

(1983) 08 OHC CK 0024
In the Orissa High Court
Case No : Second Appeal No. 357 of 1977

Smt. Sarat Kumari Naik and Another	Vs	APPELLANT
Smt. Santilata Rautaray		RESPONDENT

Date of Decision : 09-08-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 25, 100, 115, 151
Limitation Act, 1963 — Section 14, 5

Citation : (1983) 55 CLT 206

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : R.N. Sinha, N.C. Patnaik, R. Mohanty, S.C. Maharana and B. Mahanty, for the Appellant; R.K. Mohapatra, G.C. Jena, K.C. Rout, S.B. Choudhury, B.C. Das, A.N. Misra, B.P. Misra, M.K. De, C.K. Kar, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—The Respondent filed a suit for declaration that she was the owner of the disputed property and sought a decree for delivery of vacant possession thereof to her after eviction of the Defendant Appellants and for permanent injunction against the Defendants restraining them from encroaching upon the disputed land in future. The suit was dismissed by the trial court. In course of hearing of the appeal, filed by the Plaintiff before the lower appellate court, it was urged that the commissioner who had been appointed to make local inspection and measure, had failed to answer all the questions. The trial court should have asked the commissioner to demarcate the disputed property and submit his report stating the encroachment made by the Defendants. It was further urged that the trial court had framed an issue in a general way, namely whether the sale deed in favour of the Plaintiff was legal and valid but no specific issue was framed as to who succeeded to the property left by Natha. Was it Guna Dei or Sidheswar Naik? The lower appellate court accepting the submissions of

the Plaintiff, ordered remand of the wit to the trial court after reversing its judgment and decree, directing it to issue a commissioner afresh to demarcate the suit-land and to show the existence of the alleged encroachment and to frame an additional issue as to whether the 1/8 interest of Natha in the suit property inherited by Guna Dei or Sidheswar. Aggrieved by the remand judgment of the lower appellate court, the Defendants tiled Second Appeal No. 357 of 1977.

2. When the Second Appeal was taken up for hearing, an objection was raised by the counsel for the Respondent that against a judgment of remand, a second appeal did not lie to this Court; but a revision. According to Mr. R.K. Mohapatra, learned Counsel for the Respondent, there was no doubt about the position of law which was well settled and the same position was further reiterated by the decision of a Full Bench of this Court in *Dinamani Debi Vs. Paramananda Choudhury and Another*, . According to the learned Counsel, the remand being neither under Order 41 Rule 23 of the Code of Civil Procedure, nor Rule 25 thereof, it was one u/s 151 of the Code and a revision lay.

3. Confronted with this situation. Mr. R.N. Sinha, learned Counsel for the Appellants, submitted that he filed the second appeal upon good authority, being a Division Bench decision of this Court in *Sardar Bauri Bisoyi v. Surekha Sahuani and Ors.* ILR 1974 Cutt. 1433, which was a valid authority on the date of filing of the second appeal, though the said decision was later overruled by the Full Bench in *Dinamani's* case (supra). Mr. Sinha by way of abundant caution made an oral prayer for treating the second appeal as a civil revision and hearing the matter as such. By way of abundant caution and on account of insistence and vehemence of the counsel for the Respondent he filed an application for conversion of the second appeal to a civil revision wherein averments have been made indicating the reason for filing the second appeal. An application u/s 5 of the Limitation Act was also filed for condonation of delay if the conversion would amount to institution of the matter on a later date after expiry of the period of limitation. The Respondent filed his objection stating that the decision of the Division Bench in *Bauri's* case ILR 1974 Cutt. 1433 (supra) was incorrect and could not lay down a rule contrary to the established principle of law as laid down consistently by the Patna High Court which are binding on this Court, being decisions at the Patna High Court before formation of this Court. According to the Respondent, the Appellants exhibited carelessness and negligence in filing the second appeal and the advice given was unreasonable also and it was urged that the application for condonation of delay should be rejected.

4. A catena of authorities were cited at the Bar. I am referring to only those which I consider to be pertinent.

5. It is no doubt correct that the Patna High Court had taken a consistent view that against an order of remand u/s 151 of the Code of Civil Procedure, no appeal lay but a revision. So, also various other High Courts had taken the same view. In fact, two decisions of this Court had held that revision lay. References are to be found in the Full Bench decision in *Dinamani Debi Vs. Paramananda*

Choudhury and Another, .

But despite the trend of authorities in this Court and elsewhere, as stated above, a Division Bench of this Court in Bauri Bisoyi's case ILR 1974 Cutt. 1433 (supra) held:

...if this order of remand is treated as one made in exercise of the inherent powers of the Court, that order so made would be a decree which reversed the decree of the trial court and deprived Defendant No. 8 of the valuable right he had acquired thereunder. The Second Appeal was, therefore, competent u/s 96, Code of Civil Procedure, read with Section 100 thereof....

