

(1984) 06 OHC CK 0011

In the Orissa High Court

Case No : Civil Revision No. 384 of 1980

Steel Authority of India Ltd.

APPELLANT

Vs

S.N. Patnaik

RESPONDENT

Date of Decision : 28-06-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 1(2)

Citation : AIR 1985 Ori 123

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

Bench : Single Bench

Advocate : Ashok Das and S.N. Satpathy, for the Appellant; P.K. Roy, P.K. Mohanty, S.C. Mohapatra, A.K. Sahoo, C.R. Nanda and G.K. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—This revision is directed against an order of rejection of an application filed under Order 9, Rule 4 of the Civil P. C. for restoration of a suit dismissed for default of both parties on 8-3-1979.

2. On the motion of the parties the suit was posted for hearing on 8-3-1979. On 27-2-1979 the learned counsel for the plaintiff-petitioner filed an advance application for adjournment of the suit beyond 11-3-1979 on the ground that from 8-3-1979 he would be away at Delhi to assist the senior counsel in some matters pending before the Supreme Court. The learned Subordinate Judge directed the matter to be called on 8-3-1979. That day the prayer for adjournment was refused and the case was taken up for hearing. As both the parties remained absent, the suit was dismissed for default of both the parties. On 7-4-1979 an application under Order 9, Rule 4 of the Civil P, C. was filed by the petitioner for restoration of the suit. It was pleaded that the counsel was to instruct the senior advocate at Delhi in some matters pending before the Supreme Court. So, the advance application for adjournment was filed. There was not enough time to engage another counsel. The counsel for the petitioner

examined himself supporting the allegations and stated that he could not return by 8-3-1979.

3. The learned Subordinate Judge upon a consideration of the materials and referring to Clause (c) of the Proviso to Order 17 Rule 2 observed :

".....so, merely because the petitioner's advocate was engaged in Supreme Court, it is not a ground for adjournment of the suit....."

He rejected the application.

4. Mr. A. Das, the learned counsel for the petitioner, has strenuously contended that reliance on Clause (c) of the Proviso to Order 17, Rule 2 by the learned Subordinate Judge was misconceived. In as much as hearing of the suit had not commenced, Clause (c) to the Proviso was inapplicable. He has submitted that the facts and circumstances of the case justified restoration of the suit.

5. Mr. S. C. Mohapatra, the learned counsel for the opposite party, has made reference to the objects and reasons for the amendment to Rules 2 and 3 of Order 17 by Civil P. C. (Amendment) Act, 1976 and has emphasised that the proviso was applicable and the facts and circumstances of the case did not entitle the petitioner an adjournment.

6. Sub-rule (1) of Order 17, Rule 1 confers discretion on the Court if sufficient cause is shown at any stage of the suit, to grant time to a party or the parties and adjourn the hearing of the suit from time to time. Sub-rule (2) requires the Court, where time is granted and hearing is adjourned under Sub-rule (1), to fix a date for the further hearing of the suit. Then comes the proviso imposing restrictions on the grant of adjournments. Clause (a) provides that where the hearing of the suit was commenced, it shall be continued from day to day until all the witnesses in attendance have been examined or for exceptional reasons the Court is satisfied that adjournment of the hearing beyond the following day is necessary. It requires the Court to record the reasons for its satisfaction why the hearing of the case would be adjourned beyond the following day. Clause (b) posits that unless the circumstances are beyond the control of the party, no adjournment at his instance shall be granted. Under Clause (c) the engagement of the lawyer in another Court would not be a ground for adjournment and Clause (d) provides that if the ground is that the lawyer is ill or is unable to conduct the case for any reason, other than his being engaged in another court, adjournment should not be granted unless the court is satisfied that the party applying for adjournment could not have engaged another lawyer in time. Clause (e) empowers the Court to record the statement of the witness who is present in Court but the party or his pleader is absent or, though present, is not ready to examine or cross-examine the witness and to pass orders dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

7. The aforesaid provisions were substituted in place of the original proviso with a view to curbing the dilatory tactics indulged in by the parties and expediting

disposal of suits. The statement of objects and reasons for the amendment reads as follows :

"Proviso to Rule 1(2) of Order XVII provides that, when hearing of evidence has once begun, such hearing shall be continued from day to day. The said provisions are being made more restrictive, so that once the stage has been reached, an adjournment should be granted only for unavoidable reasons. A few other restrictions are also being imposed on the grant of adjournment."

8. Mr. Das, the learned counsel for the petitioner, has contended that the clauses of the Proviso have application if and only when the hearing of the suit, "has commenced"; neither of the clauses applies when hearing of the suit has not commenced and has referred me to *Suru Syamalamba Vs. Kinthali Polisetti and Another*, in support of his contention.

