

(1973) 04 OHC CK 0015
In the Orissa High Court
Case No : Civil Review No. 14 of 1971

Nidhi Padhi and Others

APPELLANT

Vs

Bramhananda Padhi and Others

RESPONDENT

Date of Decision : 02-04-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Orissa High Court Rules, 1948 — Rule 5

Citation : (1973) 39 CLT 693

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : D. Mohanty and S.S. Mohanty, for the Appellant; A.K. Padhi, for the Respondent

Judgement

B.K. Patra, J.—Petitioner No. 1 Digambar Padhi the predecessor-in-interest of Petitioners 2 to 7, Petitioner No. 8, Petitioner No. 9 and Somanath Padhi the predecessor-in-interest of Petitioners 10 to 13 filed Title suit No. 367 of 1954 against opposite party No. 1. Braja Ballav Badapanda, the predecessor-in-interest of opposite parties 2, 3, 6. 7 and 8 opposite party No. 4 and opposite party No. 5. Thus there were five Plaintiffs and four Defendants in the suit which was one for declaration of easementary right of way and removal of obstruction. That suit was dismissed in the trial Court. The Plaintiffs preferred an appeal in the Subordinate Judge's Court, Balasore (M.A. 7/35 of 62/60).

During the pendency of the appeal. Somanath Padhi who was Plaintiff No. 4 died on 12-11-1961 but no substitution was made. Obviously in ignorance of the death of Somanath Padhi, the appeal was heard and was allowed on 29-9-1962 by the Additional Subordinate Judge, Balasore. After the disposal of the appeal and before the second appeal was preferred, Braja Ballav Badapanda Defendant No. 2 died on 14-11-1962. Thereafter, Defendants 1, 3 and 4 (opposite parties 1, 4 and 5 herein) along with the legal representatives of Brajaballav Badapanda preferred a second appeal (Second Appeal No. 400 of 1962) in this Court on

21-12-1962. Permission for impleading the legal representatives of Brajaballav Badapanda had also been obtained under Rule 5 of Chapter VI of the Rules of the High Court of Orissa vide order No. 4 dated 8-10-1963.

2. One of the grounds urged in this Second Appeal (S.A. 400/62) was that since Somanath Padhi, Plaintiff No. 4 died during the pendency of Munsif Appeal No. 7/35 of 1962/60 in the first Appellate Court and his legal representatives were not brought on record, that appeal (M.A. 7/35 of 1962/60) abated as a whole.

As soon as this objection was raised, an application was filed on behalf of the Plaintiff for substitution of the legal representatives of Somanath Padhi, Second Appeal No. 400 of 1962 was accordingly remanded to the first Appellate Court for a decision on the question of abatement of the appeal as a result of the death of Somanath Padhi. The application filed in this Court for substitution of the legal representatives of Somanath Padhi was also forwarded to the Court for disposal.

3. After remand the first Appellate Court dismissed the appeal on a finding that In the circumstances already stated the appeal had abated as a whole.

4. Against this judgment of the first Appellate Court, the Plaintiffs filed Second Appeal No. 55 of 1967 in this Court. Although in Second Appeal No. 400 of 1962, Brajaballav Badapanda's legal representatives had already been impleaded with the permission of the Court, in the memo of appeal submitted in the Second Appeal No. 55 of 1967, the Plaintiffs impleaded Brajaballav Badapanda as Respondent No. 7. The fact that his legal representatives had already been brought on record in the previous Second Appeal had not been brought to the notice of the Court.

In the usual course, therefore, notice was ordered to be served on Brajaballav Badapanda and the serving peon in his report dated 22-3-1968 stated that Brajaballav Badapanda was dead. On perusal of the report, the Court by its order No. 21 dated 3-7-1969 directed that the legal representatives of Brajaballav Badapanda should be brought on record within a period of seven days. As this order was not complied with an order was recorded on 24-1-1969 that the appeal abated against Respondent No. 7. My learned brother A. Misra, J when he heard the Second Appeal No. 55 of 1967 was of the opinion that as the appeal abated against Respondent No. 7 Braja ballav Badapanda the entire appeal, having regard to the facts of the case, a bated and consequently dismissed the Second Appeal. The present application has been filed to review that judgment.

