ORISSA HIGH COURT : CUTTACK

R.S.A. NO. 201 OF 2004

From a judgment and decree dated 21.4.2004 and 5.5.2004 respectively passed by Shri S.K.Pattnaik, learned 2nd Additional District Judge, Bhubaneswar in R.F.A. No. 5/44 of 2003 confirming the judgment and decree dated 22..11.2003 and 3.12.2003 passed by Shri D.S. Mishra, learned Civil Judge (Senior Division), Bhubaneswar in T.S. No. 447 of 2000.

Sakuntala Subudhi & another ..... Appellants

-versus-

Subash Chandra Panda & others ..... Respondents

For Appellants : M/s. S.P. Mishra, Sr. Advocate,
S. Mishra, S. Nanda &
Miss S.Mishra

For Respondents : M/s. B. Baug, B.K. Das,
S.S. Ghosh, B. Das & S.Rath.
(For R. No.1)

Decided on 31.07.2012

P R E S E N T :

THE HONOURABLE MR. JUSTICE M. M. DAS

M.M. DAS, J. The unsuccessful defendants 1 and 2, who are the appellants in this Second Appeal, have challenged the confirming judgments of the learned courts below decreeing the plaintiff's suit for permanent injunction and directing recovery of possession.

2. The present respondent No.1 as plaintiff filed T.S. No.447 of 2000 in the court of the learned Civil Judge (Senior Division),

Bhubaneswar for a decree for permanent injunction by restraining the defendants 1 and 2 (present appellants) perpetually from disturbing the possession of the plaintiff-respondent No.1, which also includes the building. It was, inter alia, pleaded in the plaint that the defendant No.4, who is the present respondent No.3, got the suit land from the General Administration Department of the Government of Odisha by the registered lease deed dated 28.03.1984 (Ext.1) and thereafter, he constructed a building over the suit land and applying for conversion of the suit land to "free hold", the same was allowed by the G.A. Department and a deed of conveyance was executed in his favour vide Ext.5. Thereafter, the said defendant No.4, through his Power of Attorney – defendant No.5, executed a registered sale deed – Ext.6 on 29.05.2000 in favour of the plaintiff and delivered possession of the same to the plaintiff. The plaintiff thereupon, continued to possess the suit land along with the house and mutated his name in the Record of Rights vide Ext.7 and paid rent obtaining rent receipts Exts.8 & 8(a). He also got his building assessed to municipal tax and paid municipal tax as per the receipt Ext.9. But the defendants 1 and 2, who have no manner of right, title and interest and possession claiming that the defendant No.1 is a prospective purchaser, created disturbance in the possession and enjoyment of the suit land and the building of the plaintiff. The defendant No.4 vide Ext.2 had executed a Power of Attorney in favour of the defendant No.2, which the

defendant No.4 subsequently cancelled by a registered deed of cancellation vide Ext.3 and issued notice by registered post, of the said cancellation vide Ext.4 to the defendant No.2. Under the said Power of Attorney – Ext.2, possession was never handed over to the defendant No.2 by the defendant No.4. The plaintiff had let out the building existing on the suit land to different tenants. Hence, the plaintiff filed the suit for permanent injunction to restrain the defendants 1 and 2 from creating any disturbance in his peaceful possession and enjoyment of the suit property.

3. The defendant No.4, the original lessee of the suit land with the building and the defendant No.5, who was a Power of Attorney holder of defendant No.4, under a registered Power of Attorney, filed a written statement supporting the plaintiff's case and admitted that the defendant No.4 has sold the suit property to the plaintiff.

4. The defendants 1 and 2, i.e., the present appellants filed a joint written statement denying the plaint averments and claimed that the defendant No.4 had executed a Power of Attorney in favour of the defendant No.2 vide Ext.2 and the defendant No.2 had no knowledge with regard to cancellation of the same under Ext.3 and the defendant No.1 has got an agreement to sell in her favour for purchase of the suit land at a cost of Rs.2,35,000/- and paid the entire consideration amount, but the defendant No.4, instead of

executing and registering the sale deed in her favour, delayed the matter and sold the suit land to the plaintiff.

5. It may be mentioned here that the defendant No.2 was deleted from the case record.

6. On the above pleadings, the learned trial court framed two issues, which are as follows:-

I. Whether the suit is maintainable ?

II. Whether the plaintiff is entitled to get a decree of perpetual injunction against the defendant with respect to the suit land and the house ?

