

(2003) 06 OHC CK 0064

In the Orissa High Court

Case No : Civil Revision Petition No"s. 192 and 193 of 2003 and TRP (C) No. 22 of 2003

Pramod Chandra Rath and Others

APPELLANT

Vs

Dr. Dhruva Charan Pattnaik and Others

RESPONDENT

Date of Decision : 28-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 115, 151, 2(2), 24

Citation : (2003) 96 CLT 296

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : A.K. Mohapatra, K.N. Parida, M.R. Misra, R.R. Mohanty, N.C. Rout, S.K. Padhi, for the Appellant; B.H. Mohanty, D.K. Pradhan for O.P. No. 1, for the Respondent

Judgement

P.K. Tripathy, J.—Petitioners in the above noted Civil Revisions and the Transfer Petition are the respondents Nos. 5,6 & 7 in R.F.A. No. 13 of 2003 which was filed in the Court of District Judge, Cuttack, and after being transferred on 2.4.2003 the same is now subjudice in the Court of 2nd Addl. District Judge, Cuttack. Appellant in the appeal is the opposite party No. 1. The other co-respondents of the petitioners are the opposite parties 2 to 5. All the aforesaid petitioners and the opposite parties were parties to the Civil Proceeding registered as Title Suit No. 208/13 of 2002-1998 of the Court of Civil Judge (Jr. Division), 2nd Court, Cuttack. Opposite party No. 1 as the plaintiff had filed that suit. The nature of the dispute and the relief claimed in the suit are not relevant and therefore not noted in this judgment. All the above noted cases having been heard analogously and this common judgment shall abide the result in all such cases.

2. The above noted suit was disposed of on January 30,2003. Trial Court dismissed the suit on contest as against defendant Nos. 1,2,5,6 & 7 (respectively respondents in the same order in the R.F.A. and opposite parties 5 & 2 and the

petitioners before this Court) and ex parte against defendants 3 and 4 (respondents in the same order in R.F.A. and opposite party members 3 and 4 before this Court). That appeal was filed on 5.2.2003 by presenting the appeal memo under Order 41, Rule 1, CPC. That order No. 1 dated 5.2.2003 reads as hereunder :

"Memorandum of appeal, appeal memo, put up petition, and certified copy of impugned judgment and decree passed by C.J. (J.D.) 2nd Court, Cuttack in T.S. 208-2002 presented before the Registrar, Civil Court, etc. on 5.2.2003 is put up Register. Seen office note. Office note ready. Copy of the appeal memo served on the advocate for the R-1, 6, 7 & 5 as caveators. Heard the advocates on the question of admission. The appeal is admitted. Issue notice to the R-2, 3 & 4 by both ways fixing 27.3.2003 awaiting S.R. and P.A. Call for the L.C.R."

As it appears from the certified copy of the decree, that decree was prepared, sealed and signed on February 14, 2003. The appellant/opposite party No. 1 applied for the certified copy on March 12, 2003 and got the copy on April 13, 2003. The decree has already been filed in the appellate Court.

3. An application under Order 39, Rules 1 & 2, CPC was simultaneously filed by opposite party No. 1 and that was registered as Misc. Case No. 31 of 2003 in the Court of District Judge. The present petitioners had filed application u/s 148-A, CPC. As the caveators, they entered appearance soon after filing of the aforesaid R.F.A. and the Misc. Case. As it appears from the record of the R.F.A., on February 18, 2003 respondent No. 1 (opposite party No. 5) filed an affidavit stating that he having resigned from the post of Managing Director transferring the interest in favour of respondent Nos. 5 to 7 (petitioners before this Court), therefore, his name may be deleted from the appeal memo because he has no right and interest in the company and also in the present case/litigation.

