
(1990) 02 OHC CK 0016
In the Orissa High Court
Case No : Civil Revision No. 372 of 1986

Subala Charan Rout

APPELLANT

Vs

Smt. Prafulla Kumari Dei and Others

RESPONDENT

Date of Decision : 02-02-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 2, Order 18 Rule 2(4), Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 9

Citation : (1990) 1 OLR 327

Hon'ble Judges : K.C. Jagadeb Roy, J

Bench : Single Bench

Advocate : N.C. Pati, B.S. Mohapatra and S. Misra, for the Appellant; B. Patnaik, for the Respondent

Final Decision : Allowed

Judgement

K.C. Jagadeb Roy, J.—The Petitioner is the Defendant No. 1 in T.S. No. 165 of 1981 of the Subordinate Judge, Second Court, Cuttack, the suit being for partition. The present opp. party No. 1 was the Plaintiff and opp. parties 2 to 5 were Defendants Nos. 2 to 5 who are the mother and sisters of the Defendant No 1. The Petitioner after due service of summons did not appear and was set ex parte on 12-12-1983 due to non-appearance.

2. Other Defendants contested the suit by filing written statement. Plaintiff examined all his witnesses and the Defendants examined only D.W. 1 when Defendant No. 1, the present Petitioner had appeared in the suit and filed a petition on 12-12-1985 stiling that he had not received any summons or notice of the suit but having heard subsequently that the suit had been filed against him he came to know after query that there was wrong report of the process-server that he had refused to accept the summons wherein, in fact, the Plaintiff hold managed to suppress the summons gaining over the process-server. The petition does not show under which provision this petition was filed but from the recitals in the prayer portion of the petition of Defendant No. 1 this can be

treated as an application under Order 9, Rule 7, Code of Civil Procedure. The trial Court also rightly treated the petition as one under Order 9, Rule 7, CPC and after hearing the parties passed order dated 16-1-1986 refusing the prayer of Defendant No. 1 for setting aside the ex parte order passed against him, but allowed him to participate in the proceeding from that stage. The Court further allowed Defendant No. 1 to file his written statement subject to payment of Rs. 75/- as cost and in pursuance of the said order the written statement was filed by Defendant No. 1 which has been accepted.

3. Latter on the Defendant No. 1 had filed a petition under Order 18, Rule 2(4), CPC read with Section 151 at the same with a prayer to allow him to examine his witnesses in the suit. Plaintiffs had objected to this petition on the ground that by order dt. 16-1-1986 Defendant No. 1 was allowed to participate in the proceeding from the stage at which he had appeared and could not be allowed to set the hand of the clock back. It was further objected by him that the Defendant No. 1 had appeared in the suit and was allowed to file written statement when the Defendant Nos. 2 to 5 had already started to led their evidence and one of their witnesses had already been examined. Besides on the basis of the averments in the written statement of Defendant No. 1, which was subsequently filed to the effect that the two sale deeds executed and registered by him in favour of the Plaintiffs were benami transactions, no issues had been framed on such disputed facts. There was no justification therefore for the Defendant No. 1 to be allowed to examine his witnesses in the suit. Learned Subordinate Judge vide his order dated 18-3-1986 held that it was not a fit Case where Defendant No. 1 should be allowed to examine his witnesses be the just cause of the case. Accordingly he rejected the petition of Defendant No. 1 against which order, the present Civil Revision has been preferred.

4. In the present case while the Defendant No. 1 made allegations that summons were not duly served on him and were suppressed at the instance of the Plaintiffs, it was for the Court to enquire into such allegation and to give a finding that indeed the summons had been duly served which the trial Court has not done. The trial Court allowed the Defendant No. 1 to file written statement on payment of cost of Rs. 75/- and allowed him to participate in the proceeding from that stage. He refused to set aside the ex parte order on the ground that good cause was not shown for the non-appearance of Defendant No. 1 and refused Defendant No. 1 to be relegated to the position that he would have occupied had he appeared on the date on which he was set ex parte. Defendant No. 1 did not choose to make an application under Order 9, Rule 6 for fresh service of notice on the ground that he was not served with notice and the notice was suppressed by the Plaintiff in collusion with the process-server and did not object the Court treating his application as one under Order 9, Rule 7, Code of Civil Procedure. After the trial Court passed the order on 10-1-1985 treating the application as one under Order 9, Rule 7, CPC and refused to set aside the ex parte order on the ground that Defendant No. 1 had failed to show cause for his non-appearance on the date. The Defendant did not choose to challenge this

order dated 16-1-1986 which left unchallenged and became final.

