

(1997) 08 OHC CK 0009
In the Orissa High Court
Case No : Civil Revision No. 340 of 1994

Smt. Anima Mishra

APPELLANT

Vs

Smt. S. Venkataratnam and Others

RESPONDENT

Date of Decision : 14-08-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (1997) 2 OLR 288

Hon'ble Judges : D.M. Patnaik, J

Bench : Single Bench

Advocate : Mahadev Mishra, S.K. Mohanty, S. Barik and M. Misra, for the Appellant; A. Mukherji and P. Mukherji., for the Respondent

Final Decision : Allowed

Judgement

D.M. Patnaik, J.—The present revision is by the plaintiff-petitioner against the order dated 9.11.1994 of the Civil Judge (Senior Division), Bhubaneswar allowing the petition of the defendants under Order 9, Rule 13 Civil Procedure Code, thereby restoring the suit for specific performance of contract.

2. The plaintiff-petitioner's case is, one S.L. Narasingham, husband of opposite party No. 1, and father of opposite parties 2 to 4 entered into an agreement on 4.9.1982 with the plaintiff to sell his land and house for a consideration of Rs. 65,000/- and put the plaintiff into possession. He agreed to execute the registered sale-deed after obtaining permission from the Government. But unfortunately before he could do this, he died on 21.6.1984. When the petitioner approached the opposite parties, they refused to execute the sale-deed and hence the plaintiff filed the suit.

3. Defendants did not appear in spite of notice and ex parte decree was passed on 9.7.1987. On 5.9.1989, that is more than two years after the ex parte decree, the opposite parties filed a petition under Order 9, Rule 13. C.P.C. to set aside the ex parte decree with a petition for condonation of delay on the ground of

illness of defendant No. 1. It was pleaded that opposite party No. 1, wife of said Narasingham, fell ill from 20.10.1986 to 31.7.1987 during which period she was under treatment of a medical practitioner at Niali and in a private Nursing Home at Visakhapatna, and again from 31.7.1987 to 2.9.1989 she was treated at Niali and therefore could not file written statement.

The trial Court took up the hearing along with the matter of condonation of delay and opposite party No. 1 laid evidence about her illness. The Court allowed the petition thereby restoring the suit. The plaintiff moved this Court in Civil Revision No 61/92 and by order dated 14.2. 1992 the Court disposed of the revision holding that the condonation of delay should not be a ground to consider the merit of the application under Order 9, Rule 13, C.P.C.

4. Mr. Mahadev Mishra, learned counsel for the petitioner-plaintiff submitted that the decision of the learned Civil Judge (Senior Division), Bhubaneswar allowing the petition for restoration is based on no evidence, therefore the order is illegal.

Mr. A. Mukherji, learned counsel for defendant-opposite party No. 1, on the other hand, strenuously urged that a revision is not maintainable since it cannot be said that the Court has exercised jurisdiction not vested on it or refused to exercise the jurisdiction so vested, nor according to Mr. Mukherji, the Court committed any illegality in conducting the proceeding with material irregularity. Rather, according to him, from the circumstances proved the Court was satisfied that defendant No. 1 had been able to prove sufficient cause, that is, her illness in not attending the Court on the date filed.

The rival contention need examination.

5. In the present case, opposite party No. 1 alone examined herself. Though the medical certificates are on record, those have not been proved nor the doctors issuing them were examined, nor any person or any neighbour who might have been acquainted with the fact of illness of the defendant No. 1 was examined to corroborate the version of defendant. The Court found that it was not possible on its part to come to a definite finding with regard to illness of defendant No. 1, but at the same time the Court relied on certain "circumstances" and held that they proved the illness of defendant No. 1. We may examine the legality or otherwise of such a finding.

