

(1988) 09 OHC CK 0025

In the Orissa High Court

Case No : Civil Revision No. 717 of 1986

Siba Prasad Jena

APPELLANT

Vs

Ganeswar Khanda

RESPONDENT

Date of Decision : 19-09-1988

Acts Referred:

Bankers Books Evidence Act, 1891 — Section 5, 6
Criminal Procedure Code, 1973 (CrPC) — Section 105

Citation : (1989) 67 CLT 330

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : P.K. Misra, N.C. Pati and A.K. Nanda, for the Appellant; S. Mishra-2, S. Mantry, R.C. Rath and A.K. Misra, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Defendant is the Petitioner in this Civil Revision.

2. After the ex parte decree was set aside, parties were given opportunity to file list of witnesses and the suit was posted to 30.9.1986 for hearing. That day Defendant filed an application to direct the Branch Manager, Central Bank of India Balasore Branch, to submit information by producing certified copy of the entries of the Accounts of-

(i) Madanlal, Saraf during September, 1982 to November, 1982 in relation to eight cheques details of which were given to show whether they were issued by Madanlal in name of one Bhagaban Paramanik ;

(ii) Ganeswar Khanda in his own name or in the name of Utkal Cold Storage, Ganeswarpur, as to whether the amounts in cheques detailed in respect of Madanlal had been deposited in his account; and also to furnish further certificates that no other entries are to be found in the books of accounts of the Bank concerning the account in ;

(iii) indicating that no other cheque issued by Madanlal in name of Bhagaban has

been deposited in account of Ganeswar.

Trial Court having rejected such petition, this Civil Revision has been filed.

3. u/s 5 of the Bankers' Books Evidence Act, 1891 (hereinafter referred to as "the Act") unless there is special cause, no officer of any Bank who is not a party is to be compelled to produce any Bankers' Book, the contents of which can be proved under the Act or to be a witness to prove matters, transactions and accounts recorded therein. u/s 6 Court may order inspection of books by a party. It reads as follows:

6. Inspection of books by order of Court or Judge-

(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purpose if such proceeding, or may order the bank to prepare and produce within a time to be specified in the order certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to Certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank and shall be served on the bank three clear days (exclusive of bank, holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

4. It is submitted that the application is for exercise of discretion u/s 6 of the Act. There is no doubt that Court has discretion to pass an order u/s 6. This discretion is to be judicially exercised. For exercise of judicial discretion it is to be first considered whether the application is self contained. Where the application would not disclose the reason the wide discretion of the Court would "not be" exercised. Thereafter, it is to be considered whether the entries sought to be inspected by the applicant are relevant for the suit. Relevancy shall be considered as, the basis of pleadings in the suit since Court cannot entertain any evidence for which there is no basis in the pleading. Once it is a discretion conduct of the party is material. Even if the conduct would be deplorable, Court can exercise the discretion in favour of the applicant where the prejudice of adversary can be mitigated by payment "of cost". Where the Court feels that such inspection would assist it at arriving at a just conclusion, it can a) so permit inspection. As has been provided in Section 6, the order is to be passed without hearing the bank. Accordingly, the objection of the bank if any shall be carefully considered where a direction u/s 6 is given without hearing the Bank. Since

assertion of facts and circumstances, is necessary in the application: Court shall insist on the affidavit of the applicant, so that any false assertion to invoke the discretion of the Court would attract penal consequence.

5. In this case the application does not contain details. It is not specific. On this ground, the Court could have rejected the application after giving opportunity to the Petitioner to rectify the same. Trial Court has, rejected the application on account of the conduct of the, Petitioner without examining the prejudice to the Plaintiff and consequence. However, the order does not call for any interference, it give liberty to the Petitioner to file a better application following the requirements as laid down above. The suit is ready for hearing. Many of the materials as sought for by the Petitioner can be collected from the witnesses of the Plaintiff if pleadings permit, to that effect.

Therefore, the witnesses for the Plaintiff may be examined and in case it becomes necessary for the Defendant to invoke the discretion of the Court, he may make an application which shall be considered by the trial Court on its own, merits. In case the application is allowed, the further hearing of the suit .would be deterred. In case such application is not found favour, the hearing shall proceed without giving any opportunity to the Defendant to challenge the order since a wrong order against which no appeal lies can be challenged in the appellate Court by the party in an appeal against the decree as provided in Section 105, Cr.P.C.

6. In the result, the Civil Revision is disposed of with the aforesaid observations. No costs.