It is true that the decision in Bhairab Chandra Dutta and Others Vs. Kali Kumar Dutta and Others, , the foundation for the aforesaid view of the Division Bench in Dinamani Debi Vs. Paramananda Choudhury and Another, was dissented from by a Division Bench of the Calcutta High Court in Banka Behari Deb Vs. Birendra Nath Dutta and Another, and by the Patna High Court in Permanand Kumar and Others Vs. Bhon Lohar and Others, but none the less, a Division Bench of this Court following Bhairab Chandra Dutta and Others Vs. Kali Kumar Dutta and Others, and Mahammad Ali Fakir Vs. Karam Ali Taluqdar and Others, , laid down the rule that against an order of remand u/s 151 of the CPC a Second appeal to the High Court.

6. The next question is the question of belated prayer for conversion of the second appeal. Mr. Mohapatra, learned Counsel for the Respondent cited a few decisions laying down the principle governing condonation of delay. In Tirumala Bhaskar Rao Naidu v. Panasa Narayanamma and Anr. 22 (1966) C.L.T. 309, a suit had been wrongly valued by the lawyer for the purpose of court-fee and jurisdiction. The plaint was returned for presentation in proper court. By the time the plaint was refilled in the proper court, the period of limitation prescribed for the suit had already expired. On the question whether the Plaintiff was entitled to exclusion of time during which the suit was pending in the wrong court u/s 14 of the Limitation Act, the Division Bench observed:

...The Plaintiff is entitled to the exclusion of the period u/s 14 of the Act only when it is established that the mistake was due inspite of due care and attention, that is to say, that the mistake was due not on account of the negligence of the party or his legal adviser who was left in charge of the case.... The court has got to examine and scrutinise the conduct of the lawyer. If on such scrutiny it is found that the conduct of the lawyer was palpably negligent and that the view taken by him was unreasonable, the Plaintiff has got to suffer for the conduct of his counsel Mere absence of dishonesty and mala fide on the part of a lawyer is not sufficient for the Plaintiff to invoke in his aid the provisions of Section 14 of the Act.

In Rabeya Khatun v. Official Liquidator 34 (1968) C.L.T. 831, G.K. Misra, J. (as his Lordship then was) speaking for the Division Bench said:

Position of law is now well settled that to give benefit to the Plaintiff u/s 14 of the Act, on account of mistakes committed by her legal adviser, the conduct of the lawyer must be examined and scrutinised carefully. If it is found that the conduct of the lawyer was palpably negligent and the view taken by him was unreasonable, the Plaintiff has to suffer for the conduct of her counsel. If on the other hand the view of the counsel, even though mistaken was reasonable to be taken, Plaintiff is entitled to the benefit of Section 14....

The same learned Judge deciding singly the case of Bhagirathi Padhan and Ors. v. Achuta Padhan 31(1965) C.L.T. 105, observed:

Sufficient cause must receive liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the Appellant....

and his Lordship pointedly drew attention to the distinction drawn by the Supreme Court in Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., , between the requirements of Section 5 and of Section 14 of the Limitation Act, by using the expressions "to the same extent and in the same manner" in the following passage:

Therefore considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only u/s 5 without reference to.

8. In this connection, I may draw attention to the decision of the Supreme Court in Mata Din Vs. A. Narayanan, , which has relevance. In Mata Din Vs. A. Narayanan, , a memorandum of appeal was erroneously held before the District Judge. Having regard to the valuation of the suit, appeal lay to the High Court. The District Judge directed return of the memorandum of appeal. Mata Din filed a revision and represented the memorandum of appeal. The High Court refused to condone the delay holding that the advocate of 34 years standing would not possibly make the mistake in view of the clear provisions of law that appeals of the value above Rs. 5,000/- were to be filed before the High Court. The Supreme Court observed:

The law is settled that mistake of counsel may in certain circumstances be taken into account in condoning delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. It is always a question whether the mistake was bonafide or was merely advice (devisèd) to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way. The High Court unfortunately never considered the matter, from this angle. If it had, it would have seen quite clear by that there was no attempt to avoid the Limitation Act but rather to follow it albeit on a wrong reading of the situation.

Their Lordships further observed in paragraph 7 that in the appeal which was

filed before the District Court, the same court fee had been paid. So, there was no question of an attempt to save court-fee. The appeal was filed before the District Court within the period of limitation prescribed and in fact, the Appellant had two months in hand to file the same in the High Court. There could be apparent no underhand motive to file the appeal in the District Court. Their Lordships further observed that the counsel erroneously interpreted a rule framed by the High Court relating to valuation of the appeal, but there was nothing to show that the error was tainted by any mala fide motive on the part of the counsel and so holding upset the decision of the High Court and condoned the delay. In this connection, I may also refer to an observation of Brett, M.R. in *Highton v. Treherne* (1879) 41 L.J. Ex. 167.