5. It is clear from the narration of the facts above that since the legal representative of Brajaballav Badapanda had already been impleaded in Second Appeal No. 400 of 1962 of this Court, taking further steps for bringing his legal representatives did not arise. But for the sequences that have ensued in this case, the present Petitioners are entirely responsible. Their first mistake lay in impleading in the present Second Appeal Brajaballav Badapanda as a Respondent when he was admittedly dead by that time. At that stage, the Court had no means to know that Brajaballav was already dead, and in usual course therefore,

the Court ordered notice to be served on him. When the Court peon returned the notice with the endorsement that Brajaballav was dead and the Court ordered that steps should be taken to bring his legal representatives on record, the Petitioners ought to have pointed out at least at that stage that this had already been done in the previous Second Appeal and that as a matter of fact the, legal representatives of Brajaballav are already on record. As the peremptory order passed by the Court was not complied with, the Court was justified in passing the order that the appeal abated as against Respondent No. 7 and that consequently the whole appeal abated. There cannot therefore be any doubt that it was due to the carelessness of the Petitioners that the order sought to be reviewed has been passed in this Court.

6. Under Order 47, Rule 1, CPC the Court of review has only a limited jurisdiction circumscribed by the limits fixed by the language therein. It may allow a review on three specified grounds, namely, (1) discovery of new and important matter or evidence which after exercise of due diligence was not within the Appellant's knowledge or could not be produced by him at the time when the decree was passed, (2) Mistake or error apparent on the face of the record and (3) for any other sufficient reason. Obviously, the present case does not fall under item (1). It is argued on behalf of the Petitioners that the case would fall either under item (2) or under item (3). It has been held by the Judicial committee of the Privy council in *Chhaju Ram v. Neki and Ors.* AIR 1922 P.C. 112, that the words "any other sufficient reason" appearing in item No. (3) must mean a reason sufficient on grounds at least analogous to those specified in the rule. It is, therefore, argued that although the facts that Brajaballav Badapanda was already dead and his legal representatives have already been brought on record at a previous stage of this litigation, namely, in Second Appeal No. 400 of 1962, would not be apparent from the appeal memo filed in S.A. 55 of 1967, yet they would be apparent from the records of Second Appeal No. 400 of 1962 which form a part and parcel of the record of the subsequent Second Appeal No. 55 of 1967 and consequently the case would be covered either by the second item or by the third item of Order 47, Rule 1. Reliance is placed on the observations made by Jagannatha Das, J in *M.M. Basselios Gatholieos and Anr. v. Most Rev. M.P. Athanasius and Ors.* AIR 1954 S.C. 526. Dealing with a case under Order 47, Rule 1, CPC his Lordship stated at page 543 of the report-

We see no reason to construe the word record in the very restricted sense as was done by Denning, L.J. in *Rex-v-Northumberland Compensation Appeal Tribunal, Ex Parte Shaw*, (1952) 1 K.B. 338 at pp. 351-352(K) which was a case of certiorari and include within that term only the document which initiates the proceedings, the pleadings and the adjudication and exclude the evidence and other parts of the record.

A Division Bench of the Pepsu High Court in *Naurata and Ors. v. Anokha and Ors.* AIR 1954 Peplu 85, held that when important documentary evidence already on record was not brought to notice of Court, and referred to by either party when

the appeal was heard, all the same the document being already there, the error is apparent on the face of the record, such an error whether it occurs by reason of the counsel's mistake or it creeps in by reason of an oversight on the part of the Court can always be a good ground for exercise of the jurisdiction of the Court to reverse its decision. Admittedly records of the proceedings contain the information that Brajaballav Badapanda was dead long before Second Appeal No. 55 of 1967 was filed in this Court and that his legal representatives had already been brought on record. Unfortunately, this information was not brought to the notice of the Court due to the mistake of the counsel at the time the Court passed the impugned order. Not to allow this review application would, in my opinion, result in great injustice.

7. I would accordingly allow this application for review, set aside the judgment passed by my learned brother A. Misra, J. in Second appeal No. 55 of 1967 and direct that the appeal be re-heard. The Petitioners shall pay the costs of this proceeding to the opposite parties as a condition precedent for rehearing of the appeal.