Thereafter, the parties led evidence. During pendency of the suit, the plaintiff along with the plaint had filed Misc. Case No.391 of 2000 for grant of temporary injunction restraining the defendants 1 and 2 from interfering with his possession over the suit land. After appearance of the defendants 1 and 2 in the said Misc. Case, an order was passed to maintain status quo over the suit property with a prima facie finding of possession of the plaintiff. The said order of status quo was ultimately made absolute. Alleging that the defendants 1 and 2 forcibly entered into the ground floor of the building on 06.07.2011 by violating the order of status quo, the plaintiff in his evidence, stated about such violation of the order of status quo and his forceful dispossession by the defendants 1 and 2, when he was examined as P.W.1. The defendants 1 and 2 did not cross-examine the P.W.1. The defendants 1 and 2, though examined the defendant No.2 as D.W.1,

who filed his evidence-in-chief on affidavit, was cross-examined by the defendant No.4 and partly by the plaintiff. But thereafter, on the adjourned dates, the said D.W.1 for the defendants 1 and 2 did not turn up for further cross-examination and consequently the evidence of D.Ws. 1 and 2 was closed. It is revealed form the records that when the suit was posted for argument, the defendants 1 and 2 filed an application to allow them to exhibit certain documents, which were allowed on 06.11.2003, but the defendants 1 and 2 did not produce any document for being marked as exhibit. Again on 13.11.2003, on the application of defendants 1 and 2, the learned trial court recalled the order closing the evidence from the side of defendants 1 and 2. But the defendants 1 and 2 neither exhibited any documents nor was D.W.1 produced for cross-examination. Thereafter, the suit was posted for argument and the learned trial court disposed of the suit by its judgment dated 22.11.2003, decreeing the same for permanent injunction and directed recovery of possession, since the defendants 1 and 2 were found to have dispossessed the plaintiff during pendency of the suit by violating the order of status quo on 06.07.2001.

7. The defendants 1 and 2, challenging the judgment and decree of the learned trial court, filed R.F.A. No.5/44 of 2003 in the court of the learned District Judge, Khurda at Bhubaneswar, which later on was heard by the learned 2nd Additional District Judge, Bhubaneswar. The learned first appellate court, after hearing the

parties, by its judgment dated 21.04.2004, dismissed the appeal, confirming the judgment and decree passed by the learned trial court. Hence, this Second Appeal.

8. This Second Appeal has been admitted on the following substantial questions of law:-

(A) Whether the learned trial judge was justified in disposing of the suit on merit as per Order – 17, Rule – 3 of the Code of Civil Procedure instead of disposing of the suit under Order – 9 C.P.C. ?

(B) Whether the courts below are justified in granting the relief of eviction against the defendants 1 and 2, when the suit was a suit simplicitor for permanent injunction ?

9. It appears that before the learned lower appellate court, the appellants raised the following questions:-

(a) They were not given opportunity to file and exhibit documents on their behalf;

(b) They were not given opportunity to cross-examine the P.W.1;

(c) They would have been set ex-parte, when the petition for adjournment filed by them was rejected and ex-parte judgment, instead of contested one, would have been passed;

(d) They prayed for remand of the case to the trial court for its fresh disposal.

10. Mr. S.P. Mishra, learned senior counsel appearing for the appellants drew the attention of this Court to Order – 17, Rule – 3

C.P.C. and submitted that it is provided therein that when any party in the suit, to whom, time has been granted, fails to produce evidence, the court may proceed to decide the suit or resort to Order – 9 C.P.C. As it is seen in the present case, the defendant could not present himself for cross-examination, the court should have given an opportunity to the defendant to defend the case. According to Mr. Mishra, the learned courts below committed serious irregularities in projecting the case to be a contested one, denying opportunity to the defendants to present their case or produce and prove documents. Further, drawing the notice of this Court to the facts of the case, Mr. Mishra submitted that the appellant No.1 got a registered Power of Attorney from the defendant No. 4 – Prafulla Kumar Panda on 28.02.1997 which was an irrevocable general Power of Attorney. As per the said Power of Attorney, the property in dispute, being a lease hold property granted by the G.A. Department, the appellant No.1 was empowered to apply for permission for transfer of the same. As per Section – 206 of the Contract Act, a reasonable notice must be given for revocation of such a Power of Attorney, which was never given to the appellant No.1. Such notice is mandatory, bereft of which the Power of Attorney in favour of the appellant No.1 cannot be treated to be cancelled and holds good till date. The subsequent Power of Attorney executed by the defendant No.4 in favour of the defendant NO.5 – Ajit Kumar Mangaraj on 27.05.2000 was not an irrevocable

one, but by virtue of the second Power of Attorney, the plaintiff purchased the suit land on 31.05.2000 from the defendant No.5. The appellant No.1, by virtue of the irrevocable general Power of Attorney, sold the suit land to appellant No.2 on 27.01.2001. Mr. Mishra, further submitted that, if the holder of an irrevocable Power of Attorney refused to give consent for cancellation, then the principal can sue for damages. In the instant case, the defendant No.4 having not filed any suit for damages against the appellant No.1 (defendant No.1), he could not have executed another Power of Attorney in favour of the defendant No.5. According to him, if the Power of Attorney executed in favour of the appellant No.1, has not been revoked by following due procedure of law, then a presumption arises that the second Power of Attorney has been created for the purpose of the suit. He also disputes the allegation of dispossession during pendency of the suit, which is a question of fact.

