
(2002) 09 OHC CK 0013

In the Orissa High Court

Case No : Second Appeal No. 73 of 1997

Tima alias Abhimanyu Sarkar Mohapatra

APPELLANT

Vs

Nanda Kishore Pattnaik and Others

RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 41 Rule 3A

Citation : (2002) 2 OLR 485

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : R. Das Mohapatra, for the Appellant; B.K. Dagara, S.K. Ray, N.P. Patra, A. Mukherji for respondent No. 1 and S.R. Mohapatra for respondent 7, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—Defendant No. 2 is the appellant before this Court against a reversing judgment so far as part of the relief sought for by the plaintiff is concerned.

Plaintiff-respondent No. 1 filed the suit for declaration of title/possessory title, confirmation of possession over the suit land and for permanent injunction.

2. Case of the plaintiff-respondent No. 1 is that the suit land was originally a fallow land of Banki Khasmahal which was acquired by defendant No. 1 Jadunath Mohapatra under an agreement between Tahasildar, Banki and on the strength of such agreement pending formal grant of lease the defendant No. 1 was inducted as a tenant in respect of the said land by the Tahasildar on payment of certain sum in lieu of rent and possession was delivered to him. Defendant No. 1 constructed a small house thereon and carried on business in the name and style "Hataghar". Though the defendant No. 1 had not been granted formal lease in respect of the suit land he possessed the same and while in possession alienated the same on 19.2.1965 in favour wife of the plaintiff under a registered sale-

deed and delivered possession. Further case of the plaintiff-respondent No. 1 is that after coming into possession of the said land he has been paying rent and cess, panchayati tax, N.S.C. tax etc. Claim of the plaintiff-respondent No. 1 is that he has become a lessee in respect of the suit land on the strength of his purchase and such right has accrued to him on the ground that the State has been accepting rent from him and he has been enjoying rights of a lessee. Since defendant started disturbing his possession, suit had been filed for the reliefs stated above.

3. Defendants 2 to 4 in their joint written statement denied the plaintiffs claim of acquisition of possessory title on the strength of registered sale-deed dated 19.2.1965 and pleaded that taking undue advantage of unsound mind of defendant No. 1, he managed to get the sale-deed executed in his favour without payment of any consideration. It is the case of defendants 2 to 4 that late Amulya Mohapatra was the eldest son of Jadunath Mohapatra who was running a business in selling sweets in the suit house. Said Jadunath Mohapatra was a rich landlord and well known contractor of the locality. In the year 1965 he lost his mental equilibrium and taking advantage of the same the plaintiff obtained the sale-deed from him which was never acted upon and no consideration having been passed under the sale deed the sale is void.

4. On the pleadings of the parties, the learned 2nd Addl. Sub-Judge, Cuttack, framed eleven issues and decreed the suit in part by declaring the plaintiffs title over the property. However, the learned Court did not find possession with either of the parties and accordingly did not allow other prayer of the plaintiff. Against the said judgment and decree plaintiff carried an appeal before the learned Sessions Judge, Cuttack which was allowed directing the defendants to vacate the suit premises and deliver possession thereof to the plaintiff, failing which the plaintiff shall be entitled to recovery of possession. The aforesaid judgment and decree passed by the learned District Judge. Cuttack is impugned before this Court.

5. At the time of admission this Court formulated the following substantial question of law to be adjudicated.

"Whether the impugned judgment is bad in law inasmuch as delay was not condoned."

6. Sri Das Mohapatra, learned counsel appearing for the appellant challenged the judgment and decree passed by the learned lower appellate Court on the ground that the appeal was filed by the plaintiff after expiry of the period of limitation and therefore an application was also filed for condonation of delay in filing the appeal. It is submitted by Sri Das Mohapatra that without condoning delay and without admitting the appeal the present appellant was set ex parte, the appeal was heard and disposed of. According to Sri Das Mohapatra the appeal could not have been heard without condoning the delay and had notice been served in the appeal matter on the present appellant, he could have filed a cross-appeal

challenging the decree of the trial Court declaring title of the plaintiff over the suit land.

Sri Mukherji, learned senior counsel appearing for the respondent No. 1, on the other hand, submitted that notice in the limitation matter had been issued by the lower appellate Court and in spite of service of notice in the limitation matter the present appellant did not file any objection. The suit having been dismissed for default it is deemed that not only delay was condoned but also appeal had been admitted, failing which there was no occasion for the lower appellate Court to dismiss the appeal for default. Only after restoration of the appeal the same was taken up for hearing and the present appellant having not contested in the appeal cannot have a grievance before this Court.

