

(1984) 12 OHC CK 0017
In the Orissa High Court
Case No : Civil Revision No. 83 of 1982

Orissa State Financial Corporation	Vs	APPELLANT
Gopal Chandra Ghosh		RESPONDENT

Date of Decision : 12-12-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 13, 141
Orissa State Financial Corporation Act, 1951 — Section 31

Citation : (1985) 1 OLR 81

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R.N. Sinha and S.N. Sinha, for the Appellant; B. Rath and J.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—This Civil Revision arises out of an order of the District Judge:, Cuttack, in Misc. Case No. 79 of 1981 setting aside the final order passed u/s 38(7) of the Orissa State Financial Corporation Act, (hereinafter referred to as the "Act"), confirming the order of attachment and directing the sale of attached property of the opposite party.

2. The short facts bereft of details relevant for disposal of the case, are as follows :

"In the year 1971, the Orissa State Financial Corporation (hereinafter referred to as the "Corporation") accommodated the opposite party with some loan as per the agreement entered into with him. On the allegation that the opposite party failed to discharge the loan, the Corporation enforced the claim u/s 31 of the Act. On receipt of the application, the District Judge passed an ad interim order attaching the security for the loan and issued notice to the opposite party. After the opposite party showed cause, the District Judge proceeded to investigate into the claim of the Corporation and decided that the opposite party has the right to

begin. Thereafter, the case was not heard on various dates and was ultimately posted to 1. 7. 1981 for investigation. On that day, the lawyer for the opposite party filed a petition that the case should be adjourned for fifteen days as he was on his legs in a case in the High Court. This application for adjournment was rejected on the ground that law does not permit adjournment on such a ground. Thereafter, another application was filed that the lawyer being on his legs in the High Court was not able to-examine or cross-examine the witnesses. Therefore, it was prayed that the documents by both the parties might be marked as exhibits that day and the examination and cross-examination of the witnesses might be deferred till 6. 7. 1981, which was a Monday. This was not also entertained. Although, the opposite party had the Tight to begin, without closing the case of the opposite party, the petitioner was permitted to adduce evidence. P. W. 1 was examined on behalf of the Corporation and exhibits were worked. On 4.7.1981, the Misc. Case tinder section 31 was allowed ex parte and the order of attachment was made absolute. Opposite party filed an application for setting aside the ex parte order. This petition was allowed on-28. 11. 1981 on the finding that non-participation of the Advocate on account tit being engaged in another Court should not lead a party to suffer.

This is the impugned order in this case Mr. R.N. Sinha, the learned counsel for the petitioner-Corporation has submitted that Order 9 has no application to a proceeding u/s 31 of the Act, Secondly, he has submitted that the application tot setting aside the ex parte order does not come within the scope of Order 9, Rule 13, C. P. C. Thirdly-, he has submitted that adjournment of a case on the ground of the lawyer being engaged in another Court being statutorily prohibited in Order 17, Rule 3, C. P. C, there was no scope for setting aside the ex parte order on that ground. Lastly, Mr. Sinha has submitted that there is no material to support the ground that the lawyer was so engaged in the High Court. AH the contentions of Mr. Sinha require careful consideration.

3. Recovery of money lent is a civil tight. The remedy of a person to realise money lent is by filing a suit in the Civil Court. In view of the special nature of the loan under the Act, forum and manner of recovery have been provided under the Act. It is provided u/s 32(6) of the Act that the investigation of the claim of the Corporation in an application u/s 31 is to be made in accordance with the provisions contained in the CPC in so far as such provisions may be applied thereto. Thus proceeding arising out of an application u/s 31 of the Act is a civil proceeding and provisions of C. P. C. would be applicable unless there is inconsistency. To such a proceeding, the provisions of C. P. C. are also applicable u/s 141 of the Act, Orders 9 and 17, C. P. C., are not inconsistent with the procedure for investigation laid clown in section 32 of the Act. The language of Sub-section (6) of section 32 is wide enough to include the applicability of Orders-9and 17, C. P. C., with more restricted language for application ofthe C.P.C. to the proceedings under the Orissa House Rent Control Act and the Industrial Disputes Act,, this Court has consistently held Chat Order 9r Rule 13, C, P. C, has application for the reasons stated above, I cannot accept the

contention of Mr. Sinha that Order 9 has no application to an- investigation arising out of an application u/s 31 of the Act.

4. Laying stress on the second contention, Mr. Sinha submitted that once the enquiry has commenced and it has been decided that the opposite party has right to begin which is a provision under Order 18,. Rule 2r C P. C. there is no scope for applying the provisions of Order 9, Rule 13, C. P. C., any further. He has cited the decision reported in 31(1965) CLT 871 : Baidhar Behera and Ors. v. Pranabandhu Maharatha. This decision has been followed in 1971 (1) C. W. R. 338; Banchhanidhi Satpathy and Anr. v. Ghanashyam Satpathy. Both the decisions were rendered before the amendment of the C. P. C. in 1976. Order 17, Rule 3, C. P. C, before amendment read as follows :

"3. Court may proceed notwithstanding either party fails to produce evidence, etc. :

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

After amendment of Order 17, Rule 3, C. P. C. by Act 104 of 1976, those lines of decisions are of no avail. By Section 68(iii) of the Amending Act, Order 17, Rule 3 was amended. The amending section reads as follows :

"(iii) in Rule 3, for the words "the Court may, notwithstanding such default, proceed to decide the suit forthwith", the following shall be substituted, namely, ; the Court may, notwithstanding such default-

- (a) If the parties are present, proceed to decide the suit forthwith; or
- (b) if the parties are, or any of them is, absent, proceed under Rule 8."