11. Basically, Mr. Mishra argued that the judgment and decree passed by the learned trial court is an ex-parte decree and this case is a fit case for remand and retrial.

12. Mr. B.Baug., learned counsel for the plaintiff- respondent No.1, on the other hand, contended that the appellants before the learned lower appellate court, did not press the question as to whether in a suit for permanent injunction, if the plaintiff is dispossessed during the pendency of the suit, violating the order of

injunction, can a direction be issued for recovery of possession ? According to him, this ground, which was taken by the appellants before the learned lower appellate court, was abandoned and, therefore, cannot be raised in this Second Appeal. He further submitted that the learned trial court, having found the right, title and interest of the plaintiff over the disputed property and further found that the plaintiff has been dispossessed from the same on 06.07.2001 by the defendants 1 and 2, by violating the order of status quo, has rightly directed recovery of possession, while decreeing the suit for permanent injunction. Learned counsel relied upon the decision in the case of ***Bauri and others v. Natabar Swain and others,*** AIR 1982 Orissa 268 in support of his contention. In the said case, a similar question was raised that in absence of a prayer for recovery of possession, the courts below acted illegally in granting the said relief to the plaintiff. This Court, while deciding the aforesaid issues, took note of the decisions of the Jammu and Kashmir High Court in the case of ***Mohd. Sultan Wani v. Quasim Ali***, AIR 1977 J & K 21 as well as the decision in the case of ***Sikharchand Jain v. Digamber Jain Praband Karini Sabha***, AIR 1974 SC 1178, where the Supreme Court has held as follows :-

> "... Ordinarily, a suit is tried in all its stages on the cause of action as it existed on the date of its institution. But it is open to a Court including a court of appeal to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that the relief claimed originally has (1) by reason of

> subsequent change of circumstances become inappropriate: or (2) where it is necessary to take notice of the changed circumstances in order to shorten the litigation, or (3) to do complete justice between the parties. (See ***Rai Charan v. Biswanath***, AIR 1915 Cal. 103). On the basis of the above decision, I have no hesitation to agree with the learned courts below that it was necessary for the court to take notice of the changed circumstances in order to shorten the litigation and the course they adopted, best subserves the ends of justice, particularly when the defendants are not prejudiced on account of lack of notice".

13. In view of the above, therefore, I find that the learned courts below have committed no illegality in directing recovery of possession of the disputed property from the defendants – appellants, even though the suit was filed for grant of a decree of permanent injunction, by taking note of the subsequent events. The question of law framed as Question No. B during admission of this Second Appeal is, therefore, accordingly answered.

14. With regard to the substantial question of law as mentioned in (A), it is seen from the facts of the case that defendants 1 and 2 participated in the trial, cross-examined the plaintiffs' witness and they also produced their evidence, but the witness examined on their behalf, did not turn up for cross-examination and only thereafter, the learned trial court passed a contesting judgment under Order – 17, Rule – 3 C.P.C., which has been confirmed by the learned lower appellate court.

15. In order to find out as to whether in the facts of the present case, Rule – 2 of Order – 17 C.P.C. applies or Rule – 3 thereof

applies, it would be apt to extract the provisions of Order – 17, Rules – 2 and 3 C.P.C., which are as follows:-

> ***"ORDER XVII***
>
> 1. xxx xxx xxx
> 2. **Procedure if parties fail to appear on day fixed**. – Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.
>
> **(Explanation** – Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.)
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> 3. **Court may proceed notwithstanding either party fails to produce evidence, etc.** – Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, [the Court may, notwithstanding such default, -
>
> (a) if the parties are present, proceed to decide the suit forthwith, or
> (b) if the parties are, or any of them is, absent, proceed under rule 2]."

