A.F.R.

HIGH COURT OF ORISSA: CUTTACK

W.A. No. 103 of 2010

The appeal arises out of judgment dated 19.03.2010 passed by the learned Single Judge in W.P.(C) No.4524 of 2010.

Nityananda Ghosh,
S/o Late Gobardhan Ghosh,
At/PO- Jayarampur,
P.S. Bhograi, Dist: Balasore. ... Appellent

-Vrs-

Shri Shirish Chandra Dutta ... Respondent

For Appellant : M/s Ramchandra Sarangi, P.M. Pratihari, S.S. Mohanty, S.Jena, M.R. Pattnaik & A. Mohanty

For Respondent : M/s. U.K. Mohanty, B.K. Pradhan, H.K. Mallick N. Biswal, & S. Parija.

P R E S E N T:

THE HON'BLE THE CHIEF JUSTICE SHRI V. GOPALA GOWDA
AND
THE HON'BLE MR. JUSTICE B.N. MAHAPATRA

Date of Judgment :16.05.2012

B.N. Mahapatra, J. This writ appeal has been filed for setting aside the orders passed under Annexures-1, 2 and 3. Annexure-1 is the order dated 16.12.2009 passed by the learned Civil Judge (Sr. Division), Balasore allowing CMA No. 46 of 2005 in part on contest subject to payment of cost of

Rs.2000/- to the opposite party within a stipulated date, i.e., by 27.12.2009. Annexure-2 is the revisional order dated 22.2.2010 passed by the learned District Judge, Balasore-Bhadrak, Balasore in Civil Revision No. 1 of 2010 holding that the revision petition is not maintainable. Annexure-3 is the order dated 19.3.2010 passed by the learned Single Judge in W.P.(c) No.4524 of 2010 dismissing the writ petition on the ground that the trial court has done substantial justice in the matter by restoring the Execution Case subject to payment of cost of Rs.2000/- to the defendant in order to mitigate the prejudice caused to him.

2. The facts and circumstances giving rise to the present writ appeal are as follows:

The writ appellant is the judgment-debtor in Execution Case No.1 of 1988 pending in the court of learned Civil Judge (Senior Division), Balasore. The plaintiff-respondent filed suit being O.S. No.111 of 1976 for specific performance and the same was decreed with a specific direction to the appellant to execute the sale deed. Pursuant to the said decree, the plaintiff-respondent instituted Execution Case No.1 of 1988 before the learned Civil Judge (Sr. Division), Balasore. On 04.08.2000 advocate for the DHR filed a petition praying to give possession. The said execution case was dropped on 24.8.2004 as no step was taken by either parties since long and none appeared on repeated calls on that day. The CMA bearing No. 46 of 2005 was filed on 20.1.2005 by Decree-holder for restoration of the execution case by invoking jurisdiction under Section 151, CPC and ultimately the same was allowed by the learned Civil Judge

(Sr. Division) subject to payment of cost of Rs.2,000/- vide order dated 16.12.2009 (Annexure-1). Being aggrieved by the said order under Annexure-1, the appellant had filed Civil Revision No.1 of 2010 which was dismissed vide order dated 22.2.2010 (Annexure-2) on the ground that the said revision petition was not maintainable.

3. The writ appellant filed W.P.(c) No. 4524 of 2010 challenging the revisional order dated 22.2.2010 with a prayer to set aside the said order and for issuance of a direction to hear the revision petition on merit, which was dismissed on the ground as stated above.

4. Mr. R.C. Sarangi, learned counsel appearing for the writ appellant submitted that a cryptic, non-speaking and unreasoned order has been passed by the learned Single Judge without considering the totality of the facts and circumstances of the case. The learned Single Judge has failed to appreciate that Section 151, CPC cannot be invoked in favour of a person who is guilty of delay and laches. The learned Single Judge should not have granted relief indirectly which cannot be granted directly. The effect of the order passed under Annexure-1 is a nullity having been passed without jurisdiction. The Executing Court cannot act contrary to law. Therefore, even though the power under Article 226 of the Constitution is discretionary, the learned Single Judge should have declined to exercise her discretionary power in favour of the plaintiff-respondent. Restoration of an execution case is governed under Order 21, Rule 106, CPC which provides for a special period of limitation of one month to make application for restoration of the execution case. Section 5 of the Limitation Act is not

applicable to the execution proceedings. Therefore, even when a restoration application is filed in the garb of an application under Section 151, CPC, the special period of limitation fixed expressly by the statute cannot be by-passed. In support of his above contention Mr. Sarangi relied upon a decision of Hon'ble Supreme Court in the case of ***Damodaran Pillai & others v. South Indian Bank Ltd***. , 2005 (II) CLR (SC)- 554 . The leaned District Judge is not justified to hold that the revision is not maintainable particularly when the effect of reversal of the impugned order before him would have terminated the entire execution proceedings. It was further submitted that learned District Judge is not justified to hold that civil revision is not maintainable in view of decision of Hon'ble Supreme Court in the case of *Keshardeo Chamria v. Radha Kissan Chamria*, AIR 1953 SC 23. Learned Single Judge has dismissed the writ petition by a cryptic, bald and unreasoned order. Concluding his argument Mr. Sarangi submitted for grant of the relief sought for in the writ appeal.