4. As it appears from the L.C.R., on February 18, 2003, the present petitioners entered appearance in the appeal and filed their cross-objection. On 4th March, 2003 the cross-objection was admitted, L.C.R. was received and both appeal and the Misc. Case were adjourned to March 11, 2003 for hearing. On that date also on the application of the appellant notice to respondent Nos. 3 and 4 was dispensed with after hearing the parties. Therefore, the present petitioner sought for stay of the case in view of pendency of the present litigation in this Court and grant of order of stay. Thereafter, the appeal was transferred by the District Judge to the Court of 2nd Addl. District Judge for hearing and disposal according to law.

5. On April 10, 2003 applications filed by the petitioners to de-admit the appeal on the ground of non-filing of the certified copy of the decree by the date the appeal was admitted and to recall the order by which notice to respondent Nos. 3 & 4 was dispensed with was heard and rejected by learned 2nd Addl. District Judge. The above noted two revisions are against the aforesaid composite order passed by the appellate Court in rejecting the aforesaid two applications. The

application for transfer of the appeal from the file of the District Judge to any other competent appellate court is on the ground of admission of the appeal in the absence of a copy of decree being filed by the appellant and the different orders passed by the District Judge from which the respondents/ petitioners apprehended that there may not be fair play by the Presiding Officer, i.e., the District Judge in dealing with and deciding the appeal and the issues involved therein.

6. In course of argument, Mr. A. Mohapatra, learned counsel for the petitioners laying stress on the language used in Order 41, Rule 1, CPC and the different corresponding rules in that order, argued that though an appeal can be presented by filing a copy of the judgment, but the appeal cannot be admitted without a certified copy of the decree being filed and therefore, the above quoted order passed by learned District Judge on 5.2.2003 is illegal and liable to be set aside. Accordingly, he argued to de-admit the appeal. Similarly, he argued that when relief is claimed against the IPICOL, i.e., respondent No. 3, therefore, learned District Judge could not have dispensed with issue of notice as against that respondent and under such circumstance that order is against the procedural law and the interest of justice. He, therefore, argued that learned 2nd Addl. District Judge without properly analysing the provisions of law and regularising the legal lacuna wrongly rejected the concerned petitions filed by the petitioners. So far as the transfer application is concerned, he stated that there is no lack of bona fide in the claim of the petitioners for transfer of the appeal, but as in the meantime the appeal has already been transferred by the District Judge, therefore, the prayer in that application has become infructuous.

7. Mr. B. H. Mohanty, learned Senior Counsel appearing for the opposite party No. 1 argued that when Sub-rule (1) of Order 41, Rule 1, CPC as amended by Act 46 of 1999 permits filing of an appeal memo accompanied by a judgment, therefore, filing of a certified copy of decree is not the sine qua non for admitting the appeal and under such circumstance no fault can be found with the Court below for admitting the appeal in the absence of a certified copy of the decree. He further argued that when the appellant at his own risk wanted to dispense with the notice on respondent Nos. 3 and 4, it is for the appellate Court to consider the same. Since the concerned respondents have no grievance against that order, the present petitioners cannot object to that in the absence of any justifiable cause. In the aforesaid manner he supported the impugned order, So far as it relates to the application for transfer of the appeal, though he admitted that the application has become infructuous because of the transfer of the appeal by the District Judge, but he argued that conduct of the petitioners in filing such an application without any justifiable reason is to be appropriately considered so that litigants should not blackmail Courts in the said manner. Mr. Mohanty argued that because the application for temporary injunction was pending for consideration and it was going to be heard and decided by the District Judge, therefore, petitioners wanted an adjournment and for that they adopted the device and filed the application for transfer of the appeal. He argued that the

mischief intended thereby has been achieved because the application for temporary injunction is still subjudice and it might be rendered infructuous because of lapse of time. He also argued challenging to the maintainability of the civil revisions in view of the recent amendment in Section 115 of the CPC by Act 46 of 1999.

