

(1989) 02 OHC CK 0013
In the Orissa High Court
Case No : Original Jurn. Case No. 840 of 1981

Sagarmal Panch

APPELLANT

Vs

Chief Judicial Magistrate, Puri and Others

RESPONDENT

Date of Decision : 02-02-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 4, 144
Orissa House Rent Control Act, 1967 — Section 10, 13, 27, 5, 7
Orissa House Rent Control Rules, 1968 — Rule 13

Citation : AIR 1989 Ori 158 : (1989) 68 CLT 82

Hon'ble Judges : H.L. Agrawal, C.J;L. Rath, J;G.B. Patnaik, J

Bench : Full Bench

Advocate : S.C. Lal, for the Appellant; Addl. Standing Counsel (for Nos. 1 and 2), R.K. Mohapatra and B. Routrai for No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Agarwal, C.J.—This writ application, arising out of an order passed by the Chief Judicial Magistrate, Puri, acting as the appellate authority under the Orissa House Rent Control Act, 1967 (for short "the Act"), by which he has allowed the appeal of the tenant against the order of rejection of his application for setting aside an ex parte order of eviction passed by the House Rent Controller, raises a question of construction of Section 13 of the Act, namely, as to whether the appellate authority was competent in law to entertain the appeal.

2. Earlier, when this writ application was listed before a Division Bench of this Court, it referred the matter to a larger Bench to resolve some conflict between the observations made in different decisions of this Court, particularly in the case of Maganlal Sharma v. Smt. Maya Dutta ILR (1979) 2 Cut 455 and Arun Sunder Das v. B. Subash Subudhi Rao (1988) 65 CLT 169 Kandula Prabhakar Rao Vs. Tumulu Lakshmanamurty and Another, ∴

3. The facts may be briefly noticed : --

An application u/s 7(2)(iv) of the Act was filed by the petitioner before the House Rent Controller, Puri, against O.P. No. 3 for his eviction from the suit premises in the year 1978. In that proceeding, the tenant O.P. No. 3 was set ex parte and ultimately an ex parte order for his eviction was passed on 1-7-1978 vide Annexure-1. The claim of the petitioner is- that in pursuance of the aforesaid order, delivery of possession was obtained from the executing court on the failure of the tenant to get any order of stay. In the meantime, on 24-10-1978, the tenant had filed an application under Order 9, Rule 13, C.P.C. before the Controller for setting aside the ex parte order of eviction, which was registered as a miscellaneous case. The Controller, by his order dated 9-9-1980 (Annexure-3) rejected the said application mainly on the ground that the tenant's application for stay of delivery of possession having been rejected, the decree stood satisfied and, therefore, the application for setting aside the same could not be maintained. He came to the above conclusion on referring to a decision of the Calcutta High Court in Keshab Chandra Datta Vs. Ballygunge Estate Pvt. Ltd., . Against the aforesaid order of the Controller, the tenant carried an appeal to the appellate authority (O.P. No. 1), who, by the impugned order (Annexure-1), allowed the appeal and set aside the ex parte order of eviction.

The petitioner has further alleged that the tenant, after the delivery of possession was effected, trespassed into the premises and in order to get back possession, he filed a title suit as well as a criminal case. The tenant was found guilty u/s 448,1.P.C. by the trial court and sentenced to pay fine which was maintained up to this Court.

4. Before the appellate authority, the only point that appears to have been argued on behalf of the petitioner was that the appellate authority had the jurisdiction to make further inquiry as he might think fit and decide the appeal, but had no power to remand the case to the Controller, and inasmuch as allowing the appeal would virtually amount to an order of remand for a fresh decision of the case, he had no jurisdiction to entertain the appeal. Reliance was placed on a decision of this court in Smt. Nirmala Ben Patel Vs. Indersingh Bagi and Another, : for the above submission. This plea was repelled by the appellate authority and he, on appreciation of the materials on the record, came to the conclusion that there was sufficient reason for the absence of the tenant inasmuch as the notice of the proceeding was not properly served upon him. This order has been assailed by the landlord in this Court on the following grounds :---

(1) An order passed on an application under Order 9, Rule 13, C.P.C. being not an order communicable" to the parties, no appeal lay.

