

(2016) 06 OHC CK 0020

In the Orissa High Court

Case No : C.M.P. No. 1574 of 2015 (In the matter of an application under Article 227 of the Constitution of India)

Prahallad Srichandan @ Hulas Srichandan

APPELLANT

Vs

Siba Swastik Srichandan

RESPONDENT

Date of Decision : 21-06-2016

Acts Referred:

Citation : (2016) 164 AIC 901 : (2016) AIRCC 2925 : (2017) 1 CivCC 686 : (2016) 122 CutLT 637 : (2017) 1 ICC 563 : (2016) 2 ILRCuttack 157

Hon'ble Judges : Mr. Biswanath Rath, J.

Bench : Single Bench

Advocate : M/s. N.P. Parija, S.K. Rout, A.K. Mohant and S. Parija, Advocates, for the Appellant; M/s. Gautam Mishra, D.K. Patra, A.S. Behera, A. Dash and J. Biswal, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Mr. Biswanath Rath, J.—This Civil Miscellaneous Petition arises against an order dated 01.10.2015 passed by the Civil Judge (Senior Division), Puri in C.S. No. 15/103 of 2012/2015, thereby rejecting an application at the instance of the petitioner (defendant No. 1 in the trial court) to call the Opp. party No. 1 (plaintiff in the trial court) to the dock for appearing as a witness on behalf of the defendants.

2. Short factual background involved in the case is that C.S. No. 15/103 of 2012/2015 was instituted by the plaintiff being represented through Power of Attorney Holder-Baidyanath Srichandan seeking a decree for permanent injunction against the defendants, not to enter upon the suit land, not to create disturbance in the possession of the plaintiff and not to change the nature and character of the land, further a decree for confirmation of possession with an alternative prayer in the event the plaintiff is found dispossessed during pendency of the suit, for passing a decree of mandatory injunction directing the defendants to deliver the possession of the land to the plaintiff within a

stipulated period and for any other relief as deem fit and proper with an award of cost.

3. Short back ground involved in the case at hand is that opposite party No. 1 through his power of attorney claimed that considering the fact that he became handicapped for his suffering in a road accident, his grand-father at his free will executed a Will on 21.8.2001 and by handing over the same, the grandfather permitted the opposite party No. 1 to take possession and enjoy usufructs of the land involved therein and as such the opposite party No. 1 took over the possession of the suit properties since 06.3.2002. The opposite party No. 1 on attaining majority instituted a Probate Case registered as Test Case No. 23 of 2007, converted to C.S.No.04 of 2009 for contest of present petitioner along with other defendants in the court below on transfer, subsequently, registered as C.S.No.125/04 of 2010/2009 and finally disposed of on 30.6.2010. Other properties of opposite party No. 1's grandfather were shared between the coparceners. Petitioner got his share as adopted son of late Bansidhar Srichandan, defendant No. 2 in the court below got his share as son of Debaraj Srichandan. Both of them joining together along with defendant Nos. 3 to 14 attempted to harass the opposite party No. 1 in respect of suit property and gave threatening to the father of the opposite party No. 1 on 25.11.2011, resulting the present suit for protection of his right over the suit property. On the other hand defendant Nos. 1 (the present petitioner) to 8 in a joint written statement while disputing the claim of the opposite party No. 1 specifically alleged that suit property is ancestral property of both parties. The suit has been filed collusively by father and son keeping away the relevant co-sharers. Fact that the opposite party No. 1 is handicapped is not correct. There is no voluntary execution of the Will. Fraud has been practised in managing the so called Will. Will was also not the last Will of the testator. Will also is an outcome of fraud. When the Probate Proceeding was contested, both opposite party No. 1 and his father gave assurance to all such parties to see for their legitimate share. The decree obtained in the Probate proceeding is still under adjudication of the trial court and the opposite party No. 1 cannot claim his exclusive possession over the disputed property.

4. Admitted position between the parties is that following filing of written statement and completion of pleading, the Power of Attorney Holder stood as a witness on behalf of the plaintiff/opposite party No. 1 and his examination-in-chief as well as cross-examination has already been closed. It is at this stage, the defendant No. 1/petitioner filed a petition praying to summon the plaintiff/opposite party No. 1 to stand as an witness on behalf of the defendants. This petition was objected by the Power of Attorney Holder of opposite party No. 1 on the premises that the defendants have to stand on their own leg. Plaintiff has satisfied his case upon examining the Power of Attorney Holder, representing him. The defendants are yet to lead their evidence, consequently claimed that the application so filed is premature as well as misconceived.

5. Considering the rival contentions of the parties, learned trial court rejected the application at the instance of the petitioner by the impugned order.

6. In assailing the impugned order, Mr. Parija, learned Senior counsel appearing for the petitioner contended that in view of specific allegation at the instance of the defendants including present petitioner that the Power of Attorney Holder has been examined without taking permission from the plaintiff, the defendants have a chance to prove their such allegation and such allegation can not be established or proved unless the opposite party No. 1 himself comes to dock as a witness. Further there is deliberate avoidance by the opposite party No. 1 to come as a witness in order to avoid some critical questions involved in the dispute.

