

(2006) 07 OHC CK 0044
In the Orissa High Court
Case No : Writ Petition (C) No. 812 of 2004

Sayed Mansoor Saheb Peer Bije Mustfapur and Others	APPELLANT
Vs	
The State of Orissa and Others	RESPONDENT

Date of Decision : 07-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 2007 Ori 31 : (2006) 2 OLR 167

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : Sk. Aziz, S.K. Jena, R.P. Bhagat, S. Sahin, M.A. Baig and D.P. Swain, for the Appellant; Debasis Samal, for O.Ps. 3 and 5, for the Respondent

Judgement

L. Mohapatra, J.—This writ application is directed against the order dated 20.1.2003 passed by the learned Civil Judge (Jr. Division), Bhadrak in Title Suit No. 174 of 1986-1 and 320 of 2002 rejecting the application for withdrawal of the suit with permission to file a fresh suit as well as the order passed by the revisional authority i.e. the learned Additional District Judge, Bhadrak permitting withdrawal of the suit without giving liberty for filing a fresh suit.

2. The plaintiffs are the petitioners before this Court. They had filed the suit claiming their easementary right over the suit property, for correction of the record of right and for permanent injunction. Since two defendants are the State authorities and relief is also claimed against the State authorities, notice u/s 80 C.P.C. was required to be served. Apart from the above, Orissa Wakf Board being a party to the suit, notice was also required to be served on the Wakf Board prior to institution of the suit. Though the plaintiffs-petitioners proceeded with the suit by issuing the notice u/s 80 C.P.C, at the end of the trial, when the suit was posted for argument, an application was filed for withdrawal of the suit with permission to file a fresh suit on the ground that though notice u/s 80 C.P.C. had been served, the same has been missing from the record and notice on the Wakf Board as required under the law had not been served. The said petition was

resisted by the defendants-opposite parties on the ground that petition for withdrawal of the suit should have been taken at the beginning and not at the end when the case is posted for argument. It was further objected to on the ground that if the suit is permitted to be withdrawn at this stage with permission to file a fresh suit, the same shall cause serious prejudice to the defendants-opposite parties. The learned Civil Judge in the impugned order rejected the petition and the same was challenged in the revision before the Additional District Judge, Bhadrak. The Additional District Judge, Bhadrak allowed the revision in part and permitted withdrawal of the suit without granting liberty for filing a fresh suit.

3. Shri Aziz, learned counsel appearing for the petitioners submitted that notice u/s 80 C.P.C. had been given but unfortunately, the same was not available on record and it was noticed after closure of the evidence from both sides. It was also contended that notice as required under the law on the Wakf Board had also not been given. Due to such defect, the suit is bound to fail. It was, therefore, prayed before the Court for permission to withdraw the suit with liberty to file a fresh suit. According to Shri Aziz, learned counsel appearing for the petitioners, for such defect, the suit could be permitted for withdrawal at any stage of the proceeding and in support of his contention, he relied upon some decisions. The learned counsel appearing for the State as well as private opposite parties submitted that such application should have been filed before hearing of the suit started and in the event, such application is allowed at this stage, the defendants-opposite parties shall be put to serious prejudice and they have to go through the entire process again in the event of filing of a fresh suit. The only submission of the learned counsel appearing for the petitioners is that an application for withdrawal of the suit with liberty to file a fresh suit could be filed at any stage of the proceeding. In this connection, reliance was placed by the learned counsel on some decisions reported in AIR, 1963, at page 424 AIR 1983 50, AIR 1975 J&K 89, Jubedan Begum and Others Vs. Sekhawat Ali Khan, .

4. On perusal of the decisions cited above, it is clear that whether the suit should be permitted for withdrawal with liberty to file a fresh suit or not depends on the facts of each case. No doubt, the said prayer can be allowed at any stage of the proceeding. In the present case, the suit was filed in the year 1986 and permission for withdrawal of the suit was made 16 years after filing of the suit. Apart from the above, such petition was also filed at the stage of argument. If those facts are taken into consideration, in my view, prayer for withdrawal of the suit with liberty to file a fresh suit should not be allowed. The defendants-opposite parties having participated for 16 years in the suit, cannot be permitted again to participate in a proceeding by way of a fresh suit that may be filed by the petitioners with permission of the Court. This will cause serious prejudice to the defendants-opposite parties. Apart from the above, the grounds taken by learned counsel for the petitioners that though notice u/s 80 C.P.C. had been served, the same was not found to be on record, does not appear to be acceptable. When the witnesses on behalf of the plaintiffs were examined, notice

u/s 80 was required to be proved and at that point of time the learned counsel appearing for the petitioners in the trial Court must have noticed absence of such notice in the record. At that point of time, an application for withdrawal of the suit should have been filed instead of waiting till the closure of evidence from both sides. I am, therefore, of the view that the trial Court was justified in rejecting the petition. However, the revisional Court for no reason permitted withdrawal of the suit without giving liberty to file a fresh suit is putting the plaintiffs-petitioners to serious prejudice. I am, therefore of the view that the revisional order is not sustainable I, accordingly set aside the order passed by the learned Additional District Judge, Bhadrak in C.R.P. No. 3 of 2003 and confirm the order dated 20.1.2003 passed by the learned Civil Judge, Bhadrak in the aforesaid suit.

The writ application is disposed of.