In *Suru Syamalamba Vs. Kinthali Polisetti and Another*, ; the case was posted for hearing on 2-8-1977. On 2-8-1977 the plaintiff was ready with four witnesses, but the second defendant's junior counsel represented to the Court that his senior who had been to Hyderabad could not return in time and requested the court to pass over the case. The Court without waiting for the senior counsel examined the witnesses produced by the plaintiff and decreed the suit *ex parte*. An application under Order 9, Rule 4 to set aside the *ex parte* decree was rejected. Punneya, J. observed :

"The learned Subordinate Judge declined to grant adjournment as he felt that Clauses (c) and (d) to the proviso to Sub-rule (2) of Rule 1 of Order 17 mandates that no adjournment could be granted even if the advocate of the party was engaged in another Court or if the advocate of the party was unable to conduct the case due to illness.

But the learned Subordinate Judge has lost sight of the fact that these provisions are applicable to a suit the hearing of which has already been commenced and to the circumstances mentioned in Clause (a) to the proviso of Sub-rule (2) of Rule 1 of Order 17."

In *Gram Panchayat, Manekwada Vs. Patel Bhura Ramji Bhensania*, , in the midst of recording of evidence, the advocate became suddenly ill and an adjournment was sought. The trial Judge refused to accommodate. A revision was carried to the High Court. In the context it was observed :

".....if the illness of the advocate is sudden the Court by virtue of the Order XVII, Rule 1(1) of the Civil P. C. is bound to adjourn the matter as the Clause (d) of the proviso says that if there is the circumstance beyond the control of the party, the adjournment has to be granted.....Clause (d) of the proviso, which, as interpreted by me above, clearly provides for adjournment of the case on the ground of illness of the advocate except in the situation in which the parties whose advocate he is, had enough notice of the illness and there was enough opportunity for that party to engage another advocate....."

In this decision, there is nothing to show that the clauses in the proviso apply only when hearing of the suit has commenced.

Mr. S. C. Mohapatra, the learned counsel for the opposite party, cited two decisions --one of the Assam High Court and the other of the Andhra Pradesh High Court. He referred me to the AIR Manual, Fourth Edition, Vol. 4, where the ratios of the cases have been noted. In 1972 ALR 124, it has been observed :

"These provisions give legislative effect to the views that the absence of the lawyer of a party is not a sufficient cause for an adjournment except in exceptional circumstances as where the lawyer had to leave suddenly elsewhere without an opportunity to inform the Court or falls ill and it is not possible for another lawyer to be engaged to be immediately ready with the hearing."

In (1978) 2 ALT 476, the Court observed :

"The clause "unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time" is also applicable to the case dealt with in Clause (c) of the proviso to Sub-rule(2)....."

9. Sub-rules. (1) and (2) provide for adjournment at any stage of the suit, Clauses (b), (c) and (d) impose restrictions on the grant of adjournment. Necessity of participation of the party or his counsel arises at various stages before the actual commencement of the trial, A party or his counsel may be required to participate when the Court considers the question of settlement of issues, amendment of pleadings, administration of interrogatories, discovery and inspection of documents, local investigation and inspection etc. Dilatory tactics can be and are resorted to at stages before the actual commencement of the trial. The amendment came with the object of eradicating the evil.

The objects and reasons furnish a clue to the interpretation. The second sentence in the objects and reasons, excerpted above, is referable to Clause (a). The third and the last sentence is referable to the other clauses and is general in amplitude. If Clause (b) is held to apply after the commencement of the hearing, it would be a duplication of Clause (a). Because the "exceptional reasons" in Clause (a) would also include the "circumstances beyond the control of the party" in Clause (b). I am, therefore, of the opinion that Clause (a) is a special provision and is applicable after the commencement of the hearing. So also Clause (e). But Clauses (b), (c) and (d) qualify generally the power of the Court to grant adjournments. There is nothing in Clauses (b), (c) and (d) which restricts their application only to suits hearing whereof has commenced. With respect, I cannot agree with Punneya, J. that Clauses (b), (c) and (d) are not attracted if trial of the suit has not commenced.

10. Coming to the facts of the instant case, it is seen that the suit was posted to 8-3-1979. On 27-2-1979 an advance application was filed. More than a week was available for making an alternative arrangement. If the counsel apprehended that he would not be available for the case, another counsel could and should

have been engaged. It is not a case of unforeseen circumstance. The ground taken in the application under Order 9, Rule 4 was that no other advocate could be briefed due to the short gap. If the party knew that the advocate would not be available on the date fixed, there was enough time, as I have already said, to engage another counsel. The suit was a simple money suit. At Rourkela competent lawyers are available. I am, therefore, satisfied that the plaintiffs had no justifiable ground for adjournment and the trial Judge rightly rejected the application for adjournment and the application for restoration.

11. The revision is without merit and is accordingly dismissed. But in the circumstances of the case, there would be no order as to costs.