8. So far as the impugned orders passed by learned 2nd Addl. District Judge is concerned, the order relating to refusing to recall the order dispensing with service of notice on respondents 3 and 4 is purely an interlocutory order and even if that order would have been passed in favour of the petitioners then also that could not have disposed of R.F.A. No. 13 of 2003, and therefore as against that part of the impugned order a revision application is not maintainable u/s 115, CPC in view of the provision of law as it stands now. Be that as it may, this Court also finds no illegality or jurisdictional error in that order. At the time of hearing of the appeal if the appellant shall advance any argument claiming a relief against respondent Nos. 3 and 4, then it is open to the present petitioners to raise the relevant legal issue for not granting any relief behind their back and the appellate Court may duly consider the same.

9. So far as the order passed by the Court below in refusing to de-admit the appeal by recalling the above quoted order passed on February 5, 2003, this Court finds the civil revision to be not maintainable because the nomenclature "appeal" does not qualify to the terms "suit or other proceedings" as provided in Section 115, CPC. Apart from that recalling the order of admitting the appeal, in this case would not have consequentially resulted in dismissal of the appeal. On the other hand, at best that would have led to a circumstance of admitting the appeal after filing of the certified copy of the decree.

10. Notwithstanding the above finding against maintainability of the Civil Revision, this Court consider the contention on interpretation of law in the context of factual aspect involved and the provision of law in Order 41, CPC Order 41, Rule 1, CPC (as per the Orissa Amendment) reads as hereunder :

"1. Form of Appeal: What to accompany memorandum :

(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment.

Provided that where two or more suits have been tried together and a common judgment has been delivered therefore and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the Appellate Court may dispense with the filing of more than one copy of the judgment.

Provided further that, in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, 1908, do

not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court."

(2) Contents of memorandum,- The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit, the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit."

Section 96, CPC provides for appeals from original decree and that reads as hereunder :

"96. Appeal from original decree : (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed (ten thousand rupees).

Section 2(2), CPC defines the term "decree" and that reads as hereunder :

"(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation : A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

11. A combined reading of the above quoted provisions besides the other

provision in Order 41, as it stands now, leaves no room for doubt that a memorandum of appeal can be presented along with a copy of the judgment appealed against, because a decree, as defined, is only a formal expression of adjudication determining the rights of the parties with regard to all or any of the matter in controversy in the suit. The proviso to Order 41, Rule 1, CPC shall be constructively construed for filing of a decree appealed against even if it is sufficient that the appeal is to be considered for admission if it is accompanied by a copy of the judgment. All that is required is that the appellant has to intimate to the Court about non-preparation and non-availability of the decree by the date of preferring the appeal and the Court while admitting the case has to be satisfied about that circumstance and to pass appropriate order directing the appellant to file the certified copy of the decree subject to condition stipulated in such orders of admission of appeal.

12. In the case at hand, the order-sheet dated 5.2.2003, as it appears, was scribed by the concerned ministerial staff and the District Judge has endorsed his signature. Writing and maintaining the order-sheet being the responsibility of the Presiding Officer, learned District Judge cannot keep himself away from the mistake committed by the ministerial staff in mentioning that "certified copy of the impugned judgment and decree passed... is put up", (emphasis is made on the underlined portion) Admittedly, a decree was not prepared by that date. Filing of a judgment along with a decree not being only the mandate of law but also the accepted practice in court's proceeding. Therefore, as it appears, the concerned dealing assistant by looking to the judgment was misled to make such endorsement. However, the Sheristadar/chief ministerial officer of the District Judge could not have missed to peruse the decree because that is necessary to check, inter alia, the valuation and the Court-Fees matter. Learned District Judge should take note of such lapses and casual way of checking cases by the concerned ministerial staff members.

13. The aforesaid circumstance, as it appears, does not amount to an illegality. That amounts to an irregularity. As noted above, in the meantime, the copy of the decree has already been filed and therefore the procedural irregularity has been rectified. On detection of a mistake of the above nature and in the aforesaid manner the respondents/petitioners have tried to create a storm in a cup of tea. This Court feels that if there would have been proper checking of the appeal memo, the District Judge, Cuttack, who is a senior and experienced judicial officer, definitely would have attended to the job and got the irregularities removed and the matter regularised. The order-sheet of R.F.A. does not indicate that by the date of filing the application for transfer of the appeal, petitioners brought the irregularity to the notice of learned District Judge. On the other hand, it is seen that taking advantage of that procedural irregularity they sought for transfer of the appeal. The conduct of the petitioners in that respect being lacking bona fide is therefore not appreciated.