5. Mr. U.K. Mohanty, learned counsel appearing for the respondent vehemently argued that the orders passed under Annexures-1, 2 & 3 are perfectly justified warranting no interference by this Court.

6. On the rival factual and legal contentions the following questions fall for consideration by this Curt:

(i) Whether the order passed by the learned Single Judge under Annexure-3 is cryptic, non-speaking and unreasoned?

(ii) Whether the orders passed under Annexures- 1, 2 and 3 by the learned Civil Judge (Sr. Division), Balasore, learned District Judge, Balasore and learned Single Judge of this Court respectively are not sustainable in law and are liable to be set aside?

7. So far question no.(i) is concerned, perusal of order under Annexure-3 passed by learned Single Judge of this Court reveals that the leaned Single Judge has dismissed the writ petition assigning reasons. According to the learned Single Judge, while restoring the execution case the trial court has awarded cost of Rs.2,000/- to be paid to the Judgment Debtor/defendant in order to mitigate prejudice caused to him. Learned Single Judge further held that the trial court has done substantial justice in the matter. In view of the same, it cannot be said that no reason has been assigned by the learned Single Judge while passing the impugned order under Annexure-3. Question no.(i) is accordingly answered.

8. To deal with Question No.(ii), we have to examine as to whether by exercising inherent power vested u/s. 151, CPC the learned Civil Judge (Sr. Division) can restore the Execution Case No.1/1988 which was dropped by him on 24.8.2004 for non-appearance of the Decree Holder upon considering a petition for restoration filed by the Decree Holder beyond period of one month provided under sub-rule (3) of Rule 106 of Order XXI of the CPC. In other words, whether the executing court by exercising its power u/s. 151, CPC can extend the period of limitation prescribed under Sub rule (3) of Rule 106 of Order XXI of the C.P.C. for setting aside dismissal order

passed under Rule 105(2). For this purpose, it is relevant to quote Rules 105 and 106 of Order XXI of C.P.C.

> "**R.105. Hearing of application**- (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.
> (2) where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.
> (3) where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the Court may hear the application ex parte and pass such orde4 as it thinks fit.
> **R.106. Setting aside orders passed ex parte, etc.-** (1) The applicant, against whom an order is made under sub-rule (2) of rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.
> (2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.
> (3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order."

9. The above provision clearly shows that sub-rule (1) of Rule 105 of Order XXI provides for fixing a date for hearing of the application. Sub-rule (2) of Rule 105 makes it clear that if on the day fixed or on the other day to which the hearing may be adjourned, the applicant does not appear when the case is called on for hearing, the Court may make an order for dismissal

of the application. Sub-rule (1) of Rule 106 provides that the applicant against whom an order is made under Sub-rule (2) of Rule 105 may apply to the Court to set aside the said order and if he satisfies the Court that there is sufficient reason for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to cost or otherwise as it thinks fit and shall appoint a date for further hearing of the application. Sub-rule (3) of Rule 106 provides that an application under Sub-rule (1) shall be made within thirty days from the date of the order or where, in the case of an ex parte order, the notice was not duly served within 30 days from the date when the applicant had knowledge of the order.

Thus, the limitation period of thirty days provided under sub-rule (3) of Rule 106 for making application to set aside the order made under sub-rule (2) of Rule 105 is only where on the date fixed or any other day to which the hearing may be adjourned, the applicant does not appear when the case is called on for hearing.

10. This Court in the case of ***Suka Mukhi V. Nata Mukhi & others*** reported in 70 (1990) C.L.T. 776 held as follows:-

> "…..A perusal of rule 105 makes it clear that dismissal for default at the stage of hearing is only covered under it. Only when an application is fixed for hearing or on an adjourned date of hearing dismissal of such an application, for default will be covered under Rule 105. If dismissal for default is at any other stage the same is not under Rule 105. In such cases, there is no scope for applying for restoration under Rule 106. Such application would be only by invoking the inherent power of the Court as there is no other provision for the same."

