

(1986) 06 OHC CK 0035

In the Orissa High Court

Case No : Civil Revision No. 804 of 1982

Shri Ganeswar Mishra

APPELLANT

Vs

Sri Adwait Charan Mohanty and Another

RESPONDENT

Date of Decision : 27-06-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96(4)
Limitation Act, 1963 — Section 21

Citation : (1987) 63 CLT 708 : (1986) 2 OLR 164

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

Bench : Single Bench

Advocate : R.N. Sutar, for the Appellant; R.Ch. Mohanty and R.K. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—The trial Court having accepted the plea raised by opposite party No. 1 that the suit was barred by limitation u/s 21, Limitation Act (hereinafter referred to as the "Act") the plaintiff-petitioner has filed this application u/s 115 of the CPC challenging the said order.

The petitioner, Ganeswar Mishra, filed Money Suit No. 211 of 1977 in the Court of the Subordinate Judge, Cuttack, against opposite party No 1, Adwait Charan Mohanty, for recovery of Rs. 2520/- as arrear house rent and arrear charges of water pipe, With interest, at the rate of 6 percent per annum on the claim. It was averred in the plaint that though arrear house rent amounting to Rs. 3744/-, including the water pipe charges for the period commencing from January, 1973 to April, 1977 was due from the defendant as the arrear rent from 1-1-1973 to May, 1974 was barred by limitation the plaintiff was antitled to recover Rs. 2520/- only. The rent was due in respect of the house situated in Ward No. 17 in Rajabagicha area of Cuttack town bearing holding No. 717.

The defendant-opposite party No. 1 while denying the claim of the plaintiff-petitioner in his written statement, took the plea that the real owner of the house

in question was Mahendr Kishore Mishra, son of the plaintiff, Ganeswar Mishra and hence the suit filed by the latter was not maintainable. This plea was reiterated by the opposite party No. 1 in the application filed by him on 22nd October, 1981 praying to the Court that the issue of maintainability of the suit, should be decided as a preliminary issue before going into its merits. On this application the parties were heard and by its order dated 23-1-1982 the Court in exercise of its power under Order 1, Rule 10(2), C. P. C, directed the plaintiff to implead Mahendra Kishore as a party to the suit. Indeed the trial Court held that he was the owner of the house in question. In accordance with the said direction the petitioner filed an application on 16-2-1982 to implead Mahendra Kishore Mishra as a party to the suit and by order dated 17-4-1982 on hearing the counsel for both the parties the Court impleaded Mahendra Kishore Mishra as proforma defendant No. 2 in the suit. Mahendra Kishore Mishra filed his written statement stating that the plaintiff was the owner of the property and the suit at his instance was maintainable. Thereafter the opposite party No. 1 in his application filed on 8-7-1982 prayed to the court to take up the question of limitation as a preliminary issue "The contention raised in the application was that since Mahendra Kishore Mishra, the real plaintiff in the suit was impleaded as party on 17-4-1982 the claim in the suit was barred by limitation and the suit was to fail on that court. This application was disposed of by the trial Court by its order dated 20-7-1982 upholding the contention of the defendant-opposite party No. 1 and the said order is impugned in the present case. The suit having been dismissed on the ground of limitation by the aforesaid order a decree was drawn up on 31-7-1982 and it was sealed and signed on 5-8-1982.

2. The learned counsel for the petitioner contended that the Court below clearly erred in dismissing the suit on the ground of limitation applying the provisions of Section 21 of the Act. The learned counsel for the opposite party No. 1 while supporting the impugned order raised the question of maintainability of the civil revision.

