Code of Civil Procedure, 1908, <a href=3859 — Order 1Rule
10>Order 1Rule 10, Order 7Rule 11

Citation : (2017) 03 OHC CK 0071

Hon'ble Judges : Biswanath Rath

Bench : SINGLE BENCH

Advocate : S.P.Mishra, S.Nanda, B.Mohanty, S.S.Kashya,?S.K.Sahoo,
B.S.Panigrahi, K.Samantara, B.K.Sahoo, K.C.Sahoo, B.Satpathy, S.K.Sanganeria,
P.Nayak

Judgement

1. This Civil Revision has been filed assailing the impugned order dated 9.9.2009 passed by the 2nd Additional Civil Judge (Senior Division), Cuttack thereby rejecting an application under Order 7, Rule 11 of the Code of Civil Procedure at the instance of the present petitioner by appearing as defendant no.8 in the suit.

2. Short background involved in the case is that opposite party no.1 filed a Civil Suit against the Orissa Textile and Steels Employees, Nayabazar, Cuttack and six others bearing C.S. No.12 of 2006 praying therein as follows: "i. A decree be passed declaring that the outstanding statutory dues (under computation) of the employees under defendant no.1 and 3 who are represented by the plaintiff will be recovered from the properties of the defendant no.1 and 2 establishments.

ii. The defendants be injected from transferring by any means the properties of defendant no.1 and 2 establishment. So long as the dues of the employees are not settled.

iii. A decree for mandatory injunction directing the defendant to restore the property if transferred in the meantime.

iv. The decree be passed for the cost of the suit.

v. And any other decree as may deem fit for fair disposal of the case."

3. Pending trial of the suit, the plaintiff i.e. the present opposite party no.1 filed an application for impleading the present petitioner as defendant by way of an application under Order 1, Rule 10 of the Code of Civil Procedure, which application being allowed by the trial court vide order dated 9.10.2006. Consequent upon allowing the application under Order 1, Rule 10 of the Code of Civil Procedure, the present petitioner was impleaded as defendant no.8 in the suit. On service of notice, the defendant no.8 at the first hand filed an application under Order 7 Rule 11 of the Code of Civil Procedure for rejection of the plaint as against the present petitioner i.e. defendant no.8. This application was decided on contest ultimately rejecting the application of the petitioner under Order 7 Rule 11 of the Code of Civil Procedure on the premises that the petitioner being a subsequent purchaser of the property involved in the suit there may not be an effective adjudication of the suit in absence of the present petitioner. Further, any judgment and decree passed in the suit may also remain ineffective in absence of defendant no.8. It is under the above premises, the trial court also held that there was no scope for rejecting the plaint at that stage.

4. In assailing the impugned order, Sri S.P.Mishra, learned Senior Counsel submitted that the present petitioner i.e. the defendant no.8 was not a party in the suit at the original stage. It has only been arrayed as a party by way of an application under Order 1 Rule 10 of the Code of Civil Procedure at the instance of the plaintiff therein. Even though the present petitioner was sought to be added as a party to the suit on the premises that the disputed property should transfer in favour of the present petitioner pending disposal of the suit, but the plaint pleading remain as it is, even after addition of this petitioner. It is in the above premises, Sri Mishra, learned Senior Counsel also further contended that even after bringing this petitioner as defendant, there is no change to the relief portion so as to seeking any decree against the defendant no.8. There is no pleading involving defendant no.8 and therefore there remains remote chance in considering the transaction taken place in between. Sri Mishra, learned Senior Counsel therefore submitted that the defendant no.8 is neither a necessary party nor a proper party in the Civil Proceeding, further there is no difficulty in passing the decree either way taking into consideration the pleadings of the parties from the beginning therein and the trial court has failed in appreciating all the above aspects. Referring to the decisions in the case of *The Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman v. M/s. Ponnamman Educational Trust represented by its Chairperson/Managing Trustee*, 2012 (II) CLR (SC) -237, in the case of *P.V.Guru Raj Reddy Rep. by GPA Laxmi Narayan Reddy & Anr. v. P.Neeradha Reddy & Ors.Etc.*, 2015 (I) OLR (SC) -714 and in the case of *Saleem Bhai and others v State of Maharashtra and others*, (2003) 1 Supreme Court Cases 557, Sri Mishra, learned Senior Counsel submitted that his claims are well supported by the above decisions of the Hon"ble Apex Court and under the circumstance prayed this Court to interfere in the impugned order and thereby while allowing the application under Order 7 Rule

11 of the Code of Civil Procedure, the plaint be directed to have been dismissed as against the defendant no.8, the present petitioner.