Thus Order 17, Rule 3, C. P. C, not with stands now, after amendment, reads as follows :

"R. 3. Court may proceed notwithstanding either party fails to produce evidence, etc.-

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, (the Court may, notwithstanding such default,-

- (a) if the patties are present, proceed to decide the suit forthwith; or
- (b) if the parties are, or any of them, is absent, proceed under Rule 2.)"

The amended provision, as quoted above, clearly envisages two situations-a situation where the parties are present as provided in Rule3(a) and a situation if

the parties or any of them, is absent, as provided in Rule 3(b).

In this case, the opposite party and his lawyer were absent. The order sheet clearly discloses that time had been granted to the opposite party to produce his evidence. We defaulted on 1. 7. 1981 Therefore, notwithstanding such default, the learned District Judge proceeded under Order 17, Rule 9, C. P. C, as envisaged under Order 17, Rule 3(b). Order 17, Rule 2, C. P. C, provided that the suit is to be disposed of under any one of the modes directed in that behalf by Order 9. Thus, there cannot be any doubt that Order 9, Rule 13, C.P. C, has application to the ex parte decree.

5. Coming to the third contention of Mr. Sinha, the Court has found that the Advocate for the opposite party was absent being engaged in High Court. The learned District Judge attributed the absence of the Advocate as laches on his part and came to the conclusion that the parties should not suffer on account of laches of the advocate. Mr. Sinha has submitted that this finding of the learned District Judge is contrary to the clear provision under Order 17, Rule 1(2), Proviso (c) wherein, the engagement of the pleader of a party in another Court has been categorically stated not to be a ground for adjournment. Order 17, Rule 1, C. P. C., provides for adjournment of a case. Rightly in this case, the learned District Judge did not adjourn the case and proceeded to hear the same as provided in Rule 3(b). No evidence was recorded in this case at that stage. Therefore, he did not apply the explanation to Order 17, Rule 2, C. P. C. Accordingly, he disposed of the case in one of the modes directed in that behalf by Order 9 and passed the final order. In such a situation, the facts of each case are to be examined. While dealing with Order 9, Rule 13, C. P. C, this Court in clear terms expressed that absence of a lawyer where the party could not have helped the situation by engaging another lawyer would be a sufficient cause for setting aside the decree or restoration Of the suit. (See I. L. R. 1965 Cut. 846 : Parikshit Sai v. Indra Bhoi and 58 (1984) C. L. T. 507 : Amiya Kumar Mohanty v. Paichha Dalai and others, Mr. Sinha cited a decision reported in 1984 (I) O. L. R. 703 Steel Authority of India Ltd. v. S. N. Patnaik, in support of his contention that there is no sufficient cause. The facts of the said case are completely different from the facts of the present case. In that case, it was held :

" If the counsel apprehended that he would not be available for the case, another counsel could and should have been engaged. It is not a case of unforeseen circumstance..... If the party knew that the Advocate would not be available on the date fixed, there was enough time, as I have already said, to engage another counsel. The suit was a simple money suit. At Rourkela competent lawyers are available. I am, therefore, satisfied that the plaintiffs had no justifiable ground for adjournment and the trial judge rightly rejected the application for restoration."

6. In the present case, there is no evidence that the party had sufficient time and opportunity to engage another lawyer. It is also not the contention of Mr. Sinha with the voluminous documents and the heavy amount involved in the

case, which require long time for preparation, there is no scope for another Advocate to immediately take up the matter when the lawyer is absent. Therefore, I am satisfied that the opposite party was helpless in the situation. In *Bhagwan Dass Arora Vs. First Additional District Judge, Rampur and Others*, it has been held that the litigant should not be penalised on the pain of being thrown out of Court on a technical ground. This contention of Ms. Sinha also fails.

7. Mr. Sinha thereafter submitted that there is no material that the Advocate was engaged in the High Court. He submitted that the application for setting aside the ex parte decree was not supported by an affidavit and on the objection by the Corporation to the fact, the matter should have been proved by opposite party by cogent evidence. I find that the two applications filed on 1. 7. 1981 on the date when the matter was heard ex parte, clearly show that the lawyer was engaged in the High Court. These two applications are sufficient materials to support the facts stated in the petition. No objection was taken to those two petitions on 1. 7. 1981 on the ground that the facts stated therein were incorrect. Besides, absence of a lawyer is a question of fact and the learned District Judge has held that the lawyer was so absent.

8. Thus, all the contentions of Mr. Sinha having failed, the Civil Revision has no merit and is accordingly dismissed. There shall be no order as to costs in this Civil Revision.