Referring to some of the averments in the plaint as well as in the written statement, Mr. Parija, learned Senior counsel appearing for the petitioner contended that in view of the allegations and counter allegations specifically contained in the plaint as well as in the written statement, there may not be an effective adjudication in absence of examination of the opposite party No. 1 himself. Mr. Parija further contended that the trial court having not taken into account the above fact in to consideration, the impugned order suffers and since the defendants will be prejudiced by not getting a fair chance of evidence, this Court should interfere in the impugned order and should allow their application. In support of his such contention, Mr. Parija, learned counsel for the petitioner relying upon two decisions of the High Court in the case of V.K. Periasamy alias Perianna Gounder v. Rajan, reported in AIR 2001 Madras 410 and in the case of Braja Mohan Patra v. Ananta Charan Patra and others, reported in AIR 2003 Orissa 209 submitted that his claim has been well covered by these two decisions and this Court in interfering with the impugned order, should allow their application directing the opposite party No. 1 to be present personally in the court below for deposing on behalf of the defendants.

7. On the other hand, in opposition, Mr. Gautam Mishra, learned counsel appearing for the Opp. party No. 1 (plaintiff) contended that defendants can not force the plaintiff to stand as an witness on their behalf and the attempt of the defendants is only to linger the conclusion of trial. That apart, Mr. Mishra also contended that it is the duty of the defendants to prove their case by resorting to appropriate evidence and they cannot force the plaintiff to stand as an witness on their behalf. Mr. Mishra, in support of his such contention, in order to establish his case, cited a decision vide a case in between B.K. Maniraju v. State of Karnataka, reported in (2008) 4 SCC 451 particularly referring to paragraph-24 of the said judgment contended that none is available to correct mere errors of fact or of law unless the error is manifest and apparent on the face of record, a grave injustice or gross failure of justice has occasioned thereby. Referring to the case in between Janki Vashdeo Bhojwani and another v. IndusInd Bank Ltd. and Others, reported in (2005) 2 SCC 217 referring to Paragraph-13 of the judgment submitted that the petitioner has no case in view of the principle laid down

therein.

8. Perused the petition filed at the instance of defendant No. 1 seeking direction of the trial court to summon the plaintiff himself to stand as an witness on behalf of the defendants. On perusal of the petition, this Court finds the following pleadings at paragraph Nos. 2 and 3, which reads as follows:

"Para-2. That in the power of Attorney it has been reflected that Siba Swastik Srichandan, s/o Baidyanath Srichandan. That in order to grab the suit property which was/is belonging to Bhagirathi Srichandan the alleged father of the plaintiff has able to procure a false will by practicing fraud as so also giving false impression to compromise the matter between the parties and subsequently without intimating the real truth the defendant has been able to obtain an ex parte order i.e. in the Probate Proceeding that for which the said matter under sub-judice before Hon^{ble} High Court of Orissa bearing CMP No. 300/2014.

Para-3: That the alleged power of attorney holder who has examined as P.W. No.1 in the present case i.e. without taking any permission from the original plaintiff or not i.e. doubtful; as because the certificate issued in SEBC a Misc. Case No. 646/2010 by the Tahasildar, Delanga i.e. in favour of Siba Swastik Srichanda, s/o Bhagirathi Srichandan of vill-Tigiria. So aforesaid circumstance it is doubtful whether the plaintiff has instructed/directed to Baidyanath Srichandan i.e. to act on behalf of him or not i.e. great suspicious in nature. That, for which to ascertain the actual father name of the present plaintiff as because it is different in Misc. Case (SEBC) No. 646/2010 and in the alleged power of attorney which are contrary to each other. Therefore in order to ascertain the real truth and the genuineness of the power of Attorney married as Ext.1. It is necessary to examine the plaintiff himself i.e. from the defendants side and which will met the real dispute between the parties."

Perusal of the rival pleadings and after going through the averments of the plaint and pleadings in the written statement as quoted herein above and on reading together, this Court finds that this is not a case where power of attorney holder has rendered some acts in pursuance of power of attorney. This case being a straight contest between the plaintiff and defendants with serious allegations by the defendants in their written statement, this Court observes that the case at hand goes beyond the role of the power of attorney holder and as such there may not be effective adjudication of the suit in absence of the evidence of the plaintiff himself. Further since a chance of cross-examination by the Power of Attorney Holder is very much available, this Court also finds no prejudice would be caused to the Power of Attorney Holder in the event the plaintiff himself would be produced as an witness. Both the citations cited by Sri Goutam Mishra, learned counsel for the Opp. party No. 1 do not find support to his case.

9. Perused the citations cited by Sri N.P. Parija, learned Senior counsel for the petitioner in the case of Braja Mohan Patra v. Ananta Charan Patra and others, reported in AIR 2003 Orissa 209. In deciding a parameteria situation, a previous

Bench of this High Court taking into consideration the Division Bench decision of Patna High Court in the case of Awadh Kishore Singh v. Brij Bihari Singh, reported in AIR 1993 Patna 122 came to hold that there is no harm in calling the adversary to be examined as an witness on behalf of the other party. This decision finds full support to the petitioner's case.

10. Under the afore narrated circumstances and after going through the legal position enunciated herein above, keeping in mind the respective pleadings, this Court finds the reasons assigned by the trial court in rejecting the application at the instance of the petitioner for summoning the plaintiff to personally stand as an witness on behalf of the defendants, is improper. Consequently while interfering in the impugned order, this Court sets aside the same, thereby allows the application at the instance of the defendant No. 1 for summoning the plaintiff himself to stand as an witness on behalf of the defendants.

11. Civil Miscellaneous Petition stands allowed. However, there is no order as to cost.