
(2014) 09 OHC CK 0028
In the Orissa High Court
Case No : W.P.(C) No. 24359 of 2013

Prafulla Kumar Sahoo

APPELLANT

Vs

Sudam Charan Sahoo and Others

RESPONDENT

Date of Decision : 30-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 5, 151

Citation : (2014) 2 ILR 1174

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Advocate : P.K. Rath, R.N. Parija, A.K. Rout, S.K. Pattanayak and A. Behera, Advocates for the Appellant; M.K. Mishra, T. Mishra, M.K. Raiguru, G.B. Jena and A.K. Sahu, Advocates for the Respondent

Judgement

Sanju Panda, J.—Petitioner in this petition has challenged the order dated 21.9.2013 passed by learned Civil Judge (Sr. Divn.), Kendrapara in C.M.A. No. 351 of 2013 arising out of C.S. No. 350 of 2004 allowing an application under Order, 9 Rule, 5 read with Section 151 of the Code of Civil Procedure filed by the opposite party No. 1 to set aside the order dated 2.3.2009 passed by the court below in the aforesaid suit. The facts leading to the aforesaid suit as reveals from the record that opposite party No. 1 as plaintiff filed the suit impleading the present petitioner as defendant No. 3 for declaration that Regd. Sale Deed No. 2052 dated 23.5.2002 is illegal, fraudulent and void and for permanent injunction and other consequential relief. In the plaint plaintiff has given a genealogy which reveals that plaintiff and defendant Nos. 3 to 10 are sons and daughters of Dhruba Sahoo and defendant Nos. 1 and 2 are son and wife of defendant No. 3. The plaintiff inter alia alleged that the property was purchased by Dhruba in the name of his wife. However after death of Dhruba his wife Radhamani alienated the property in the name of defendant No. 1 in the year 2002. He further alleged that said Radhamani was not in a proper state of mind to execute the sale deed hence the suit As the plaintiff is residing in the said house plaintiff and defendant Nos. 3 to 10 were in the joint mess and property,

defendant Nos. 1 and 2 threatened him to dispossess from the said property. It is averred by the petitioner in the petition that the opposite party No. 1 suppressing the material facts and misleading the Excise Authorities falsely disclosing the suit property as his recorded property has got a Excise License to operate "On Shop" over the suit property. An objection was filed by the petitioner before the authority regarding the license issued in favour of opposite party No. 1. After considering the objection filed by the petitioner the Collector, Kendrapara has issued a show cause notice dated 19.8.2013 to the opposite party No. 1 for cancellation of license of I.M.F.L. "On Shop". Thereafter, on 21.8.2013 the license has been cancelled by the Excise Authorities. In the suit notice was issued to the defendants on 8.10.2004 in both ways. On 25.1.2005 defendant Nos. 4 & 6 to 10 entered appearance through their counsel and prays for some time to file written statement. From the order dated 21.6.2007 it appears that service returns from defendant Nos. 1 to 3 back and service returns from defendant No. 5 not back. Thereafter the matter was posted to prove service against defendant Nos. 1 to 3 by plaintiff. Hence the plaintiff did not prove the service against defendant Nos. 1 to 3 on 6.1.2009 the court below has directed the plaintiff to take fresh step against defendant Nos. 1 to 3 and S.R. of defendant No. 5 awaited till then. Fresh step as against defendant Nos. 1 to 3 has not been taken by the plaintiff and the court below on 2.3.2009 dismissed the suit against defendant Nos. 1 to 3. After dismissal of the suit against defendant Nos. 1 to 3, plaintiff has filed an application under Order, 9 Rule, 5 read with Section 151 of the Code of Civil Procedure before the trial court which was registered as C.M.A. No. 351 of 2013 to restore the suit seeking recalling the order of dismissal. The learned trial court without issuing any notice and without giving any opportunity of hearing to the defendants in the impugned order has allowed the application and set aside the order dated 2.3.2009. The court below has directed issue summons against the defendant Nos. 1 to 3 and restoring C.S. No. 350 of 2004 to its file. The court below in the impugned order also observed that opportunity should be given to the plaintiff to issue summons to the defendants to say about their case and allow the suit to dispose of in present of all the parties on merit. After recalling of the order by the trial court the plaintiff has filed an application for injunction which was registered as Interim Application No. 419 of 2013.

2. Learned counsel for the petitioner submitted that from the order sheet of the trial court it reveals that the plaintiff filed an application under Order, 9 Rule, 5 of the Code of Civil Procedure to set aside the order dated 2.3.2009 and for restoration of the suit to its original record and to allow the plaintiff to take fresh step against the defendant Nos. 1 to 3. The plaintiff has to take step for issuance of notice to defendant Nos. 1 to 3 as such step has not been taken the suit was dismissed against them. The court below set aside such dismissal order without issuing notice to the defendant Nos. 1 to 3 against whom the suit was dismissed. As the right accrued in favour of those defendants was affected by setting aside the order of dismissal by impugned order therefore, the said order need be interfered with. The court below condoned more than four years delay and

restored the suit to its original form. The court below allowed the plaintiff to take fresh step and condoned the delay even though the said application was filed beyond the period of limitation.

3. Learned counsel appearing for opposite party No. 1 -plaintiff submitted that the plaintiff has taken a plea of illness which has accepted by the trial court and allowed the plaintiff to take fresh step by setting aside the order of dismissal. As substantial justice has been done the order need not be interfered with.

4. Considering the above fact and circumstances as described hereinabove and the rival submission of the parties there is no doubt that the suit was dismissed against defendant Nos. 1 to 3 for not taking fresh step by the plaintiff in the year 2009. The plaintiff has filed an application to set aside the said order in the year 2013. On dismissal of the suit against the defendant Nos. 1 to 3 a valuable right accrued in favour of those defendants which was not considered by the court below without issuing notice in the application for restoration of the suit, the trial court has set aside the order of dismissal considering an application under Order, 9 Rule, 5 read with Section 151 of the Code of Civil Procedure.

5. There was delay of more than four years in filing such application by the plaintiff for restoration of the suit against defendant Nos. 1 to 3. The present petitioner who is defendant No. 3 knew about all the above facts after he received notice. A right accrued in favour of the petitioner on dismissal of the suit against him. Hence it is open to the petitioner to challenge the said order on his appearance as a valuable right accrued to him and there is delay in filing such application. In view of the discussion made in the aforesaid paragraph this Court disposes of the writ petition with an observation that in case the petitioner files an application in such event the court below shall consider the same in the light of decision rendered by the Apex Court in the case Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, after giving an opportunity of hearing to the parties. With the aforesaid observation the writ petition is disposed of.