(2) In view of the fact that the ex parte decree had been fully executed and satisfied during the pendency of the appeal, the appellate authority became functus officio as there was no decree in existence which could be set aside.

(3) The effect of the order being a rehearing of the case, in essence, this amounted to an order of remand which was without jurisdiction, and

(4) The proceeding before the Controller being summary in nature, the only remedy available to the tenant against the ex parte decree was to make an application under, Order 37, Rule 4, C.P.C. and the application under Order 9, Rule 13, C.P.C was not maintainable as such.

5. In order to appreciate the submission, it is necessary to refer to some of the provisions of the Act, particularly, Sections 12, 13 and 21 of the Act, which read as follows : --

"12. Enquiries and Procedure -- (1) An enquiry under this Act shall be of a summary nature and shall, so far as practicable, be held in accordance with the provisions contained in the Code of Civil Procedure, (Act 5 of 1908).

(2) xx x x x x x x x x (3) x x x x x x x x (4) Subject to the provisions of this Act, the provisions of the Limitation Act, 36 of 1963 except Sections 6, 7, 8, 9, 18 and 19 shall apply to all appeals and applications under this Act."

"13. Appeal -- (1) Any person aggrieved by an order of the Controller may, within thirty days from the date on which the order is communicated to him, present an appeal in writing to the Chief Judicial Magistrate or any other officer specially appointed by the State Government for the purpose.

(2) The authority before whom an appeal is presented shall send for the record of the case from the Controller and after perusing such record, hearing the parties and after making such further enquiries, as he thinks fit, shall decide the appeal."

"21. Power to make rules -- (1) The State Government may make rules to carry out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for-

(a) the procedure to be followed by Controllers and appellate authorities in the performance of their functions under this Act; and

(b) the manner in which notices and orders under this Act shall be given or served."

6. Let me also notice Rule 13 of the Orissa House Rent Control Rules, 1968, framed u/s 21 of the Act, which is the main plank of the long argument. The relevant rule reads as follows : --

"13. Service of orders :-- The copies of the orders passed by the Controller under Sections 5,7,9 and 10 of the Act shall be served on the parties concerned either personally or through the lawyers representing them or by registered post."

Rule 13 is not a rule regarding the procedure with respect to the filing of an appeal u/s 13 of the Act. It simply lays down the mode of service of some important orders which can be passed under some of the provisions of the Act (for service) on the party concerned. In my opinion, therefore, it is difficult to

correlate the expression "communicated" in Section 13 of the Act with the scheme of Rule 13 and hold that the Legislature intended that an appeal by an aggrieved person would be maintainable only with respect to the orders passed by the Controller under Sections 5, 7,9 and 10.

It is a well settled principle of law that the rule-making authority cannot abridge the legislative intendment. The object of all interpretations is to discover the intention of the Legislature and that intention must be deduced from the language used by the legislation. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words. It is not disputed that unless the application of Rule 13 is injected, it cannot be held that the legislation intended to qualify the nature of orders against which alone appeals would lie. The rules made in pursuance of the delegated authority to that effect must be consistent with the statute under which they came to be made and the delegate cannot neutralise or contradict the statutory provisions. If the legislature has conferred an unrestricted right of appeal or revision, the Government can only regulate the right in procedural matters, but cannot impose impediments and restrictions on its exercise which are clearly not intended by the Legislature as that would make the rules ultra vires. The right of appeal u/s 13 has been very widely worded by saying "a person aggrieved by an order of the Controller" and apparently suggests an appeal from every order; passed by the Controller. Let me at once refer to a somewhat similar provision in Section 38(1) of the Delhi Rent Control Act 59 of 1958 which reads as follows : --

"An appeal shall lie from every order of the Controller made under this Act to the Rent Control Tribunal (hereinafter referred to as the Tribunal) consisting of one person only to be appointed by the Central Government by notification in the Official Gazette."