5. Sri B.K. Sahoo, learned counsel appearing for the contesting opposite party, the plaintiff, on the other hand though not disputed the allegation of the petitioner that there is no amendment in the original pleading even after the addition of this petitioner as defendant no.8 but submitted that the prayers involved in the original suit and for being addition of defendant no.8, may be at a subsequent stage, automatically stands extended in respect of defendant no.8. Further, defending the impugned order, Sri Sahoo, learned counsel appearing for the contesting opposite party contended that once a defendant is added by consideration of an application under Order 1, Rule 10 of the Code of Civil Procedure, there is no further scope with the trial court dismissing the suit as against such defendant. The suit is only required to be put for trial involving the defendant no.8. Sri Sahoo, learned counsel further contended that for the developments taken place during pendency of the suit, particularly, for transaction of the disputed property by the contesting defendant in favour of the present defendant no.8 and for the involvement of the disputed property in the sale transaction involving defendant no.8, there cannot be any effective adjudication of the suit in absence of the defendant no.8 i.e. the present petitioner. Further, taking this Court to the order passed in a disposed of writ petition and the order in the review arising thereon, Sri Sahoo, learned counsel further contended that for the direction contained in the writ petition directing to deposit the sale proceed and keeping the same in fixed deposit till disposal of the suit and for non-compliance of this order by the original contesting defendant, there is no deposit as such and unless the defendant is allowed to continue, disclosure to the fact of sale and involving value thereof, cannot be brought into picture and this situation will lead to an in-executable judgment and decree in the suit. Sri Sahoo, learned counsel referring to the decisions in the case of Aliji Momonji & Co v. Lalji Mavji and others, (1996) 5 Supreme Court Cases 379 and in the case of Shuvam Construction Pvt. Ltd. v. Smt.Babita Mohanty & Anr., 109 (2010) CLT 368, submitted that the contesting opposite party's claim has the support of these decisions. Under the aforesaid circumstance and for the ruling referred to therein, Sri Sahoo submitted that there is no error in the impugned order leaving any scope for interfering in the same.

6. Considering the rival contentions of the parties, this Court finds originally the suit was filed only involving the opposite party nos.2 to 8 appearing as defendant nos.1 to 7 and thus the suit originally had no pleading involving defendant no.8, who has been added subsequently allowing an application under Order 1, Rule 10 of the Code of Civil Procedure and the suit at the original stage was having the following prayer but confined to the defendants available then:- "i) a decree be passed declaring that the outstanding statutory dues (under computation) of the employees under defendant No.1 and 2 who are represented by the plaintiff will be recovered from of properties of the defendant No.1 and 2 establishments.

ii) The defendants be enjoined from transferring by any means the properties of defendant no.1 and 2 establishments. So long as the dues of the employees are not settled.

iii) A decree for mandatory injunction directing the defendant to restore the property if transferred in the meantime.

iv) The decree be passed for the cost of the suit.

v) And any other decree as may deem fit for fair disposal of the case."

7. Perusal of the amended plaint, this Court finds there is no change in the pleading in the suit absolutely except there is a change in the plaint at the side of defendant bringing in the present petitioner as defendant no.8. This Court finds while the matter stood as above, there is some developments during pendency of the suit, which appears as follows: The contesting opposite party i.e. the plaintiff upon rejection of an application for interim protection vide I.A.No.7 of 2006 and the confirmation of the said order in F.A.O.No.26 of 1996 brought a writ petition (W.P.(C).No.5479 of 2006) before this Court for interfering in the impugned order therein and thereby allowing the I.A.No.7 of 2006 at the instance of the plaintiff. This writ petition was heard and disposed of with the following order:

"I, therefore, modify the orders passed by the courts below and direct that the opposite parties be permitted to sell the machineries and materials under observation of the trial court and the entire sale proceeds be deposited before the trial court which shall be kept in fixed deposit till disposal of the suit. Depending on the decisions taken in the suit, orders shall be passed for release of the said amount."

8. From the aforesaid two orders, it appears, there was an allegation against the contesting defendant therein that there is an attempt by it for transfer/ shifting of the machineries and materials and it is considering the submissions therein by the respective parties, the High Court in disposal of the review petition permitted the contesting defendant to sale the machineries and materials under the observation of the trial court and entire sale proceeds be deposited before the trial court and the same shall be kept in fixed deposit till disposal of the suit with a consequential order that the release of the same will be dependent on the ultimate outcome in the suit. In filing review petition, the petitioners therein i.e. plaintiff brought to the notice of the Court that during pendency of the writ petition, W.P.(C) No.5479 of 2006, there has been disposal of the machineries and materials during pendency of the suit and prior to disposal of the writ petition and the review petition was accordingly disposed of simply with a direction to the petitioners therein i.e. the plaintiff to bring these facts to the notice of the trial court by making necessary application. Even in spite of the above incidents taken place, this Court finds there is no change in the original pleading in the suit involving the issue either sale of the disputed property or the sale of the machineries and materials to the fold of the suit. Under the circumstance, this Court finds, there is absolutely no pleading involving

transaction taken place in between with defendant no.8 in whatsoever manner. Consequently, this Court finds in absence of any pleading in respect of defendant no.8 involving any application even the reliefs sought for in the suit have no bearing on the defendant no.8.