11. At this juncture it would be profitable to refer to the judgment of the Hon'ble Supreme Court in the case of ***Damodaran Pillai and others v. South Indian Bank Ltd.*** reported in 2005 (II) CLR (SC)-554 in which the Hon'ble Supreme Court referring to its several earlier judgments held as under :

> "9. The learned Executing Court allowed application of restoration filed by the Respondent herein on the ground that it acquired the knowledge about the dismissal of the Execution Petition only on 25.3.1998.
> 10. The learned Judge, however, while arriving at the said finding failed and/or neglected to consider the effect of Sub-rule (3) of Rule 106. A bare perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge thereabout. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where an ex-parte order was passed and that too without proper notice upon the judgment debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly irrelevant.
> 11. We may notice that the period of limitation has been fixed by the provisions of the Code and not in terms of the second schedule appended to the Limitation Act, 1963.
> 12. It is also not in dispute that the Kerala amendment providing for application of Section 5 of the Limitation Act in Order XXI. Rule 105 of the Code became inapplicable after coming into force of the Limitation Act, 1963 (Act LVI of 1964).
> 13. It is also trite that the Civil Court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of

> applicability of the provisions of Section 5 of the Limitation Act, the Court cannot invoke its inherent power.
> 14. It is well-settled that when a power is to be exercised by a Civil Court under an express provision, the inherent power cannot be taken recourse to.
> 15. An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code. Application of the said provision has, thus expressly been excluded in a proceeding under Order XXI of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the Court cannot be invoked."

12. In the instant case, Execution Case No.1 of 1988 was dropped/dismissed on 24.8.2004 as no step was taken by either of the parties. Now the question arises as to whether the date 24.8.2004 was fixed for hearing of the application. For this purpose, it is necessary to quote the order passed on 24.8.2004 and orders passed on some previous dates in Execution Case No.1 of 1988.

"Dt.7.3.2003. Petitioner files hazira. Put up on 16.5.03 for hearing of proceeding and consideration of sale deed.

Sd/- Illegible,
C.J. (S.D.).

Dt.16.5.2003. Dhr. file hazira. Call on 12.8.03 for hearing.

Sd/- J. Mishra,
C.J. (S.D.), I/C

Dt.12.8.2003. Dhr. file hazira. Call on 13.11.03 for hearing.

Sd/- R.K. Panda, 12.8.03
C.J. (S.D.),

Dt.13.11.2003. Dhr. file hazira. No time today. Call on 20.1.04 for hearing of proceeding.

Sd/- S.N. Tripathy,
C.J. (S.D.)

Dt.20.1.2004. Dhr. files hazira. No time today. Call on 20.3.03 for hearing of proceeding.

Sd/- S.N. Tripathy,

C.J. (S.D.), Bls.

Dt.20.3.2004. Dhr. files hazira. P.O. is on E.L. Put up on 1.5.04 for hearing of the case.

Sd/- J. Mishra,
C.J. (S.D.), I/C

Dt.1.5.2004. Dhr. files hazira. None moves for hearing. However put up on 10.8.04 for hearing of the case.

Sd/- S.N. Tripathy,
C.J. (S.D.),

Dt.10.8.2004. No steps taken by the Dhr. None appears on repeated calls. However put up on 24.8.04 for hearing of the case.

Sd/- S.N. Tripathy,
C.J. (S.D.),

Dt.24.8.2004. No steps taken by the either party since long. None appears on repeated calls. Hence the case is dropped.

Sd/- S.N. Tripathy,
Civil Judge (Senior Divisions), Balasore

Dt.28.12.2009. As per order dt.16.12.09 passed in CMA 46/05, the Exn. Case is restored to file make necessary entry in the concerned register. Put up on 25.1.10 for further orders.

Sd/- P.K. Patasani,
C.J. (S.D.), Bls."

13. Thus, from the above orders passed on different dates, it is amply clear that the date of hearing of the case was fixed to 24.8.2004 on which date, the decree-holder did not appear for which case was dropped/ dismissed. It is only by order dated 16.12.2009 passed in CMA No.46 of 2005, the order passed on 24.08.2004 was set aside and the execution case was restored to file. Therefore, it is clear that no application for setting aside the dismissal order dated 24.08.2004 and for restoration of the execution case was filed within the stipulated period of thirty days as provided under sub-rule (3) of Rule 106 of Order XXI.

In view of the order dated 16.12.2009 passed by the learned Civil Judge (Sr. Division), Balasore allowing CMA No.46 of 2005 is not sustainable in law.

14. This Court having held that the order passed by the Civil Judge (Sr. Divn.), Balasore dated 16.12.2009 under Annexure-1 is not sustainable in law, there is no need to deal with the legality of the order passed by the learned District Judge, Balasore on 22.2.2010 under Annexure-2 which will amount to mere academic exercise.

15. In the result, the order of the learned Civil Judge (Sr. Division) under Annexure-1, the revisional order passed by the learned District Judge under Annexure-2, and the order of the learned Single Judge passed in W.P.(C) No. 4524 of 2010 under Annexure-3 are set aside.

16. The appeal is allowed. No cost.

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B.N. Mohapatra,J.

V. Gopala Gowda, C.J. I agree.

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Chief Justice.

Orissa High Court, Cuttack
The 16th May, 2012/ssd.