

Bisandayal and Sons and anr. Vs. United Bank of India and ors.

Bisandayal and Sons and anr. Vs. United Bank of India and ors.

SooperKanoon Citation : sooperkanoon.com/533819

Court : Orissa

Decided On : Jun-30-2003

Reported in : AIR2004Ori40; III(2004)BC403; 2003(II)OLR310

Judge : P.K. Tripathy, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 9, Rule 13 - Order 17, Rule 1

Appeal No. : Civil Revision No. 185 of 1999

Appellant : Bisandayal and Sons and anr.

Respondent : United Bank of India and ors.

Advocate for Def. : D.P. Sarangi and M.S. Raman

Advocate for Pet/Ap. : B.H. Mohanty, J.K. Bastia, S.C. Mohanty and B. Das

Disposition : Revision allowed

Judgement :

ORDER

P.K. Tripathy, J.

1. United Bank of India, Nayasarak Branch, Cuttack, on 19-4-1977 presented the plaint and instituted Title Mortgage Suit No. 102 of 1977 against the petitioners as

defendants Nos. 1 and 2 and opposite party Nos. 2 and 3 as the other defendants, and claimed for recovery of a sum of Rs. 2,61,380/- (two lakhs sixty one thousand three hundred and eighty only) with pendente lite and future interest and cost, and in that respect, if necessary, to sell the mortgaged property covered by the Schedule 'A' and 'B' of the plaint on the ground of liability of the defendants on the basis of the cash credit facility and overdraft facility provided in course of the transactions. In their separate written statement including the additional written statement petitioners as well as defendant No. 4/opp. party No. 2, inter alia, have challenged to the extent of their liability and the mode of calculation. Issues have been framed on the basis of the pleadings of the parties in which legality, validity and binding nature of the contract and genuineness of the claim is covered by some of the issues, As per the order-sheet No. 335 dated 2-4-1994, the suit was heard ex parte due to default in participation by the defendants and after further hearing on 29-4-1994, learned First Addl. Civil Judge (Sr. Division), Cuttack on 10-5-1994 passed a preliminary decree for the suit amount along with future interest @ 14% per annum with the leave to realise the same by putting the mortgaged and hypothecated properties to auction sale. Defendants thereafter filed Misc. Case No. 38 of 1994 under Order 9, Rule 13, C. P. C. That Misc. Case at the stage of hearing, was dismissed on 12-9-1995 for the default of the petitioners. As against that, petitioners filed Misc. Case No. 53 of 1995 for restoration of Misc. Case No. 38 of 1994. That application was allowed ex parte on 10-7-1996 and Misc. Case No. 38 of 1994 was restored to file. Again on 4-12-1996 Misc. Case No. 38 of 1994 was dismissed for default of the petitioners. As against that, petitioners filed Misc. Case No. 160 of 1996 for restoration of Misc. Case No. 38 of 1994, and after hearing the parties that application was dismissed on contest as per the impugned order passed on 23-12-1998. Hence this revision under Section 115, C.P.C.

2. In the application for restoration (Misc. Case No. 160 of 1996) petitioners have advanced the ground that petitioner No. 2 looks after the case on behalf of the defendants and on the relevant date he could not return in time to Cuttack because of the fact of attending a marriage ceremony of a nephew, i.e., son pf a cousin sister. In support of that contention petitioner No. 2 was examined as P.W. No. 1 and the invitation card was proved as Ex. 1. Learned Civil Judge rejected

such plea on the ground that when the petitioner is the defendant in a year-old suit, such negligent conduct on his part does not constitute sufficient cause, and therefore the application for restoration is devoid of merit. Accordingly he passed the impugned order.

3. Learned counsel for the petitioners argued that when the fact of petitioner No. 2 looking after the litigation on behalf of the defendants and the fact that he was absent because of the social obligation is a matter which is not in dispute, such plea of the petitioner could not have been ignored merely because his cousin sister is distantly related. He argued that it is not the degree of relationship according to the family genealogy but the social relationship and closeness which was relevant and in that respect there is nothing in the evidence of P.W. 1 so as to discard such a plea advanced by him on behalf of the defendants. He further argued that even if the aforesaid ground advanced by the petitioner does not constitute sufficient cause, but certainly such circumstance qualifies to the condition of a good cause, and in an application for restoration under Section 151, C.P.C. the Court below should have looked for a good cause and should have allowed the application. Accordingly, he prayed to set aside the impugned order and to allow the application for restoration.

