

(2008) 10 OHC CK 0045
In the Orissa High Court
Case No : Writ Petition (C) No. 6332 of 2007

Sri Dadhibaman Jew

APPELLANT

Vs

Draupadi Das and Others

RESPONDENT

Date of Decision : 20-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3A, Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1A(2), 151
Constitution of India, 1950 — Article 227

Citation : (2008) 10 OHC CK 0045

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Advocate : G. Mukherji, P. Mukherji, S. Pattnaik, M.K. Majumdar and A.C. Panda, for the Appellant; S.P. Mishra, S.K. Mishra, S. Mishra, L. Bhuyan and S.S. Satapathy for Resp-1, 2, 3, 6 and 7, for the Respondent

Judgement

Sanju Panda, J.—Invoking the jurisdiction under Article 227 of the Constitution of India, challenge in this writ petition has been made by the Petitioner to the order dated 26.4.2001 passed by the learned Addl. District judge, Bhadrak in Misc. Appeal No. 1 of 2001 confirming the order dated 12.12.2000 passed by the learned Civil Judge (Senior Division), Bhadrak in Misc. Case No. 150 of 2000.

2. The facts as narrated in the records are as follows:

The Petitioner as Plaintiff instituted Original Suit No. 188 of 2000 in the court of learned Civil Judge (Senior Division), Bhadrak against the predecessor- in-interest of Nidhi Ch. Dash and four others with the following prayers:

(I) For declaration that sale deed dated 19.9.1970 executed in favour of Defendant No. 2 in respect of Schedule "Ka" properties is illegal, fraudulent, inoperative and without consideration and as such Defendant No. 1 has not acquired any title over the said property;

(II) Compromise decree dated 8.3.1998/20.3.1998 filed in Title Suit No. 279 of

1992 in respect of Schedule "Kha" property is illegal and inoperative;

(III) for injunction restraining Defendant No. 1 not to come up on the suit property or to interfere with the possession of the Plaintiff over the suit property;

(IV) for cost of the suit and other relief.

In the said suit, Plaintiff filed an application under Order 39, Rules 1 and 2 read with Section 151 of the CPC (hereinafter referred to as "the Code") for ad interim injunction restraining Defendant No. 1 from demolishing any portion of the existing old building and cut any tree and raise any construction or change the nature and character of the suit property. The said suit was transferred to the court of learned Civil Judge (Senior Division), Bhadrak after enhancement of the pecuniary jurisdiction of the learned Civil Judge (Junior Division) and it was numbered as Misc. Case No. 150 of 2000. The opposite parties filed their objection to the said Misc. Case. The learned Civil Judge considering the pleadings of both the parties regarding issuance of injunction held that the Petitioner had no prima facie case; the balance of convenience was also not in favour of the Petitioner and he would not sustain any irreparable injury. On the said findings, by order dated 12.12.2000 he rejected the said Misc. Case for temporary injunction. Being aggrieved by the said order, the Petitioner filed Misc. Appeal No. 1 of 2001 before the learned Addl. District Judge, Bhadrak who, by order dated 26.4.2001, held that the suit was not maintainable as there was a bar under Order 23 Rule 3A of the Code. He further held that as the sale deed and the compromise decree passed in Title Suit No. 279 of 1992 were not set aside by the competent court, the Petitioner could not be said to have a prima facie case in his favour and the balance of convenience also did not lie in his favour since he had no prima facie case and no irreparable injury was caused to him in case temporary injunction was refused. On the above findings, he confirmed the order passed by the learned Civil Judge. Challenging the said order, Petitioner filed Civil Revision No. 192 of 2001. During the pendency of the said civil revision, since the revision was not maintainable in view of the amendment of the CPC in the year 2002, the Petitioner converted the same to the present writ petition. In the Civil Revision, the Petitioner obtained an interim order which is still continuing.

3. The Learned Counsel appearing for the Petitioner submitted that the Plaintiff challenged the compromise decree passed in Title Suit No. 279 of 1992 in the Original Suit on the ground of fraud and misrepresentation. In the plaint, the Plaintiff specifically pleaded that he agreed to give up his claim in respect of Ac.0.14.600 sq. links of land and in the body of compromise petition it was so mentioned. However, Nidhi Ch. Dash, the predecessor-in-interest of the opposite parties, while describing the said property, fraudulently managed to mention the dimension of the said land in links. The said fraudulent insertion of dimension escaped the notice of the Petitioner. As per the said dimension of the land, the area comes to Ac.0.18.135 sq. links and not Ac.0.14.600 sq. links in respect of which the suit was compromised. This fraud was detected when Nidhi Ch. Dash

claimed Ac.0. 18.135 sq. links of land as per the dimensions of the land mentioned in the compromise petition in place of Ac.0. 14.600 sq. links. Under the above circumstances, he had no other way than to challenge the said compromise decree by filing the Original Suit. Since both the courts below did not consider the same in its proper perspective, the order is liable to be set aside.