14. Application filed by the petitioners u/s 24, CPC for transfer of R.F.A. No. 13 of

2003, as already noted, has become infructuous, because the appeal has already been transferred to the file of the 2nd Addl. District Judge, Cuttack. That application was filed before this Court on 12.3.2003 and it was placed before the Bench on 14.3.2003. On that date this Court passed the following order:

"Heard.

This application is preferred by the petitioner with the prayer for transfer of R.F.A. No. 13 of 2003 from the Court of District Judge, Cuttack to the Court of Addl. District Judge, Cuttack. In paragraph 3 of the application petitioner has stated -

"That the petitioners may not get justice in the matter if the appeal is heard in the same Court, The order sheet of appeal will establish extra interestedness of the P. O. and the P.O. is biased."

In that respect petitioner has not disclosed in detail about the reasons for which petitioner apprehends that he will not get justice from that Court. Therefore, let the petitioner file a further affidavit in that respect giving the details of the circumstance from which his manner of apprehension can be known. Thereafter this Court will pass appropriate order. Such affidavit, as stated by the learned counsel for the petitioner, shall be filed within a period of two weeks. Hence, list this case for orders after filing of such affidavits."

On 21.4.2003 the case was listed but no such affidavit, as noted above, was filed. Therefore the case was directed to be listed on 23.4.2003, On that date affidavit of the petitioner No. 3 was filed. In fact, two affidavits sworn in on 22.4.2003 by petitioner No. 3 were brought on record. In both the affidavits narrations have been made about the conduct of the opponents and relating to litigations between the parties. In one of such affidavits in paragraph-12 the following averments are relevant to be considered in view of the order passed by this Court on 14.3.2003. That paragraph-12 reads as hereunder :

"12. That the husband of Smt. Reeta Mohanty, Dr. D. C. Pattnaik filed T. S. No. 13 of 98 at Cuttack which is renumbered as T.S. No. 208 of 2002 on transfer on the direction of Hon"ble Court to the Court of Civil Judge (Jr. Division) Second Court, Cuttack who dismissed the suit filed by the Dr. D. C. Pattnaik by judgment dtd. 30.1.2003 against which D. C. Pattnaik filed R.F.A. No. 13 of 2003 before the learned District Judge, Cuttack who admitted R.F.A. No. 13 of 2003 on 5.2.2003 without having a copy of decree and fixed the appeal hearing on 4.3.2003 without having certified copy of decree and without service of notice in Appeal on the Respondent Nos. 3 & 4 by dispensing with notice. The said order dtd. 5.2.2003 and order dtd. 4.3.2003 were under challenge before this Hon"ble court in C.R.P. No. 111 of 2003 and CRP No. 115 of 2003 where it was directed on 14.3.2003 to move the Lower Appellate court. The lower appellate court confirmed the order dtd. 5.2.2003 and 4.3.2003 by order dtd. 4.10.2003, so CRP No. 192 of 2003 and 193 of 2003 are pending before this Hon"ble Court. The order sheet of R.F.A. No. 13 of 2003 from 5.2.2003 to 4.3.2003 and further

orders will show extraneous consideration and over interestedness of the Presiding Officer of the Court of District Judge, Cuttack. So the present petitioners are afraid of in the background. The appeal of Smt. Reeta Mohanty was also transferred from the court of District Judge, Cuttack considering the circumstances. At present the petitioners are also afraid of and apprehension about miscarriage of justice in the unwarranted situation. In the compelling circumstances the petitioners moved this Hon"ble Court to transfer the case & to protect th.eir right and to get justice."