9. Law has been fairly well settled that it is mandatory to first to see that the plaint against which a bundle of facts which is necessary for the plaintiff to prove in order to succeed in the suit and there is also necessity not only to aver the facts but also to prove the facts in order to succeed in the suit. Entire reading of the plaint after amendment even this Court nowhere finds any facts/pleading involving defendant no.8 so as to determination of either of the issues in suit is required in presence of the defendant no.8. Order 7 Rule 11 of the Code of Civil Procedure reads as follows:

11. Rejection of plaint.- The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) whether the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provisions of rule-9;"

Reading the provision at Order 7 Rule 11 of the Code of Civil Procedure, this Court finds that there is a clear provision for rejection of the plaint in absence of disclosure of cause of action, which means there ought to be disclosure of a cause of action in respect of a party involving the prayer made therein in the suit. From the documents involved in the present case, the pleading and as already observed by this Court that there is absolutely no pleading involving the defendant no.8, the present petitioner, in whatsoever manner in the suit, this Court has no hesitation to observe that in absence of any cause of action pleaded in a plaint, the plaint has to be vitiated in respect of such defendant. Continuance of suit against such parties will become only academic and no help and only an harassment to such parties as it will be compelled to force to face an unnecessary litigation the proceeding throughout the trial, which is admittedly to end with no grant of relief against the petitioner i.e. defendant no.8 in the case at hand.

10. Dealing with the citations cited by Sri S.P.Mishra, learned Senior Counsel

appearing for the petitioner, this Court going through the decision involving The Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman v. M/s. Ponniammam Educational Trust represented by its Chairperson/Managing Trustee, 2012 (II) CLR (SC) -237, finds the Hon'ble Court after taking into consideration has come to hold that the Single Bench of the High Court has correctly observed that in absence of any cause of action shown as against the first defendant therein, the suit could not have been proceeded against such party and therefore confirmed the order of rejection of an application under Order 7 Rule 11 of the Code of Civil Procedure. Now coming to the citation in between of P.V.Guru Raj Reddy Rep. by GPA Laxmi Narayan Reddy & Anr. v. P.Neeradha Reddy & Ors.Etc., 2015 (I) OLR (SC) -714, in similar situation the Hon'ble Supreme Court in paragraph 5 held as follows: "Rejection of the plaint under Order VII rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII Rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law, the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial."

11. This Court has also gone through the citations cited by Sri Sahoo as referred to hereinabove in paragraph-5 and finds the facts involved in the present case does not fit to the circumstance involved in the cited decisions. Therefore, the decision stated by Sri Sahoo has no application to the present case.

12. In another decision in the case of A.B.C.Laminart Pvt. Ltd. & Anr. vs. A.P.Agencies, Salem (1999) 2 SCC 163, the Hon'ble Apex Court defining the meaning of cause of action observed as follows: "A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relating whether to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

Similarly, in the case in between Bloom Dekor Ltd. vs. Subhash Himatlal Desai & Ors, (1994) 6 SCC 322, the Hon"ble Apex Court again dealing with the concept of cause of action in the circumstance observed as follows: "By "cause of action" it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court (Cooke v. Gill, 1873 LR 8 CP 107).In other words, 3 bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit."

It is mandatory that in order to get relief, the plaintiff has to aver all material facts. In other words, it is necessary for the plaintiff to aver and prove in order to succeed in the suit."

13. Considering the facts involved in the case, the allegation raised by the respective parties and going through the impugned order vide Annexure-7 to the Civil Revision, this Court finds the trial court after recording the pleadings of the respective parties and the objections therein involving the application under Order 7 Rule 11 of the Code of Civil Procedure and after taking note of the developments taken through the disposal of the writ petition in W.P.(C) No.5479 of 2006, rejected the application under Order 7 Rule 11 of the Code of Civil Procedure solely on the premises that the direction of the High Court for deposit of the sale proceeds and for non-deposit of the said amount in terms of the direction of the High Court, the presence of defendant no.8 is required to confirm the fact of sale and bring forth the amount received towards the sale of the machinery and materials. This Court here finds in absence of any pleading to this effect, there cannot be an issue. Consequently, such information remain inconsequential and even assuming that such evidence may be a requirement, then nothing prevents to record the statement of defendant no.8 taking leave of the Court and by making him a witness. The trial court has failed in appreciating the aforesaid legal aspect.

14. Under the observations and findings made hereinabove and further following the dictum of the Hon"ble Apex Court referred to hereinabove, this Court finds the petitioner had a clear case for dismissal of the plaint and trial court having failed to appreciate above aspect of the matter, the impugned order cannot be sustained. Thus, in interfering in the impugned order, this Court sets aside the order at Annexure-7 and allows the application under Order 7 Rule 11 of the Code of Civil Procedure at the instance of the defendant no.8, the present petitioner further directs the trial court to treat the suit to have been dismissed as against the defendant no.8, present petitioner.

15. In the result, the Civil Revision stands allowed. No order as to cost.