

(2000) 04 OHC CK 0002
In the Orissa High Court
Case No : Civil Revision No. 32 of 2000

Sk. Zahural Islam

APPELLANT

Vs

Tanweer Jahan Begum and Others

RESPONDENT

Date of Decision : 27-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Evidence Act, 1872 — Section 115

Citation : AIR 2000 Ori 140 : (2000) 3 CivCC 77 : (2000) 90 CLT 87

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

Bench : Single Bench

Advocate : S.P. Misra, for the Appellant; S.C. Ghosh, B.H. Mohanty, P.K. Rath and D.N. Subudhi, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Patra, J.—In this civil revision u/s 115 of the CPC (for short "C.P.C.") the petitioner has challenged the order dated 17-1 -2000 passed by Sri B. P. C. Pattnaik, Civil Judge (Senior Division) First Court, Cuttack in Title Suit No. 392 of 1997, allowing the prayer of the plaintiff for amendment of the plaint.

2. The petitioner is the defendant No. 2, the O.P. 1 is the plaintiff and the other opposite parties are defendants 1 3, 4, 5, 6, 7, 8, 9, 10 and 11 respectively in Title Suit No. 392 of 1997. The plaintiff prayed for partition of the suit properties and rendition of accounts of the Orissa Kohinoor Press (for short "the press") left behind by late Aminul Islam who died on 10-8-1985, leaving behind the plaintiff and the defendants as his heirs. The defendant Nos. 2, 3 and 4 filed their written statement, inter alia, stating that the plaintiff had no substantial right to claim partition of the properties left by late Aminul Islam. According to them late Aminul Islam executed a registered "Havanama" (gift deed) dated 9-2-1983 and gifted his right, title and ownership of the press in favour of defendant No. 2 and after that the defendant No. 2 became the owner of the press, invested money and carried on the business, the defendant Nos. 6, 7, 8 and 9 sold their

respective shares by registered sale deed dated 14-8-1991 in favour of defendant Nos. 2, 3 and 4, their mother also gifted away her share of property in favour of defendant Nos. 2, 3 and 4 by a gift deed dated 20-6-1990 and late Sk. Aminul Islam had also executed a will on 10-11-1983 in favour of the defendants 2, 3 and 4 in respect of the properties recorded in his name under khata No. 323. After filing of the written statement by defendant Nos. 2, 3 and 4 the plaintiff prayed for amendment of the plaint seeking addition of a prayer to declare the gift deeds, will and sale deed as null and void which has been allowed in the impugned order after hearing the learned counsel for the parties and rejecting the contention of the defendants that the amendment will change the nature of the suit.

3. Mr. Misra, learned counsel for the petitioner and Mr. Ghosh, learned counsel for opposite party No. 1 were heard at length.

4. Mr. Mishra, learned counsel for the petitioner assailed the impugned order on three grounds :

(i) the amendment would change the nature of the suit;

(ii) the prayer to declare the gift deeds, will and sale deed null and void, was barred by time and cannot be allowed to be included in the plaint; and

(iii) notwithstanding the receipt of cost by the defendants awarded by the Court, the revision petition is maintainable.

In support of his third contention he placed reliance on a decision of this Court, in *Hindustan Commercial Corporation, Cuttack v. Bank of Baroda, Cuttack* 55(1983) CLT 219 wherein it has been held that acceptance of the costs will not give rise to a situation of estoppel and the defendants' revision application cannot be dismissed on the ground that the awarded costs have been received.

Mr. Ghosh, learned counsel for opposite party No. 1 placed reliance on a decision in the case of *Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others*, wherein it has been held as follows (at pages 2572-2573) :

"The principle of estoppel which precludes a party from assailing an order allowing a petition for amendment subject to payment of costs where the other party has accepted the costs In pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of discretionary power of the Court to award costs because in such a case the party who has been awarded costs has no opportunity to waive his right to question the validity or correctness of the order.,"

In the instant case the impugned order reveals that the amendment petition is allowed subject to payment of cost of Rs. 50/- by the plaintiff to the defendants and a certified copy of the memo has been filed showing receipt of Rs. 50/- by the learned counsel for the defendants on 22-1-2000. In view of the decision of the Apex Court, the petitioner cannot be permitted to challenge the order allowing the prayer for amendment, since the cost awarded has been received without objection. Therefore, the revision petition is liable to be rejected on this score.

5. Regarding the second point, the learned counsel for the petitioner placed reliance on the decision in the case of Muni Lal Vs. The Oriental Fire and General Insurance Company Ltd. and another, wherein it has been held that the plaint cannot be permitted to be amended under O. 6, R. 17, C.P.C. after the suit for relief in question was barred by time during pendency of the proceeding. The question of limitation will be decided by the trial Court after recording the evidence of the parties.

6. So far as the Ist point is concerned, it is found that the impugned order cannot be interfered with since the amendment, though lengthy, will not change the nature of the suit inasmuch as after the contesting defendants filed their written statement, plaintiff sought for inclusion of the prayer to declare the gift deeds, will and the sale deed purported to have been executed by late Aminul Islam and his wife in favour of the defendant Nos. 2, 3 and 4 to be null and void since she had no knowledge about the same prior to that and claiming to be a daughter of late Aminul Islam, the plaintiff has filed the suit to carve out her share in the property of her father.

7. It may be stated that in Misc. Appeal No. 287 of 1999 vide order No. 12 dated 15-12-1999, as agreed to by the parties, they were directed to appear before the trial Court on 6-1-2000 and direction was given to the trial Court for conclusion of the hearing by the end of March, 2000. Thereafter the amendment petition has case, been filed before the trial Court and consequently the, delay was caused in disposal of the suit as per the direction of the Court. In the facts and circumstances of the case and the findings on the three points as discussed above, it will not be expedient to interfere with the impugned order which is found to be legally sustainable. Therefore, there is no merit in this petition and the same is accordingly dismissed. The learned Civil Judge (Senior Division) is directed to dispose of the suit as expeditiously as possible since the parties agree for early disposal of the same. No costs.