16. This Court, in the case of ***M/s. Radhika Engineering Industries v. M/s. Hindustan Aeronautics Ltd., Koraput Division***, 1993 (II) OLR 37, analyzing the provisions of Rules – 2 and 3 of Order – 17 C.P.C. held thus :-

> "4. Rules 2 and 3 of Order 17 provide for distinct and different sets of circumstances. Rule 2 applies where an adjournment has been generally granted and not for any special purpose, whereas Rule 3 applies where the adjournment has been given for one of the purposes mentioned in said Rule 3. Whereas Rule 3 empowers the

> Court to decide the suit forthwith, Rule 2 speaks disposal of the suit in one of the modes specified. Rule 2 does not apply unless the party has failed to appear at the hearing, whereas Rule 3 will apply where the party appears, but has committed default referred to in Rule 3. But it has been held in several cases that even where a party is physically present in Court but refuses to take part in the proceedings after his application for adjournment is rejected, he cannot be said to have appeared at the hearing so as to bring the matter within Rule 3 of Order 17, Code of Civil Procedure. Even where a party to whom time had been granted at his instance for doing one of the acts mentioned in Rule 3 of Order 17, but he fails to do the same, and also does not appear at the hearing of the suit, then the Court should proceed only under Rule 2. This is the view expressed by this Court as well as several other High Courts in several cases. (See AIR 1967 Orissa, 14 (***Parikshit Sai and another v. Indra Bhoi and others***) : 41 (1975) CLT 1117, (***Adhikari Devanidhi Das v. Krupanidhi Nanda)*** : 43 (1977) CLT, 63 (***Dr. Lakhiram Gupta v. S. Paikrai***) AIR 1977 Madhya Pradesh, 282 (FB) (***Rama Rao and others v. Shantibai and others***) : AIR 1964 Kerala, 99 (***P. Govinda Menon, son of Lakshmi Amma and another v. Visalakshi Amma and others***) : AIR 1961 Andhra Pradesh, 201 (FB) (***W. Agaish v. Mohd. Abdul Koreem***) and AIR 1977 Madras, 108 (***Chidambaram v. Kalidas and others***).....”

17. Applying the above principle to the facts of the said case and finding that the suit having been adjourned on 10.10.1986, it was an adjournment generally and for any special purpose or for any of the purposes mentioned in Rule – 3 of Order – 17 C.P.C. and on 19.11.1986, no evidence had been led by either party and the defendants’ application for adjournment was rejected and the Lawyer appearing for the defendants also did not further participate in the proceeding and finally, the court, on the evidence of the plaintiff, concluded the matter. The said disposal of the suit cannot be held to be one under Order – 17, Rule – 3 C.P.C., but Rule – 2 thereof.

18. In the case of ***Prakash Chander Manchanda and another v. Smt. Janki Manchanda***, AIR 1987 SC 42, the Supreme Court interpreted Order 17, Rules – 2 and 3 C.P.C. and held as follows:-

> "If on a date fixed, one of the parties to the suit remain absent and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the mater in accordance with O. 17, R. 2 in any one of the modes prescribed under O. 9 of the Civil P.C. After the Amendment by Act 104 of 1976 to O. 17, Rr. 2 and 3 in cases where a party is absent only course is as mentioned in O. 17, R. 3(b) to proceed under R. 2. Therefore, in absence of the defendant, the Court had no option but proceed under R. 2. Similarly the language of R. 2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under O. 9. The explanation to R. 2 gives discretion to the Court to proceed under R. 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence." ***(Emphasis supplied)***

19. As already stated in the present case, the plaintiff was examined as P.W.1 in full and was cross-examined by the defendants 1 and 2 (appellants). Thereafter, the evidence from the side of the plaintiff was closed, then the defendant No.2 was examined as D.W.1 upon filing his affidavit evidence and examined in chief. He did not exhibit any document and thereafter he was cross-examined by the defendants 4 and 5 and partly cross-examined by the plaintiff, when the case was adjourned to the next date for further cross-examination. On the adjourned dates, D.W.1 did not appear for further cross-examination and took adjournments. Lastly, such time petition was rejected and the evidence from the side of defendants 1

and 2 was closed and the suit was posted for argument. The defendants remained absent. In the facts of the present case, therefore, it is seen that the defendants 1 and 2, to whom time was granted, failed to produce D.W.1 for further cross-examination. Hence, it can be said that they failed to perform an act necessary to the further progress of the suit, for which time was allowed. In such event, in Rule – 3 (b), since the defendants were absent, the court was to proceed under Rule – 2. As per the explanation to Rule – 2, as the substantial portion of the evidence on behalf of the defendants was already recorded, when the defendants failed to appear on the date, to which the hearing of the suit was adjourned, the court rightly exercised its discretion and proceeded with the case, as such parties were present. The net result, therefore, is that the court, having exercised its discretion under the explanation given in Rule – 2, not having disposed of the suit in one of the modes directed in that behalf by Order – IX, the judgment cannot be stated to be an ex-parte one, but amounts to a judgment on contest.

20. This Court, therefore, answers the said substantial questions of law by holding that there is no illegality committed by the courts below in decreeing the suit on contest.

21. The Second Appeal being devoid of merit stands dismissed, but in the circumstances, without any cost in respect of this appeal.

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M. M. DAS, J.

Orissa High Court, Cuttack.
July 31st ,2012/Subha.