Section 38(1) was the subject-matter of construction in the case of Central Bank of India Vs. Shri Gokal Chand, and a question arose as to whether an appeal lay against an order rejecting a prayer for issue of commission for preparing a plan of the premises. The Rent Control Tribunal took the view that no appeal lay from the order of the Controller u/s 38(1). The same view was taken by the Delhi High Court, and the Supreme Court also taking the same view observed as follows :-- (Para 3)

".....Even an interlocutory order passed u/s 37(2) is an order passed under the Act and is subject to appeal u/s 38(1) provided it affects some right or liability of any party. Thus, an order of the Rent Controller refusing to set aside an ex parte order is subject to appeal to the Rent Control Tribunal."

The above authority clinches the issue and answers almost fully the question arising in this case. I find myself in respectful agreement with the above view that the right of appeal conferred u/s 13 of the Act must be with respect to all such orders which affect some right or liability of any of the parties. But it

necessitates reference to some of the cases decided by this Court.

7. The first in point of time and relevancy is a Bench decision in *Mangelal Sharma v. Smt. Maya Dutta* ILR (1979) 2 Cut 455. In that case, a proceeding was initiated by the landlord under Sections 5 and 7 of the Act. An application for stay was filed by the tenant on the ground that the title of the disputed house was in question in a civil case then pending in the High Court, The Controller refused the prayer and an appeal therefrom was dismissed as not maintainable. The tenant then filed a writ application where it was submitted that an appeal lay from every order of the Controller. The Central Bank's case (supra) was noticed by the Court and it was held that as the question of relationship of landlord and tenant is to be decided in the proceeding itself, the tenant could not be held to be aggrieved and, therefore, no appeal lay. The observation is in the line of the observation of the Supreme Court in the Central Bank's case. But, a further observation that according to Section 13(1), only the orders which are communicated to a party, i.e. as provided under Rule 13 of the Orissa House Rent Control Rules, 1968, are appealable was made, and it is this observation which is the bone of dispute for which a reference to the larger Bench has been made.

The above observation in *Mangelal Sharma's* case is also the sheet-anchor of argument made on behalf of the petitioner-landlord and it was vehemently submitted by Mr. Lal that an order passed under Order 9, Rule 13, C.P.C. is not an order under Sections 5, 7, 9 to 10 of the Act and not communicable within the meaning of Rule 13 of the Rules and, therefore, no appeal lay under the Act. The observation in *Mangelal's* case no doubt supports the submission of Mr. Lal. But, I have already stated that Section 13 of the Act is wide enough in its application and it does not contain any restriction with respect to the nature of orders which alone would be appealable. Restricting its ambit with reference to Rule 13, which has an entirely different dimension and purport, would be only improper. In my opinion, the observations have got no legal basis and cannot be held to be correct.

8. The next decision of this Court which is relevant in point of time is *Kandula Prabhakar Rao v. Tumulu Lakshmanamurty* 54 (1987) CLT 713 : *Kandula Prabhakar Rao Vs. Tumulu Lakshmanamurty and Another*, a decision to which both the learned brothers were parties. This decision will have some bearing on the second question and I shall refer to this again while dealing with that question. But the following observation is relevant for the first point (at p. 266 of AIR) :

".....the provisions of the CPC can be applied by the House Rent Controller to proceedings before him as principles of natural justice and that such provisions apply unless any provision in the Act is inconsistent with the provision of the CPC making the applicability of the latter unworkable and that the power of restoration can also be exercised in respect of appeals under the Act as an inherent power....."

In my opinion, this aspect of the matter does not require any further discussion in view of Section 12 of the Act which provides for disposal of the proceedings under the Act "in accordance with the provisions contained in the Code of Civil Procedure."

