
(1989) 08 OHC CK 0044

In the Orissa High Court

Case No : Civil Revision No's. 966 and 975 of 1988

Shri Durga Charan Routray

APPELLANT

Vs

Narasingha Charan Das

RESPONDENT

Date of Decision : 08-08-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 10

Citation : (1990) 69 CLT 163

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

Bench : Single Bench

Advocate : N. Prusty, for the Appellant; N.C. Pati, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Mohapatra, J.—Civil Revision No. 966 of 1988 is directed against the order dated 4-10-1988 passed by the learned Munsif, Khurda staying Title Suit No. 58 of 1987 pending in his court u/s 10 of the CPC "(Code" for short) until disposal of First Appeal No. 65 of 1988 pending in the High Court. Civil Revision No. 975 of 1988 arises out of an order dated 4-10-1988 wherein the learned Munsif passed a similar order of stay in Misc. Case No. 37 of 1987 which was under Order 39, Rules 1 and 2 of the Code.

2. The following facts are relevant and undisputed. The Petitioner was the President and the Defendant was the Secretary of the governing body of Durga Charan Chilika College (referred to as "College") at Tangi in Puri district. The Petitioner instituted O. S. No. 35 of 1983 in the court of the learned Subordinate Judge, Khurda representing the governing body of the College in which he claimed that the opposite party being the Secretary of the governing body was maintaining the cash and accounts and other records of the College. He did not place the accounts before the governing body despite requests and ultimately submitted resignation in the month of September, 1982 which was duly accepted. The Principal of the College was taken in as the new Secretary. Although he ceased to be the Secretary, yet the opposite party avoided to return

the accounts and cash to his successor. Therefore, the Petitioner in the suit made the following prayer:

Let a preliminary decree be passed for directing Defendant to produce the accounts and the records of the college to the Plaintiff within a time fixed by the court, failing which (for) the accounts he taken by appointment of a commissioner and (for) the amount found due upon Defendant be recovered from him and the decree be made final.

In the written statement the opposite party took the plea that he did not resign from the office of Secretary and continued to hold such office. Therefore, the question of making over charge of the records of accounts and cash to the Plaintiff did not arise. On the other hand, by a resolution dated 10-5-1983 of the governing body, the Petitioner was removed from the office of President of the governing body of the College and so he had no locus standi to institute the suit so as to demand accounts and cash from him.

3. The learned Subordinate Judge who decided the suit did not frame an issue directly as to whether the Defendant continued as the Secretary of the College or he had ceased to be the Secretary on account of his resignation being accepted. But while answering the issue to the effect, "Has the Plaintiff No. 2 any locus standi to bring the suit and is he entitled to represent Plaintiff No. 17, he considered it appropriate to decide as to whether the Petitioner (Plaintiff No. 2) or the opposite party (Defendant) was continuing in the existing governing body and whether the governing body headed by the Petitioner or the governing body of which the opposite party claimed to be the Secretary was the real governing body of the College. After considering the evidence, both oral and documentary, in this regard he concluded:

From the materials on record and discussion made above, it therefore appears that the Governing Body headed by the President (Plaintiff No. 2) is the real Governing Body of the College and the Plaintiff No. 2 is still continuing to be the President of the college and P.W. 2 is continuing to be the Principal-cum-Secretary. On the other hand, the Governing Body headed by the Defendant is not the real Governing Body and the Defendant having been resigned on 5-9-1982 and his resignation having been accepted by the President on 30-9-1982 and by the Governing Body on 22-10-1982 is no more the Secretary of the Governing Body of Durga Charan Chilika College, Tangi.

Eventually he passed a preliminary decree in favour of the Petitioner and against the opposite party for rendition of accounts. The opposite party has challenged the preliminary decree in this Court in First Appeal No. 65 of 1988.

4. The Petitioner again instituted Title Suit No, 58 of 1987 describing himself as the President of the governing body of the College against the opposite party in the court of the learned Munsif, Khurda. He stated therein that although the opposite party was no longer the Secretary of the College, having resigned the office on 5-9-1982 which was duly accepted on 30-9-1982, he was giving out to

others describing himself as the Secretary of the governing body of the College and I though the government and the other public authorities do not recognise as such. He, therefore, felt it necessary to institute a suit praying for the following reliefs:

(a) Let it be declared that the Defendant is not the Secretary of the Durga Charan Chilika College at Tangi, "District Puri, since 30-9-1982 (thirtieth September, nineteen hundred eighty two) and he is not competent to act as the Secretary of the College, in any matter.

(b) Let the Defendant be permanently restrained not to pose himself as the Secretary of the said College and not to interfere in the administration of the College affairs.

A petition was also filed by him for temporary injunction so as to restrain the opposite party from posing himself as the Secretary of the governing body of the College and to interfere with its administration in any manner during pendency of the suit. While the suit was pending, the opposite party filed a petition u/s 10 of the Code for stay of the suit. He stated that in the earlier suit (O.S. No. 35 of 1983) of the court of Subordinate Judge, Khurda, it was decided that having resigned the office, he was no longer the Secretary of the governing body of the college by judgment and decree dated 30-1-1988. The same have been challenged by him in First Appeal No. 65 of 1988 in the High Court which was admitted on 15-4-1988. The same issue falls for consideration in the pending suit (T.S. No. 58 of 1987) and so till disposal of the First Appeal arising out of a previously instituted suit between the same parties, it is necessary to stay the suit u/s 10 of the Code to avoid conflict of decisions. In an objection, the Petitioner stated that the matter in issue in the pending suit was not directly and substantially in issue in the previous suit. So it is not necessary that the suit be stayed u/s 10 of the Code.