4. The Learned Counsel appearing for the opposite parties submitted that as per the provision of Order 23, Rule 3A of the Code a fresh suit for setting aside a compromise decree not being maintainable, the said provision was a bar in the original suit and both the courts below rightly rejected the application of the Petitioner as there was no prima facie case or balance of convenience in his favour and no irreparable loss or injury was caused to him.

5. From the above contentions of the parties, this Court has to examine whether the Original Suit is maintainable as per the provision of Order 23, Rule 3A of the Code.

Normally, every person whose civil right is affected has a remedy unless specially excluded by legislation or is impliedly barred by any provision. A party who has signed an agreement or compromise in writing being duped either on account of fraud, coercion or undue influence has a remedy since legislature had not specifically barred the same. Remedy by way of filing a suit to set aside the decree on compromise is now specifically barred under Order 23, Rule 3A of the Code of Civil Procedure. An agreement of compromise affected by fraud, coercion or undue influence is not void to be non est and ignored. It has to be avoided being voidable. A decree whether on adjudication on merits of the claim or based on an order recording an agreement or compromise has the same effect. A person is not remediless in the judicial system of our country.

In the present case, as the decree was passed on compromise, right of appeal against the same is provided in Section 96 of the Code of Civil Procedure.

Sub-section (3) of Section 96 of the Code provides that an appeal would lie against such decree which is a consent decree. Therefore, it is to be examined whether a decree on the basis of recording compromise or agreement, which is challenged to be vitiated on account of fraud, coercion or undue influences, comes within the category of consent decree to bar a challenge in appeal.

Language of Order 23, Rule 3 of the Code is clear to the effect that order recording compromise is to be made on the satisfaction of the court. Having satisfaction, a Court would require to prove that (i) there is a compromise in writing, (ii) the compromise is signed by the parties and (iii) such compromise is lawful. Where the compromise is void or voidable under the Indian Contract Act, it shall not be deemed to be lawful as provided in the Explanation to Order 23, Rule 3 of the Code. Before making an order recording the compromise, if a party denies to have entered into the compromise, the Court is to make an enquiry into the matter as per the Proviso to Order 23, Rule 3 of the Code. Keeping in view the public policy of expeditious finality of a litigation, it has been provided

that for the purpose of enquiry, no adjournment shall be granted to a party unless for reasons to be recorded Court thinks fit to grant such adjournment. If the Court decides that there was no compromise, it has to proceed with the suit and pass a decree ultimately on merit. Where, however, the trial court decides that there is a lawful compromise, it passes an order to record the same and on that basis a decree is passed. Normally, no appeal would lie as provided u/s 96(3) of the Code.

Order 43 Rule 1A(2) of the Code provides that in an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the Appellant to contest the decree on the ground that the decree should or should not have been recorded. Therefore, Section 96(3) of the Code is to be read with Order 43, Rule 1A(2) of the Code as it has to be held that where the Appellant challenges that the compromise has been recorded by the trial court without proper satisfaction, an appeal can be filed by him. There would be no difficulty where the Court has made an enquiry on denial of a party that there was an enquiry since materials which would be brought on the record by the parties would be available on record and the appellate court can decide the question on those materials.

There may be cases where an order recording compromise was obtained from the Court by practising fraud on it or on account of mistake of the Court. No party should suffer in any such situation; Court can exercise the power u/s 151 of the Code without leaving the party to prefer an appeal to avoid the decree based on mistake of Court or fraud on Court in making the order recording compromise. In this regard, reference may be made to the decision of the Supreme Court in the case of Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another, .

In view of the above decision, the original suit was not maintainable. However, since the Petitioner raised the question of fraud, it is open to him to file an appeal challenging the said compromise decree. However, the question of limitation may arise in the appeal. Law is not settled that as to whether an appeal will lie in the above circumstances and even Senior Advocates of standing expressed divergent views and the Petitioner was advised to file a suit. Therefore, in the above circumstances, in case the Petitioner files an appeal challenging the said compromise decree, the appellate court will not be helpless to consider when he came to know about the fraud and pursued the matter in a forum having no jurisdiction. If the appellate court is satisfied that it has jurisdiction to condone the delay, it will entertain the appeal and consider the same on its own merit.

6. With the above observation, the writ petition is disposed of. No costs.