6. The lower Court has taken one of the circumstances that the plaintiff put forth a case that on the date of hearing or to be precisely on 30.6.1987. defendant No. 1 was present in the Court and that on previous occasion. during the alleged period of her illness and treatment she was seen by the plaintiff at Bhubaneswar. The Court observed that if that was so it was imperative on the part of the plaintiff to draw the attention of the Court about such presence of defendant No. 1. By observing this it is apparent that the Court shifted onus of proving the fact of illness from defendant No. 1 to the plaintiff which is not permissible under law. It became completely oblivious of the position of law that the illness of defendant No. 1 as a fact during the relevant period was to be proved by her unless there

was specific admission of such illness by the plaintiff. Therefore, the issue before the Court for examination was whether defendant No. 1 laid convicting evidence to satisfy the Court that she suffered from illness during the said period. There was no better evidence from the side of the defendants to prove her illness and it was only an oath versus oath. That apart, evidence of defendant No. 1 in the cross-examination shows that she had no knowledge or idea about certain facts put in the cross-examination. Law is well settled that in civil litigations the Court is supposed to believe the existence or otherwise of a particular fact on the basis of preponderance of probabilities of the facts in respect of which evidence is laid. In my view, defendant No. 1 failed to bring about these probabilities. On this point I feel apposite to refer the decision in the case of Ananta Misra Vs. Utama Dibya, , wherein this Court while dealing with the case of setting aside ex parte decree observed that the Court failed to bestow attention on crucial factors in evidence which according to the Court might have lent some probability to the defence version that there was no service of summons.

In the case at hand, the sole version of defendant No. 1 about her illness should not have been accepted as proving fact of illness so as to consider the same as sufficient cause for non-appearance.

7. The other illegality is found to be one when the Court held that since defendants came forward to contest a suit of high valuation, for ends of justice suit should be restored. In the case of E.I.D. Parry Limited Vs. Agro Sales and Service and Others, etc., , the Full Bench of this Court held that where the statutory provisions covers the entire field, application of inherent, power would stand excluded.

In the case of Rudramani Padhan and Others Vs. State of Orissa, this Court held that when sufficient cause is not shown, the Court lacks jurisdiction to allow the petition for restoration on any other ground including exercising inherent power u/s 151, C.P.C. The Court in the present case has observed that it could not arrive at a definite finding about illness because of uncorroborated evidence of defendant No. 1. Thus here was no satisfactory evidence before the Court that defendant No. 1 suffered from illness and therefore, was prevented by sufficient cause for not appearing on the date fixed. For this as per the principles laid down in the Rudramani's case (supra) it lacked jurisdiction to restore the suit. Mr. Mishra, learned counsel for the petitioner, has cited a decision of this Court in the case of Ananda Behera and Others Vs. Nilkamal Behera and Others, wherein this Court has held that revision u/s 115, C.P.C. by the High Court is permissible, when the decision of the lower Court is that the petition deserves to be allowed because of high valuation of the suit even though no sufficient cause is proved. I accept the contention of the learned counsel that a revision would be maintainable.

8. In the case of AIR 1949 156 (Privy Council) it was held that u/s 115, C.P.C. the High Court should find out that in exercising jurisdiction the lower Court did not act illegally, that is, in breach of some provisions of law or with material

irregularities, that is by committing sonic error of procedure in the course of the trial which is material in that, it may have affected the ultimate decision.

In the present case, I have already indicated material irregularities committed by the Court in conducting the proceeding.

I may aptly refer to the decision of the Supreme Court in the case of D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, wherein it has been held that it would be competent on the part of the High Court to interfere with an order of a subordinate Court u/s 115, C.P.C. provided the said lower Court commits an illegality or conducts proceeding with material irregularities as prescribed under Clause (c) to that section. The Court explained that it is not the decision which is material, but the manner in which the said decision is reached. It further explained that orders contemplated by that clause may relate either to the breach of some provisions of law or to material defects of some procedure affecting the ultimate decision and not errors either of facts or law.

I have already indicated in the foregoing paragraphs that the manner of reaching the decision by the Court is against law and established principle in conducting a proceeding.

9. In the result, the impugned order is set aside. Revision is allowed, but parties to bear their own cost.