7. Since argument advanced by the parties relates to a technical question, it is necessary to refer to the orders passed by the lower appellate Court. The Title Appeal was presented before the lower appellate Court on 14.4.1993 alongwith a petition u/s 5 of the Limitation Act for condonation of delay in filing the appeal. By order dated 28.6.93 notice on limitation matter was directed to be issued. Notice in the limitation matter was treated as sufficient on the present appellant by order dated 7.7.94. On 6.12.94 the title appeal was dismissed for default and Misc. Case No. 153 of 1994 was filed under Order 41 for restoration of the appeal. Prayer for restoration was allowed by order dated 24.6.96 and appeal was directed to be taken up on 23.7.96 for hearing. Thereafter some adjournments were sought for and ultimately the appeal was heard and disposed of. From the orders passed by the lower appellate Court it is clear that no order had been passed condoning delay in filing appeal and no order had been passed admitted the appeal or issuance of notice on the respondents in the appeal matter.

Reliance is placed by Sri Mukherji, learned senior counsel for the respondent No. 1, on a decision of the apex Court in the case of Davinder Pal Sehgal and Anr. v. Partap Steel Rolling Mills Pvt. Ltd. and Ors., reported 2001 (8) Sup 636 and it is submitted that the appeal having been dismissed for default it is deemed that the lower appellate Court had not only condoned delay in filing the appeal but also had admitted the appeal. In the aforesaid reported case, suit was dismissed for non-prosecution and an application was filed under Order 9, Rule 9, CPC for restoration of the suit alongwith the petition for condonation of delay. Without passing any orders on the application for condonation of delay u/s 5 of the Limitation Act, Order 9, Rule 9, CPC application was allowed. The same was challenged before the High Court in revision, which set aside the order passed by the trial Court, restoring the suit on the ground that there was no consideration by the trial Court on the point of limitation. In the above factual background, the apex Court looked into the application for restoration under Order 9, Rule 9, CPC and found that the grounds stated for condonation of delay were also grounds in the restoration application. The Apex Court considering the above fact took a view that since very same grounds appearing in the restoration application were

considered by the trial Court even if no formal order has been passed in the petition for condonation of delay, it will be deemed that the very same grounds had been considered while dealing with the application under Order 9, Rule 9, CPC and delay had been condoned while restoring the suit.

The facts of the present case are completely different and in my view the said decision has no application to the facts of the present case at all. In the present case, admittedly notice was sent in the limitation matter and was held to be sufficient on the present appellant. Without passing any order on the application for condonation of delay, the appeal was heard and disposed of. Neither any order in condoning delay in filing the appeal nor any order admitting the appeal for hearing was passed. In my view the procedure adopted by the lower appellate Court is unknown to law and the appeal could not have heard without condoning delay or admitting the same. Even though no objection is filed by the present appellant to the application for condonation of delay, it was open for the Court to look into the grounds taken by the present respondent No. 1 for its satisfaction that sufficient reasons were available for not filing the appeal in time. Necessity of admission of the appeal is also there as it gives a right to the respondents to file cross-appeal. Therefore, Order 41, Rule 12, CPC prescribes that unless an appellate Court dismiss an appeal under Rule 11, it shall fix a date for hearing and Order 41, Rule 14 prescribes for service of notice on the respondents indicating the date of hearing of the appeal. In this connection, a decision of this Court in the case of Ainthu Charan Parida v. Sitaram Jayanarayan Firm reported in 1984 (II) OLR 819 may be referred to. This Court in the aforesaid decision held that until delay in preferring the appeal is condoned and so long as Court does not decide to hear the appeal after hearing application under Order 41, Rule 11, CPC it will be deemed as if there was no appeal. On the question of limitation also another decision of this Court in the case of Bahadul Gountia alias Biswal Vs. Khuriram Meher and Others, may be referred to. In the said case, the appeal was filed beyond the period of limitation. The appellate Court directed the limitation matter and the appeal matter to be taken up after appearance of the respondents. Subsequently, appeal was disposed of on merit without passing any order on the application for condonation of delay. This Court held that unless delay is condoned the appeal cannot be entertained.

6. In view of the decisions referred to above and the discussions made, the judgment and decree passed by the lower appellate Court are liable to be Set aside. Accordingly, this appeal is allowed, judgment and decree passed by the lower appellate Court are set aside and it is directed that the lower appellate Court shall pass necessary orders on the application for condonation of delay and in the event delay is condoned, he shall proceed to hear the appeal under Order 41, Rule 11 of the Civil Procedure Code. In the event the appeal is not dismissed, a date shall be fixed for hearing and copy of the appeal memo shall be served on the respondents in the Title Appeal or on the learned counsel appearing on their behalf and thereafter the same shall be heard and disposed of on merit. The entire exercise be done by the lower appellate Court within a period of six

months from the date of receipt of this order and the records. L.C.R. be sent back immediately.