15. It appears from the aforesaid allegations that admission of the appeal without a copy of the decree and dispensing with the notice to respondents Nos. 3 and 4 besides the conduct of the 2nd Addl. District Judge in passing the impugned orders have been projected as the conduct of the District Judge with the allegation that such orders were passed because of extraneous consideration (available to the District Judge) and the District Judge dealt with the matter showing over-interestedness. Fact remains that the petitioners have not stated what was that extraneous consideration which weighed in the mind of the District Judge to pass the order admitting the appeal and dispensing with notice on respondent Nos. 3 & 4. Allegations are undoubtedly contemptuous and defamatory against learned District Judge. As noted above, the appeal has already been transferred by the District Judge without waiting for an order from this Court and that is a regular order of transfer which usually the District Judges undertake for distribution of cases. In search of genuineness in the allegations of the petitioners when this Court looked to the order-sheets of the R.F.A., it is seen that along with the appeal memo the appellant (opposite party No. 1) filed application under Order 39, Rules 1 & 2, CPC (Misc. Case No. 31 of 2003) and also filed an application to pass ad interim ex parte order. Learned District Judge declined to pass any such ex parte order and directed for issue of notice. That circumstance alone justifies that learned District Judge had no extraneous consideration for considering the litigations between the parties. In fact, all throughout when the proceeding was pending in his Court, learned District Judge did not pass any order which shall affect the rights of either of the parties relating to any interim management on the subject matter of dispute. As already noted above, so far as the admission of the appeal, is concerned, learned District Judge might have been carried away by the wrong noting done by the ministerial staff or even by the amended provision in Order 41, Rule 1, CPC. Therefore, the conduct of the District Judge was on the basis of interpretation of law which cannot be said to be on the basis of extraneous consideration. In the judicial hierarchy every adjudicatory, forum is expected to interpret the law and to implement the same. In that process for any mistake committed that cannot be regarded as an order passed by such Court being influenced by any extraneous consideration. There must be some direct proof or circumstantial evidence to make an inference that the Presiding Officer conducted himself on alleged manner because of extraneous consideration. In this case no such fact or circumstances are available to draw such an inference against learned District

Judge.

16. Petitioners, therefore, as criticised by the appellant/opposite party members adopted the device of filing the transfer application as a mean to avoid hearing of the application for temporary injunction and to render that application infructuous. Any legal pursuit undertaken by a litigant in the aforesaid manner is not only to be condemned but also should be suitably dealt with. In the case at hand, the aforesaid conduct of the petitioners, the circumstances available in the case record and the legal position in Order 41, vis-a-vis the orders passed by the appellate court clearly indicates that there was no extraneous consideration available to the District Judge for passing of any of the orders against which a complaint could have been made and notwithstanding that petitioners have ventured to make false allegation against learned District Judge. Therefore, it is a fit case where a contempt proceeding should be initiated against the petitioners and in that respect the matter may be placed before Hon"ble the Chief Justice to pass appropriate order.

17. Be that as it may, the conduct of the petitioners in bringing such frivolous and motivated litigation is sufficient for this Court, in the absence of any specific provision, to penalise the petitioners by invoking the provision in Section 151, CPC by imposing a fine of Rs. 5,000/- (five thousand only) to each of the petitioners. They are directed to pay/deposit the same in the lower appellate Court within six weeks and on payment such cost shall stand forfeited to the State. In the event of non-payment of such fine within the aforesaid period of six weeks, that shall be regarded as violation of the direction issued by this Court and on receipt of the information from the Court below or on application by any of the opposite parties, appropriate proceeding shall be initiated against the defaulter for violation of the said order. Be that as it may, in the event of non-payment of the fine in time, the, Court below shall proceed against the petitioners to realise the same following the procedure for recovery of arrear land revenue.

17. (sic) As noted above, the application for transfer has become infructuous and if that would not have been infructuous then also under the given facts and circumstances this Court would, have rejected that application on merit for the aforesaid reasons. The Misc. Case stands disposed of accordingly.

18. In the result, both the Civil Revisions are dismissed and the Misc. Case stands disposed in the manner indicated above. Send back the LCR.