5. As already stated, after hearing both parties, the learned Munsif stayed Title Suit No. 58 of 1987, as well as the misc. case for temporary injunction filed in the suit u/s 10 of the Code till disposal of the First Appeal No. 65 of 1988 of this Court.

6. The ingredients of Section 10 of the Code are as follows:

(a) The matter/matters in issue should be substantially the same in the two suits;

(b) The previously instituted suit should be pending in the same Court in which the subsequent suit is brought or in another court in India having jurisdiction to grant the relief claimed; and

(c) The two suits should be between the same parties or their representatives and, these parties should be litigating in the two suits under the same title.

It was held in C.L. Tandon Vs. Prem Pal Singh etc., . that it is not the requirement of the law that the matters or the issues involved in the two suits

should be totally identical, but they must be substantially the same.

In *Life Pharmaceuticals (Private) Ltd. Vs. Bengal Medical Hall*, it was held that the test in an application u/s 10 of the Code is whether the matter in the later suit will be *res judicata* if the earlier suit is taken to have been decreed as prayed in the plaint of the later suit.

In *Shaw Wallace and Co. Ltd. Vs. Bholanath Mandanlal Sherawala and Others*, it was held by a Division Bench that the expression, "the matter in issue" in Section 10 has reference to the entire subject-matter in controversy between the parties and a mere identity of some of the issues in both the suits is not sufficient to attract the provisions of that section. Unless the decision of the suit operates as *res judicata* in the other suit it cannot be said that the matter in issue is directly and substantially the same in both the suits, that is to say, the decision in one suit must non-suit the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same.

In AIR 1973 Mad 253, *C.P. Srinivasam Pillai v. Chellakumara Gounder*, it was held that Section 10 can be applied to cases where the decision of the Court will definitely effect the decision in a suit instituted subsequently.

In *Durga Dass Vs. Smt. Gitan Devi and Others*, it was held that where an appeal lies the finality of the decree, on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* between the parties. In other words the controversy raised in the suit remains pending in appeal, as is sometimes said, an appeal is a continuation of the suit.

In *Sagar Shamsheer Jang Bahadur Rana and Another Vs. The Union of India and Others*, it was held that an appeal is a continuation of the suit and, therefore, the provisions of Section 10 apply to the previous suit which may be at the stage of appeal.

The principles laid down in the aforesaid decisions are unexceptionable and have been accepted as guidelines by all High Courts while considering an application u/s 10 of the Code.

7. Now reverting to the facts of the case under consideration in O. S. No. 35 of 1983 between the same parties which was decreed on 30-1-1988 and is now under appeal in this Court in First Appeal No. 65 of 1988, the main issue though not specifically raised for consideration was whether the opposite party still acted as the Secretary of the governing body of the college or he ceased to continue as such after his resignation was accepted on 30-9-1982. The fate of the suit against the opposite party depended on determination of this issue. Otherwise, no decree as prayed could be passed against him. The learned Sub-Judge recorded a positive and unambiguous finding which has been quoted in para 3 above that the opposite party was no more the Secretary of the governing body of the College after his resignation dated - 5-9-1982 was accepted on 30-9-1981. This finding has not so far been disturbed because, the first appeal

has not been disposed of. In the subsequently instituted suit by the Petitioner the main prayer which has been quoted in para 4 above is that the opposite party is not the Secretary of the governing body of the College since 30-9-1982, the date of acceptance of his resignation by the governing body. In view of the specific finding recorded in the earlier suit referred to above, it is not understood why a self-same prayer was made in the later suit. So, there is no escape from the conclusion that the main issue in both the suits are directly and substantially the same and the finding in the earlier suit if sustained is bound to operate as resjudicata in the later suit. This being the position, Section 10 of the Code squarely operates and no exception can be taken to the impugned orders of stay passed by the learned Munsif.

8. Before parting with the case I would like to observe that the controversy between the patties spread over several years by now, does not do good to either and puts the educational institution to a disadvantage with regard to its management and financial affairs. The sufferers are the teaching staff and the students. This controversy must stop as early as possible. Therefore, the Deputy Registrar (Judicial) of this Court should make First Appeal No. 65 of 1988 ready for hearing and place it before an available Bench in the month of October, 1989 for final disposal. The above apart, the responsibility of the Director of Public Instructions (Higher Education) is no less. According to the rules in force, members of the governing body of a college remain as such for a term of three years. It did not come to light at the time of hearing as to whether the parties still continue as members of the governing body so as to engage themselves in a legal battle challenging each others office. I hope, the Director of Public instructions (Higher Education) should take such steps as would be deemed legal and proper so that the controversy would come to an end so that the teaching staff and the students shall not suffer.

9. For the reasons stated above, I find no merit in the civil revisions which are accordingly dismissed. Parties shall bear their own costs.

Civil Revision dismissed.