...where there has been a bona fide mistake, not through misconduct nor through negligence nor through want of reasonable skill but such a skilled person might make, I very much dislike the:

Idea that the rights of the client should be thereby forfeited.

9. Having regard to the fact that *Dinamani Debi Vs. Paramananda Choudhury and Another*, though per incuriam had not been overruled or declared to be bad law but held the field, It would be unjust to hold the conduct of a lawyer, who moulded his course following the said decision, to be palpably negligent or lacking in due care and attention or as reckless. It will be unreasonable to hold that a lawyer exhibited lack of due care and attention or acted negligently or unreasonably or mala fide if he followed the law as laid down by the Division Bench and filed a second appeal against an order of remand u/s 151 of the Code of Civil Procedure. Many would swim along the tide. Another may be valiant and venturesome enough like the counsel for the Petitioner in *Dinamani Debi Vs. Paramananda Choudhury and Another*, to take up the cudgels backed by the old Patna decisions and decisions of various other High Courts and of this Court for the overturning of the rule laid down by the Division Bench. But I would hesitate to stigmatise the conduct of the less valiant as lacking in due care and attention or as negligent and unreasonable or mala fide. I may, at this stage, state that after the decision in *Dinamani Debi Vs. Paramananda Choudhury and Another*, many matters which would otherwise have been filed as civil revisions, were filed as second appeals.

10. A revision is none the less an appeal to this Court for dispensation of justice but circumscribed by jurisdiction as provided in Section 115 of the Code of Civil Procedure. The difference between an appeal or a revision lies in the limit and scope of jurisdiction. The right of appeal is one of entering a superior court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. When the aid of the High Court is Invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the CPC

circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider, and larger sense, see *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, .

Story on Constitution (of United States) Vol. 2, Article 1761 referred to with approval by the Supreme Court in *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, says that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the legislature may choose to prescribe.

11. The suitor has already entered the portals of this Court. No further court-fee is payable. There can be no technical objection to the conversion of the second appeal to a revision. Even an application for conversion is not necessary, for nothing needs further to be done excepting changing the nomenclature of the matter. Such has been the procedure and dispensation of justice as can be seen from the decision reported in the case of *Gadadhar Sahu v. Karsanbasta Patel and Ors.* ILR 1960 Cutt. 482, where it has been held:

Mr. Mohapatra's preliminary objection that no Second Appeal lies against the order of remand and that a Civil Revision lies has full force. But as court-fee more than what is payable in a case of Civil Revision has been paid, I directed the Second Appeal to be treated as a Civil Revision and to be argued on that footing.

As it was contended that an application for conversion was filed in *Gadadhar Sahu's* case ILR 1960 Cutt. 482 (supra), the records of that case were called for and it was found that no such application had been filed and the conversion was allowed on an oral prayer. So also in *Rajkishore Das v. United Bank of India* ILR 1936 Cutt. 691, a revision u/s 115 of the CPC was treated in course of hearing as a Miscellaneous Appeal and was disposed of as such.

In *Bahori Vs. Vidya Ram*, , Banerji, J. observed:

There is no specific provision for the conversion of an appeal into a revision or vice versa. Consequently, the exercise of power has to be only under the provisions of Section 151. The inherent powers of the Court permit the Court to make such orders as may be necessary for the ends of justice. The power is discretionary undoubtedly and is to be exercised in a proper case. If the interest of justice requires the passing of such an order or to prevent the abuse of the process of Court, the Court would be fully justified in passing an order under this provision.

There is nothing like a period of limitation for making an application for conversion of an appeal into revision or vice versa. All that is required to be seen

is if the appeal or the revision had been filed within the time prescribed for the filing of the appeal or the revision, as the case may be....

12. I close this topic with an apt observation of D.R. Khanna, J. in *Jiwan Dass Rawal v. Narain Dass and Ors.* AIR 1981 Del. 291.

The label placed on a cause is not conclusive and does not ordinarily affect the jurisdiction of the court to allow the libel to be corrected by treating an appeal as a revision or a revision as an appeal, provided of course the cause of justice so demands....

I would have the least hesitation, following the aforesaid authorities, in treating this second appeal as a revision, as prayed for by the counsel for the Appellant. Question of condonation of delay does not arise.

13. I direct conversion of the Second Appeal to a Civil Revision. The matter would now be placed for hearing of the revision.