5. Now the Defendant No. 1 had filed an application with a prayer that the Court may permit him to examine his witnesses which the Court has refused by his order dated 18-3-1988 as stated above.

6. The Supreme Court while dealing with the case of Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, has deal with the law from this matter. Law is well-settled that if a Defendant makes an application under Order 9, Rule 7, CPC to set aside the ex parte order and at or before such adjourned hearing and shows a good cause for his previous non-appearance the Court may upon such terms as it directs to the cost or otherwise permit the Defendant to be heard in answer to the suit as if he had appeared on the day fixed for his appearance. In other words, he shall be relegated to the position and be permitted to participate in the proceeding as if he was present in the Court on the earlier date of appearance in which case, he as a matter of right, can file the written statement. But when good cause was not shown, the Defendant could not be relegated to the same position as if he appeared in the suit earlier on being noticed and be allowed to accept the action done before and be content to proceed from the stage at which he comes in. This is because by setting the Defendant ex parte the Court is authorised in law to proceed in his absence which has an exception to the general principle that the Court shall not proceed and pass orders against a party in his absence behind his back. If the Defendant does not appear at the adjourned hearing and is set ex parte, this does not amount to an ex parte order against him or ex parte decree against him so to require the Court to set aside that decree under Order 9, Rule 13, Code of Civil Procedure. The recording of the fact that Defendant did not appear and was set ex parte is merely statement of fact and is not an order made against the Defendant in the sense of an ex parte decree" or ex parte order". It does not prevent the Defendant to participate in further proceeding of the suit, but he can only file his written statement with the permission of the Court under Order 8 read with Rules, 1, 9 and 10, Code of Civil Procedure. This Court has held in Srimati Gauda and Anr. v. Udaya Charan Patel and Ors. reported in 1984 (I) O.L.R. 924 that when a Defendant had been set ex parte and subsequently participated in hearing, acceptance of his written statement on the date of his examination was not barred by law as the provisions vest wide descretion in the trial Court to accept the written statement even after the date fixed for the purpose. But this filing of the written statement by the Defendant does not ipso facts give him a right to examine the witnesses who have already been discharged unless the Court permits him under Order 18, Rule 2, CPC to examine any such witnesses.

The judicial opinion was sharply divided on the interpretation of the words the Courts" was to make an order that the suit be heard ex parte. Occurring in Order 9, Rule 6, Clause (a), CPC which reads as follows:

6. Procedure when only Plaintiff appears-(1) where the Plaintiff appears and the Defendant does not appear when the suit is called on for hearing then.

(a) When summons duly served. If it is proved that the summons was duly served, that Court may make an order that suit be heard ex parte.

x x x x

The CPC is based on the principle that as far as possible no proceeding in a Court of law be conducted to the detriment of a person in his absence. When the Defendant having served the summons and had been afforded an opportunity to be heard on the date of hearing but he did not appear, the Court might proceed in his absence. Be it noted that the Court is not directed to make an ex parte order. The Supreme Court in Sangram Sing's case said thus:

...therefore, if a party does not appear on the day which the hearing, of the suit is adjourned he cannot be stopped from participating in the proceeding simply because he did not appear on the first or some other hearing.

Since he appeared on 16-1-1986 he is entitled in law to participate in the proceeding from that date and since the Defendant witnesses have not been closed, there is no bar for him to examine his witnesses. The CPC authorises that the Court to direct or permit any party to examine any witness at any time. This is more so as the endeavor should be to avoid snap and to afford litigants, real opportunity of fighting out their cases fairly and squarely. The Court has wide discretion in this matter though this discretion is to be used judiciously and the Court's hands are not tied by the so-called ex parte order.

7. The impugned order refusing the present Petitioner to examine his witnesses is therefore not supportable in law and is accordingly quashed. The Petitioner Defendant No. 1 is permitted to examine his witnesses in the suit. The Civil Revision is allowed but in the circumstances of the case, there shall be no order as to costs.

Revision allowed.