
(2002) 03 OHC CK 0034

In the Orissa High Court

Case No : Misc. Jurisdiction Case No. 197 of 1999

Saraswati Das and Others

APPELLANT

Vs

Pravat Kumar Sahoo and Another

RESPONDENT

Date of Decision : 22-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 12, Order 41 Rule 21

Citation : (2002) 2 CivCC 51 : (2002) 93 CLT 441 : (2002) 1 OLR 568 : (2002) 4 RCR(Civil) 659

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Advocate : R.N. Mohanty, M.K. Panda and B.N. Rath, for the Appellant; Sanju Panda, G.P. Mohanty, M.P. Mohanty, A.K. Mohanty, M.C. Nayak and D.C. Dey, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—This is an application under Order 41, Rule 21 read with Section 151 C.P.C. praying for re-hearing of Misc. Appeal No. 57 of 1992, disposed of on March 6, 1997 by this Court.

2. Misc. Appeal No. 57 of 1992 was filed u/s 173 of the Motor Vehicles Act, 1988 by Opp. party No. 2—United India Insurance Co. Ltd. challenging the award passed by the Second M.A.C.T., Cuttack in Misc. Case No. 598 of 1988 awarding a sum at Rs. 80,000/- as compensation to claimant-respondents 1, 2 and 3, (petitioners). This Court by a well-discussed judgment dated March 6, 1997 came to the conclusion that at the relevant time when the accident took place, the vehicle was not insured and that the insurance which was only for two months, had expired with effect from January 6, 1988. Admittedly, the accident took place on May 5, 1988. On the basis of such conclusion, this Court directed, the compensation amount awarded by the Tribunal to be paid by the owner and not by the Insurance Company.

3. The claimant-petitioners in this application specifically averred that after

receiving notice of the Misc. Appeal No. 57 of 1992 issued by this Court, petitioner No. 1, handed over all the necessary papers to their Advocate Shri S. N. Mohanty to do the needful, but unfortunately, Shree Mohanty did not take appropriate steps, as a result of which, the appeal was heard and disposed of ex parte and that it is a fit case where the order passed in Misc. Appeal No. 57 of 1992 should be recalled and the appeal should be re-heard.

4. Perusal of Order 41, Rule 21, CPC reveals that the three basic ingredients mandatorily required to be satisfied for exercising jurisdiction under the said provision are :

- (A) The appeal should have been heard ex parte,
- (B) The notice on the respondents was either not duly served, or
- (C) The respondents were prevented by sufficient cause from appearing when the appeal was called for hearing.

The order sheet of Misc. Appeal No. 57 of 1992 reveals that by order dated August 27, 1992, this Court admitted the appeal and directed to issue notice on the respondents. Admittedly, the present petitioners (claimants) were respondents 1, 2 and 3 in the appeal and the owner-Opp. party No. 1 was respondent No. 4. Notices of the Misc. appeal issued to respondents 1, 2 and 3 were received by respondent No. 1-mother-guardian, personally for self and on behalf of minor respondent Nos. 2 and 3, and the service was treated to be sufficient. The notice issued on respondent No. 4 was sufficient and the said respondent No. 4 entered appearance through Shri G. P. Mohanty and Shri H. P. Mohanty, Advocates on 25.3.1996, However, neither respondent No. 1 nor respondent Nos. 2 and 3, the minors entered appearance. By order dated 27.4.93, this Court directed the appellant to deposit guardian's cost for appointment of court-guardian on behalf of minor respondents 2 and 3. After depositing necessary cost, Miss Sanju Panda, learned Advocate was appointed as court-guardian on behalf of respondents 2 and 3.

Misc. Appeal was listed for hearing on 19.8.96 and the same was heard in part and was adjourned for further hearing. On 5.11.96, the matter was once again adjourned on the request of the appellant. On 19.11.96, the matter was heard further in part, and the same was adjourned for further hearing. Thereafter, the Misc. Appeal was heard in part on 26.11.96, 29.11.96, 10.12.96 and finally hearing was concluded on 12.12.96 and the judgment was reserved. On 6.3.97, the judgment was pronounced in open court.

5. Perusal of the judgment clearly reveals that the case was argued in extenso by Miss Sanju Panda, learned Advocate appearing on behalf of minor respondents 2 and 3, Mr. G. P. Mohanty, a fairly senior advocate of this Court also argued the matter for and on behalf of the owner-respondent No. 4. It further appears from the judgment that learned counsel for respondent No. 4 (owner) while supporting the contention of the appellant on merit, combated the submissions regarding

nonliability of the Insurance Company.

Paragraph - 9 of the judgment reveals that as the owner of the vehicle had not contested the case before the Tribunal, opportunity was given in course of hearing of the appeal to the counsel for the owner-respondent No. 4 to obtain instruction if the vehicle was insured after 5.1.1988. It is observed that in spite of such opportunity being given, the counsel for the owner-respondent No. 4 could not bring to the notice of the Court any material to indicate that in fact, the vehicle had been subsequently insured either with the appellant-Insurance company or with any other Insurance Company.

6. From the facts discussed above, it can be unambiguously concluded that the Misc. Appeal was hotly contested and after hearing learned counsel for the parties appearing before it, the Hon'ble Single Judge disposed of the case by a well-discussed judgment. Thus, the order/judgment dated March 6, 1997 passed by the Hon'ble Single Judge can, under no circumstance, be nomenclatured as an ex parte order so as to attract the provisions of Order 41, Rule 21 CPC.