9. There is another Bench Decision of this court which was given by brother Patnaik sitting with V. Gopalaswamy, J. in which Mangelal Sharma's case (ILR (1979) 2 Cut 455) was also considered. The facts of this case are on the point. There also the tenant had filed an application under Order 9, Rule 13, C.P.C. which was rejected by the Controller on merits. The tenant then preferred an appeal which was allowed, the ex parte order was set aside and the case was Sent back to the Controller. The appellate order was challenged in an application under Articles 226 and 227 of the Constitution. In this Court, the two points raised in the present case by Mr. Lal, are whether that (1) an appeal would lie to the appellate authority only against the final order of eviction passed u/s 7 and not against an order rejecting an application under Order 9, Rule 13, C.P.C. and inasmuch as no appeal against the main ex parte order had been filed, the appellate authority had no jurisdiction to entertain the appeal and, therefore, the impugned order was without jurisdiction; (2) in any view of the case, the appellate authority had no jurisdiction to remand the proceeding to the Controller. With respect to the second point (which was noted as the first point in the judgment), it was held that the order of the appellate authority did not amount to an order of remand, as it was only a direction to the parties to adduce evidence before the Controller in the inquiry in accordance with the provisions of Section 13(2) of the Act. With respect to the first point, in support of which reliance was placed on Mangelal Sharma's case, the Bench had to observe that "undoubtedly the aforesaid contention has much force, particularly in view of the decision of this Court in Mangelal Sharma's case....." But it wriggled out (if I may say so with respect) of the above difficulty by observing that as in view of the materials brought on record, the tenant had made out a sufficient cause for his non-appearance, the Controller had erred in law in rejecting the tenant's application under Order 9, Rule 13, C.P.C. and, therefore, it was not a fit case to invoke the writ jurisdiction and interfere with the order of the appellate authority even though the appeal was held to be not maintainable.

10. Passingly, reference may also be made to the case of Keshab Chandra Rana v. State of Orissa, AIR 1967 Orissa 201 where it was held that communication of the order was not the same as knowledge about the order within the meaning of Rule 12 of 1959 Rules, which was similar to Rule 13 of the present Rules. This decision will have hardly any bearing on the facts of the present case.

11. Mr. Mohapatra appearing for the tenant reliance upon a decision of the Delhi High Court in the case of Azian Bi Vs. Ganga Dhar, etc., which was a case under the Delhi Rent Control Act. In that case, interpreting Section 38(1) of the Delhi Act, it was held that an order u/s 25 of the Act refusing to stay dispossession was appealable inasmuch as the right to legal possession was affected

immediately when the prayer for stay was refused.

12. On the above discussion, I come to the irresistible conclusion that the appeal filed by the tenant against the order in question was maintainable u/s 13 of the Act itself without taking recourse to Order 43, C.P.C. as the said order amounted to seriously prejudicing and affecting the right of the tenant. It may well be that the tenant could have filed an appeal against the ex parte order itself and the appellate authority in its wisdom, in exercise of its independent power u/s 13(2) could make such further inquiry as he thought fit. But that is different question altogether.

13. Before proceeding to the second question, I may also make one more observation, i.e., with respect to the period of 30 days provided in Section 13 for filing the appeal from the date of receipt of the order under appeal. This provision was also taken in aid by Mr. Lal to strengthen his submission that the right to file an appeal was dependent upon the communication of the order and since communication of only four types of orders are sanctioned in Rule 13, as a necessary corollary, it must be construed that an appeal could lie u/s 13 only from those orders which were to be communicated under Rule 13 and against no other order. This submission is apparently fallacious for the reasons indicated above. The period of 30 days only prescribes the period of limitation and its mode of computation. But, it cannot be restricted or hedged by the provisions of Rule 13 as that construction would lead to scuttling the mention of the legislation by the rule making authority. There are a large number of decisions of this Court regarding the power of the Controller to entertain applications under Order 9, Rule 13 and Sections 114 and 151 of the Code of Civil Procedure, most of which have been noticed in *Kandula Prabhakar Rao Vs. Tumulu Lakshmanamurthy and Another*, and in the case of *Smt. Debmeni Devmani Atha v. Smt. Sarala Ben Mulji Bhinda* (1985) 1 OLR 215 a decision by a single Judge of this Court.

14. Now, I proceed to consider the second question, namely, as to whether the decree having been executed during the pendency of the appeal, the appellate authority would be deemed to have become functus officio.

