
(2007) 03 OHC CK 0056
In the Orissa High Court
Case No : Misc. Case No. 51 of 1998

Sri Dulal Chandra Barik and Another	Vs	APPELLANT
Sri. P.R.S. Oberoi and Another		RESPONDENT

Date of Decision : 14-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A, 115, 151

Citation : (2007) 03 OHC CK 0056

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : J. Patnaik, T.K. Pattnaik, H.M. Dhal, A.A. Das, S. Das, R. Rath, K.C. Kanungo, P.K. Patnaik and S.S. Behera, for the Appellant; G.S. Rath, A. Mohapatra, S.K. Mishra, sole O.P., N.K. Mishra, B. Pal, N.K. Misra and S.K. Mishra for O.P. No. 1, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Das, J.—This Misc. Case has been filed under Order 39, Rule 2-A of the CPC in Civil Revision No. 246 of 1997 which was disposed of by this Court by judgment dated 7.5.1999. The allegation is made by the Petitioners who were the Petitioners in the Civil Revision is that the order passed by this Court on 7.10.1997 in the Civil Revision has been violated.

2. The factual back-ground of the case is that the Petitioner No. 1 along with 43 other workmen were employees of M/s. Hotel Oberoi, Bhubaneswar. Due to alleged violent demonstration by the said workmen, the management of the said hotel suspended them pending disciplinary proceedings. Charge sheet was issued by the then Manager, the present O.P. No. 4 to the said employees including the Petitioner No. 1. The Petitioner No. 1 and the employees union-Petitioner No. 2 filed T.S. No. 138 of 1997 praying for a decree to declare that the charge sheet issued to the workmen on the basis of the certified standing Orders is illegal and void. Misc. Case No. 195 of 1997 was filed by the Petitioners for an interim order

of injunction under Order 39, Rules 1 and 2 CPC in the said suit. The learned Civil Judge (Junior Division), Bhubaneswar before whom the said suit was pending, passed an order of interim injunction on 2.7.1997 allowing the said Misc. Case No. 195 of 1997 and directing that the opp. parties in the said Misc. Case were restrained to take further action against the Petitioner No. 1 on the basis of the Certified Standing Orders dated 18.10.1996 during the pendency of the suit. being aggrieved, the then General Manager who was the Defendant in the suit preferred Misc. Appeal No. 88 of 1997 before the learned District Judge, Khurda, Bhubaneswar against the interim order of injunction passed by the learned trial Court. By judgment dated 13.10.1997, the learned District Judge holding that the suit filed by the Plaintiffs is not maintainable as well as the Plaintiffs-Respondents in the said appeal do not have a prima facie case and there is no question of irreparable injury being caused to them/him, allowed the appeal and vacated the order of interim injunction passed by the learned trial Court.

3. The Petitioners being aggrieved by the said appellate order preferred Civil No. 246 of 1997, out of which the present Misc. Case arises. Along with the Civil Revision petition, Misc. Case No. 314 of 1997 was filed by the Petitioners, inter alia, praying for stay of operation of the order impugned in the Civil Revision and for restraining the opp. parties to proceed with the domestic enquiry against the Petitioner No. 1 on the basis of the charge sheet.

4. When the said revision was taken up for hearing on the question of admission on 7.10. 1997 by this Court, the following orders were passed on the interim application registered as Misc. Case No. 314/1997.

As an interim measure, it is directed that the operation of the order dated 4.10.1997 passed in Misc. Appeal No. 88 of 1997 shall remain stayed.

The matter may be listed on 27.10.1997.

Sd/ - P.K. Misra, J. (Vacation Judge)

The General Manager, Hotel Oberoi was the only opp. party in the Civil Revision No. 246 of 1997. However, in the present Misc. Case No. 51 of 1998, the Petitioners while impleading the said General Manager by name as opp. party No. 2, have also impleaded on Shri P.R.S. Oberoi, Vice Chairman-cum-M.D. East India Hotels Limited and one Mr. Zafrulla Khan, Manager H.R.D. Hotel Oberoi as opp. parties 1 and 3 respectively.