7. The second contention of Mr. Mohanty, learned counsel for the petitioners, is that petitioner No. 1 being a destitute widow, entrusted the matter to her lower court Advocate who assured her to take appropriate steps in the Misc. Appeal, but failed to do so and thus, there was sufficient cause for non-appearance of respondents 1 to 3 when the appeal was called for hearing. Admittedly, respondent-petitioner No. 1 received the notice issued by this Court personally for self and on behalf of her minor children-respondents 2 and 3 as mother-guardian. After receiving the notice, it was incumbent upon a party to take such steps as deemed just and proper to appear before the court when the matter is taken up for hearing. Under no stretch of imagination, it can be argued that if a party, even after valid service of notice does not appear, the courts should await till the litigant chooses to appear. According to me, the words "sufficient cause" cannot be stretched to that extent. It is the settled principle of law that "sufficient cause" has to be interpreted in the given facts and circumstances of each case and the courts have to adjudge on the touch stone of pragmatic parameter and it can never be an iron-tight jacket. Once it is found that the summons were duly served, it is for the litigant to appear in court and prosecute the lis. Failure to do so, would not construe as "sufficient cause". Such an interpretation will be unjust and would be a boon to unscrupulous litigants.

In the present case, admittedly, notice was duly served upon the respondent-petitioners, but no advocate was engaged on their behalf before this Court. In view of the fact that two of the respondents were minors, in consonance with the provision of Order 32, Rule 3, CPC, this Court directed the Registry to engage an Advocate for minor respondents and further directed the appellant to deposit the guardian-cost. Miss Sanju Panda, an advocate, having fairly good practice, was appointed as an advocate on behalf of minor respondents 2 and 3. The judgment reveals that Miss Panda strenuously argued the case before the Hon'ble-Single Judge.

8. The defence of all the three respondent-petitioners is one and same. They prosecuted the lis being represented by a single advocate in court below. Thus, absolutely no prejudice whatsoever is caused to the petitioners. In the given circumstances, I feel that non-appearance of respondent No, 1 and non-engagement of an advocate by her will not be construed that the respondents were prevented by "sufficient cause" from appearing when the appeal was called for hearing, so as to attract the provisions of Order 41, Rule 21 of the Civil Procedure Code.

9. So far as the second ingredient i.e. service of notice is concerned, admittedly, notice issued by this Court in Misc. Appeal was duly served.

10. The last contention of the learned counsel for the petitioners is that petitioners 2 and 3 though became major during the pendency of the appeal, neither they were declared as major nor any fresh notice was issued. Thus, they were prevented from appearing in the court.

To appreciate the said submission, it will be just and proper to peruse Order 32, Rule 12 C.P.C. and G.R.C.O. (Civil) Vol. - I, Chapter - XIII which provide the course to be followed by minor plaintiff/applicant on attaining majority and for guidance of guardians of minor defendants and minor respondents.

11. A cumulative reading of the aforesaid provisions lead to an irresistible conclusion that the course open for a minor attaining majority during the pendency of the litigation or at the hearing stage is either to choose to proceed with the lis as minor or file an application for being declared as major and seek permission to contest the appeal as such. If he does not do so and allows the case to proceed as though he is still a minor, then he must be deemed to have elected to abide by the judgment. This view of mine finds support from the case of Madan Behera v. Vidyadhar Sahu and Ors., ILR 1974 Cuttack 1219.

The Calcutta High court in the case of Drupad Chandra Naskar v. Bindumoyi Dasi AIR 1926 Cal 1053 observed as follows :

"Where a minor defendant represented by guardian ad litem attains majority during proceedings, a duty lies on him when he attains majority to discharge his guardian ad litem and appear himself, even though the plaintiff knows that the minor attained majority."

Similarly, a Division Bench of Madras High Court in the case of Lanka. Sanyasi v. Lanka Yeran Naidu AIR 1928 Mad. 294, observed as follows :

"..... Apparently, therefore, we must take it as found by the learned Judges in that case, that the minor defendant who comes of age may if he thinks fit come on the record and conduct the defence himself. If, however, he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the

time....."

The same is the view of the Kerala High Court in the case of Hameedu Rowther and Ors. v. Padmanabhan and Ors., 1996 KLT 1106. The conclusion is, therefore, irresistible that Order 32, Rule 12, CPC casts the responsibility on the minor who attains majority to elect on attaining majority to proceed with the suit or application or appeal or not to proceed with it. Evidently if he does not elect and the proceeding proceeds with his guardian or next friend on record, the decision of the case will certainly bind him.

In the present case, it is alleged that petitioner Nos. 2 and 3 who were respondents in the Misc. Appeal became major during the pendency of the appeal. The respondent in an appeal stands in the same position as defendant in a suit. Hence, I am not persuaded to agree with the learned counsel for the petitioners that the impugned order of the Hon"ble Single Judge suffers from any error and needs to be recalled. The conclusion arrived at by me also finds support from the case of Achhaiber and Another Vs. Smt. Shakilunnisa Bibi and Others,

In the case at hand, petitioners 2 and 3 have not expressed their desire to prosecute the lis as major. Thus, it will be deemed that they elected to abide by the judgment and cannot avoid the same after disposal of the case.

Even otherwise, in the Misc. Appeal, the Hon"ble Single Judge has upheld the amount of compensation payable to the petitioners (claimants). The only modification to the award made by the Hon"ble Single Judge is that, the compensation has to be paid by the owner and not by the Insurance Company. For deciding the said issue, the only proper and necessary party was the owner of the vehicle, respondent No. 4. The owner has entered appearance before this Court through Shri G. P. Mohanty, a fairly senior advocate, and as the judgment reveals, he was heard in extenso. Thus, no prejudice has been caused to the petitioners and I, therefore, have no hesitation to hold that none of the ingredients of Order 41, Rule 21 CPC are satisfied in the present case.

12. Accordingly, the M.J.C. is dismissed. No costs.