15. The submission is entirely misconceived and must be rejected as that would be contrary even to the elementary principles of civil law. All decrees and orders passed by a court, which may although be subject to appeal, become executable, and the appellate authority is not bound to grant stay of execution in all cases. If the contention raised on behalf of the petitioner is accepted, then all those appeals would become infructuous and the appellate courts functus officio. It is for this purpose that Section 144, C.P.C. contains a provision of restitution. The learned Judge in *Smt. Debmeni's* case (1985 (1) Orissa LR 215) (supra) has already taken such a view on reference to various earlier authorities of this Court. The same view, which, if I may say so, is correct, has also been taken in *Kandula Pravakar Rao's* case (AIR 1988 Orissa 263 at Pp. 264-65) where the following observation has been made-; --

".....consequently, it would follow that an eviction, in the eye of law, had never been carried out. The question of re-occupation by the petitioner forcibly also would not arise and he would continue to fill the same character in respect of the premises which he was originally holding prior to the purported eviction. The petitioner, if had continued to remain evicted even after the restoration of the House Rent Control Case, would always file an application for restitution to be put back in the house....."

The second question, therefore, does not. deserve consideration any longer. The answer must be given against the petitioner. I would firmly hold that on account of the discharge and satisfaction of the decree under appeal, the appellate court does not become functus officio and the benefits, if any, which can flow to the appellant from the appellate order must be given to him by applying the principles of restitution enshrined in Section 144, C.P.C. Point No. 3 :

16. The third question that in the absence of any specific power to remand, the direction for rehearing of the case by the Controller after setting aside the ex parte order was bad in also erroneous. This submission has been made under the pale of the decision of this Court in Smt. Nirmala Ben Patel Vs. Indersingh Bagi and Another, which has been noticed in the impugned order of the appellate authority. In that case, the appeal was not against an order under Order 9, Rule 13, but a regular appeal against the order of eviction itself. The scope of an appeal against the order under Order 9, Rule 13 is only to find out whether the decree should be set aside or not. It should, be in the fitness of things, that the main case be decided by the Controller. The main case being not in appeal before the Controller, the scope of enquiry contemplated by the appellate authority cannot be a forum for deciding the eviction applications on merit at all. On account of the setting aside of the ex parte order, all evidence stands obliterated. An order remitting back the case to the Controller for fresh hearing would not amount to an order of remand as such as he is not asking to redécide the Order 9, Rule 13 matter. Brother Patnaik, I. in Arun Sundar Das's case 65 (1988) CLT 169 (supra) was also faced with this problem and has discussed the same in paragraph 4 of the judgment, but without going deep into the matter to answer the question finally took a line of least resistance by saying that the appellate authority has kept the matter pending before him for making further enquiry and by the impugned order had only directed the parties to lead evidence before him. Thus, there was no infraction of Sub-sec. (2) of Section 13 of the Act without making any comment on the vulnerable observation in Mangelal Sharma's case (ILR (1979) 2 Cut 455).

17. The answer to the third question, therefore, would be that the order of the appellate authority does not amount to an order of remand and thus it does not offend the Bench decision in Smt. Nirmala Ben Patel Vs. Indersingh Bagi and Another, .

18. The Point No. 4 : The fourth question to the effect that the proceeding being summary in nature it should be governed by the procedure of Order 37, C.P.C. is

entirely erroneous for the simple reason that the said order is confined only to suits of negotiable instruments and to superior courts. That apart, Mr. Lal has not understood the apparent distinction between "summary nature" and "summary procedure".

19. Having thus considered the entire arguments, the provisions of law and the facts of the case in all the remification. I find no substance in any of the points enunciated on behalf of the petitioner by Mr. Lal. The writ application, therefore, must fail and is hereby dismissed. But since the main contention had the backing of certain observations made in Mangelal Sharma's case (ILR (1979) 2 Cuttack 455) (supra), I shall not saddle the petitioner with any costs.

G.B. Patnaik, J.

20. I agree.

L. Rath, J.

21. I agree.