5. The Civil Revision No. 246 of 1997 has been disposed of by this Court by judgment dated 7.5.1999, inter alia, holding that the view of the learned appellate Court that the suit was not maintainable at the instance of the Petitioners is erroneous. However, this Court in the said judgment finding that in the meantime, the domestic enquiry has been concluded and the Petitioner No. 1 has been dismissed from service, came to the conclusion that there is no scope for giving any interim order at this stage meaning thereby that no order can be passed on the application filed under Order 39, Rules 1 and 2 CPC by the

Plaintiffs during the pendency of the suit. In effect, therefore, though the revision was partly allowed by holding that the suit is maintainable, but the effect of the order passed by the learned District Judge by which the order of interim injunction was vacated, stood confirmed. By the date when the judgment was passed in the Civil Revision, this Misc. Case No. 51 of 1998 was already filed. In view of the same, this Court in the judgment dated 7.5.1999 passed in the Civil Revision observed as follows:

.... Learned Advocate for the Petitioners has strenuously urged that the impugned order of dismissal was passed in violation of the interim order passed by this Court on October 7, 1997. The Petitioners have already filed a contempt application alleging violation of the interim order dated October 7, 1997. The said interim order was passed by Hon''ble Justice P.K. Mishra. Accordingly, the said contempt application is to be heard by Hon''ble Justice P.K. Mishra and in the said pending contempt proceeding it would be decided whether the dismissal order was in violation of this Court's order or not and appropriate order would be passed....

Thereafter, this Misc. Case has suffered a chequered career being placed before different Benches of this Court.

6. Considering the allegations made in the Misc. Case petition and the objections filed by way of affidavits against the said allegations, the moot question that arises for consideration in this Misc. Case No. 51 of 1998 is as to whether, any order, as prayed for by the Petitioners, can be passed as contemplated under Order 39, Rule 2-A, Code of Civil Procedure

7. Before entering into the said question, as I find that the opp. party No. 1 in this Misc. Case was neither a party to the Civil Revision nor he has issued the order of dismissal, this Misc. Case cannot be maintained against the said opp. party No. 1.

The Petitioners have alleged that the order of dismissal having been passed during the period when the stay of order dated 7.10.1997 was operating, the opp. parties are liable to be punished under Order 39 Rule 2-A, Code of Civil Procedure

For better appreciation of the case, Order 39, Rule 2-A of the CPC is quoted hereunder:

2A. Consequence of disobedience or breach of injunction - (1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.

8. A bare reading of the above provision would show that the Court granting the injunction under Order 39, Rules 1 and 2 CPC can order the property of the person guilty of committing breach or disobedience of such order to be attached and can also pass order directing detention of such person in the civil prison for a period not exceeding three months. The corollary, therefore, is that to invoke jurisdiction of the Court under Rule 2-A of Order 39 Code of Civil Procedure, it is required to be proved that there was in existence, of an order under Rules 1 and 2 of Order 39, CPC and the same has been disobeyed or breached by the person/ persons who was/were enjoined by the said order which was in force on the date of alleged violation.

9. In the present case, the interim order of injunction passed by the learned trial Court was vacated by the learned appellate Court and this Court while admitting the Civil Revision filed against the judgment passed in appeal directed stay of operation of the said judgment.

10. Mr. Patnaik, learned Senior Counsel appearing for the Petitioners submitted that when such stay order was in operation, the opp. parties have violated the same by dismissing the Petitioner No. 1 along with other workmen in the alleged disciplinary proceedings. According to Mr. Patnaik, by stay of operation of the appellate order, the interim order of injunction passed by the learned trial Court revived and, therefore, the opp. parties - Defendants continued to be enjoined from dismissing the Petitioner No. 1 and they having dismissed the Petitioner No. 1, it clearly amounts to violation of an order of injunction and, therefore, the opp. parties can be appropriately punished as contemplated under Order 39, Rule 2-A Code of Civil Procedure

11. Mr. B. Pal, learned senior counsel as well as Mr. N.K. Mishra, appearing for the opp. parties submitted that the effect of stay order passed by this Court on 7.10.1997, if analyzed appropriately, it cannot be construed that by passing of such order, the interim order of injunction passed by the learned trial Court revived. Mr. pal further contended that once the lower appellate Court passed its judgment, the order of the learned trial Court merged with the said judgment and by stay of operation of the appellate Court's order, the said order of the learned trial Court cannot be construed to have revived.