3. Since the question of maintainability of the civil revision has been urged, it would be appropriate to consider the same before entering into the merits of the case. The submission of the learned counsel for the opposite party No. 1 was that the impugned order dismissing the suit on the ground of limitation was a decree and as such it was appealable. Therefore, the revision petition challenging the said order was not maintainable. Refuting this submission the learned counsel for the petitioner urged that in view of the provisions under Ses. 96(4), Civil Procedure Code, no appeal lay against the impugned order. Section 96(4), CPC", reads as follows :

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

In accordance, with the provision of this section, no appeal shall lie, except on a question of law from a decree in any suit of the nature cognisable by Small Cause

Courts when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees. There is no dispute that the suit by the landlord against the tenant for recovery of arrear house rent is of the natura cognisable by the Small Cause Courts. The valuation of the suit, as noticed earlier, is Rs. 2520/- that is, less than Rs. 3000/-. The question that remains to be considered is whether the ground on which the impugned order is challenged is a question of law. The sole question, involved in the case is whether the trial Court rightly applied the provisions of Section 21 of the Act to the case or not. The question of limitation is not a pure question of law. It is a mixed question of fact and law. Therefore, the exception provided under Ses. 96(4), CPC, cannot be said to be attracted in the present case. As such the provisions u/s 96(4), CPC, could be applicable to the impugned order dismissing the suit on the ground of limitation and since the order cannot be challenged in appeal, a revision petition is the only remedy available to the petitioner. On the aforesaid analysis the preliminary objection raised on behalf of opp. party No. 1 has to be overruled.

A contention was raised on behalf of the petitioner and refuted by the opp. parties that the impugned order amounts to a decree as defined in Section 2(2) of the CPC and hence it is appealable. The learned counsel for the opposite parties contended that the impugned order does not finally dispose of the rights and liabilities of the parties and hence it is not a decree. A number of decisions were cited by the learned counsel for both the parties in support of their respective contentions. In view of the foregoing discussions and the conclusion that the civil revision is maintainable, it is not necessary to consider this point

4. Coming to the merits of the impugned order, the question is whether the provisions of Section 21 of the Act is attracted on the facts and in the circumstances of the case. As noticed earlier, Mahendra Kishore Mishra was impleaded as proforma defendant No. 2 by order dated 17-4-1982 of the trial Court after hearing the parties. The said defendant in his written statement supported the case of the plaintiff-petitioner that he was the owner of the premises in question and was therefore entitled to recover the arrear rent due from the defendant in respect of the said premises. At this stage Section 21 of the Act may be quoted :

"21 (1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party :

Provided that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in Sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is

made a plaintiff."

The argument raised in the case centres round Sub-section (1) of Section 21. All that the said provision states is that where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. Under the proviso to Sub-section (1) the Court is given the discretion to direct that the suit as regards the newly added plaintiff or defendant shall be deemed to have been instituted on any earlier date if it is satisfied that the omission to include the new plaintiff or defendant was due to a mistake made in good faith. Even assuming that the provision u/s 21(1) is applicable to the case it could be said that against the newly added defendant No. 2 the suit should be held to have been instituted on 17-4-1982 and not earlier. It is pertinent to note here that the plaintiff seeks no relief against defendant No. 2. Indeed, defendant No. 2 fully supported the plaintiff in his written statement. In these circumstances, the plaintiff could not be non-suited applying Section 21(1) of the Act as has been held by the trial Court in the impugned order. Perhaps to get over this position the Court below observed that defendant No. 2 was the real plaintiff and therefore the suit should be deemed to have been filed by him. But this position is not available to the defendant in view of the order dated 17-4-1982 allowing the application of the plaintiff-petitioner to implead Mahendra Kishore Mishra as defendant No. 2. It is pertinent to mention here that in the said order the Court clearly came to the conclusion that by bona fide mistake and due to oversight Mahendra Kishore Mishra was not made a party to the suit earlier. In view of this order it was not open to the Court below to hold that though impleaded as defendant No. 2, Mahendra Kishore Mishra must be deemed to be a plaintiff in the suit. In effect the Court transposed defendant No. 2 to the category of plaintiff which was not sought for by any of the parties. Thus the Court below clearly erred in holding that the suit was barred by limitation applying Section 21 of the Act.

5. On the analysis aforesaid, the revision petition succeeds and the same is allowed. The impugned order is set aside. The trial Court shall dispose of the suit on merits in accordance with law. Parties will bear their respective costs of this proceeding.