12. This, Court, therefore, finds that the substantial question that arises in this Misc. Case is as to whether by applying the theory of merger, the interim order of injunction passed by the learned lower Court should be treated to have been merged with the judgment passed by the lower appellate Court and if it is construed to have merged as such, whether by stay of operation of the appellate

Court's judgment, the order of interim injunction which was passed by the trial Court would revive.

13. The Supreme Court in the case of Kunhayammed and Others Vs. State of Kerala and Another, while dealing with the doctrine of merger, its logic and scope, has held as follows:

The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When decree or order passed by the inferior Court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior Court has disposed of the lis before it either way-whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the Court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view. (Emphasis supplied)

14. In the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, , the Supreme Court has held as follows:

In the instant case, the proceedings before the Board under Sections 15 and 16 of the Act had been terminated by order of the Board dated April, 26, 1990 whereby the Board, upon consideration of the facts and material before it, found that the Appellant-company had become economically and commercially non-viable due to its huge accumulated losses and liabilities and should be wound up. The appeal filed by the Appellant-company u/s 25 of the Act against said order of the Board was dismissed by the Appellate Authority by order dated January 7, 1991. As a result of these orders, no proceedings under the Act was pending either before the Board or before the Appellate Authority on February 21, 1991 when the Delhi High Court passed the interim order staying the operation of the Appellate Authority dated January 7, 1991. The said stay order of the High Court cannot have the effect of reviving the proceedings which had been disposed of by the Appellate Authority by its order dated January 7, 1991. While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate

Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending. We are, therefore, of the opinion that the passing of the interim order dated February 21, 1991 by the Delhi High Court staying the operation of the order of the Appellate Authority dated January 7, 1991 does not have the effect of reviving the appeal which had been dismissed by the Appellate Authority by its order dated January 7, 1991 and it cannot be said that after February 21, 1991, the said appeal stood revived and was pending before the Appellate Authority. In that view of the matter, it cannot be said that any proceedings under the Act were pending before the Board of the Appellate Authority on the date of the passing of the order dated August 14, 1991 by the learned Single Judge of the Karnataka High Court for winding up of the company or on November 6, 1991 when the Division Bench passed the order dismissing O.S.A. No. 16 of 1991 filed by the Appellant company against the order of the learned Single Judge dated August, 14, 1991. Section 22(1) of the Act could not, therefore, be invoked and there was no impediment in the High Court dealing with the winding up petition filed by the Respondents. This is the only question that has been canvassed in Civil Appeal No. 126 of 1992, directed against the order for winding up of the Appellant-company. The said appeal, therefore, fails and is liable to be dismissed. (Emphasis supplied)

15. Applying the above settled principles of law to the facts of the present case, in my considered view, as has been held by the Supreme Court, keeping in mind that the doctrine of merger is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system and the said doctrine of merger is not a doctrine of universal or unlimited application, the effect of the order of stay passed in the Civil Revision No. 7.10.1997 is to be considered. The said stay order was passed by exercising inherent power of the Court u/s 151 CPC in an application/Civil Revision filed u/s 115 CPC. The scope of the said Civil Revision, as the law stood then, was only to find out if the lower appellate Court has exercised jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity. Keeping such scope of the Civil Revision petition in mind and applying the ratio of the decision in the case of M/s. Shree Chamundi Mopeds Ltd. (supra), I am of the view that the said order of stay of operation of the appellate judgment being passed by this Court on 7.10.1997 it cannot be concluded that the said stay order had the effect of reviving the interim order of injunction passed by the learned trial Court which by that time stood merged with the judgment passed by the lower appellate Court. By such stay order, it cannot be held that the effect of the judgment of the lower appellate Court was

wiped out from existence. Even by the final judgment passed in the Civil Revision though one of the conclusions of the lower appellate Court was found to be erroneous, but the said judgment was not set aside. Hence, this Court is of the view that on the date of the alleged violation of the order of stay as alleged in the Misc. Case Petition, no order of interim injunction under Order 39, Rules 1 and 2 CPC was in existence. Therefore, the contention of the learned Counsel for the Petitioners that the opp. parties can be punished by exercising jurisdiction under Order 39, Rule 2-A CPC for violating the order of injunction is misconceived.

16. In the result, I find no merit in this Misc. Case which is accordingly dismissed.