4. Learned counsel for the plaintiff/opp. party on the other hand argued that the order-sheets in the original suit speaks volume against the negligent conduct and deliberate design for causing delay in disposal of the suit. Under such circumstance though the past conduct of the defendants is not to be considered as the sole ground while considering an application for restoration, yet that conduct qualifies to the negligence shown in attending to the Court in Misc. Case No. 38 of 1994, and therefore, from, the aforesaid facts and circumstances it cannot be reasonably concluded that the plaintiff is supported with good cause. Accordingly, he prayed to dismiss the revision.

5. On the request of the plaintiff this Court called for the L.C.R. of the suit and perused the same. It appears from the order-sheets that in spite of the direction of this Court for early disposal of the civil suit as per the order passed in Civil Revision No. 104 of 1982 and Civil Revision No. 281 of 1983, the suit could not be

taken up for hearing till 2-4-1994. In that context the allegation of the plaintiff regarding the delaying tactics adopted by the defendants is partially responsible for such delay. At the same time, it reveals from the order-sheets that plaintiff is no less to be blamed for the delay for disposal of the suit of the year 1977. It appears from the order-sheet that when the plaintiff was ready, the defendant was coming either with the application for adjournment or some other applications and the trial Court was adjourning the suit either on the time petition or any other application filed on the ground of consideration of such application. When the defendant was filing Hazira, plaintiff was coming with application for adjournment of the case. It also appears from the order-sheets that the suit was dismissed for default of the plaintiffs and thereafter it was restored on an application under Order 9, Rule 9, C.P.C. filed by the opposite party, vide M.J.C. No. 44 of 1982. The suit also remained stayed during pendency of Civil Revision No. 281 of 1983. The suit was adjourned by the trial Court on several occasions on the ground of pre-occupation in hearing of other suits. Therefore, on perusal of the order-sheets, it reveals a bad manner in which the trial Court controlled the furtherance of the civil suit, and in that respect the conduct of the plaintiffs as well as defendants was either complementary or supplementary for such adjournments. Therefore, it is not correct to say that the defendants alone are responsible or they have alone adopted dilatory tactics to get the disposal of the suit delayed.

6. Be that as it may, as noted above, the defendants have left no stone unturned to contribute their part of delay in disposal of the suit. The above factum is noted that to consider the application for restoration as a ground in favour of either of the parties but to enlighten the trial Court that let the adjudicatory process be not a consenting party for delay in disposal of year-old proceedings. It is expected from an Officer in the rank of Civil Judge (Sr. Division) to utilise his knowledge and experience, apply his wisdom and legal knowledge to control the Court proceedings in a proper manner than playing as a toy in the hands of the litigants and to adjourn the case on mere asking or to endorse the signature in the order-sheet written by the Bench Clerk without realising what has been written and what effect that carries. The trial Court is expected to evoke a sense of duty and sincerity in that respect in dealing with the Court's proceeding and cases.

7. So far as the case at hand is concerned, the claim of the petitioners that petitioner No. 2 was looking after the case on behalf of the defendants has not been sufficiently challenged save and except stating that he had no written authorisation in that respect. That aspect, was failed to be visualized and considered by learned Addl. Civil Judge. Similarly, the evidence of petitioner No. 2 as P.W. 1 relating to attending to the marriage function was not proved to be false though opposite party cross-examined P.W. No. 1. Notwithstanding that, the finding of learned Addl. Civil Judge relating to non-availability of sufficient cause cannot be regarded as unreasonable or without substance inasmuch as a party fighting out a litigation of the present nature cannot have the pleasure of abandoning the Court proceeding and attending to social functions. But the circumstances stated by P.W. No. 1 undoubtedly indicates about existence of a good cause. He has stated that he had planned to return and to participate in the proceeding and accordingly undertook his journey, but could not reach at Cuttack in time so as to participate in the proceeding.

8. Learned Civil Judge did not at all consider if there exists a 'good cause' which prevented petitioner to appear in the Court on the above indicated date of hearing of the application (Misc. Case under Order 9). He rejected the application on the ground of non-proving of sufficient cause. Thus, the Court below failed to consider the application for restoration in accordance with law. Under such circumstance, this Court finds that the principle of preferring the ends of justice when it is in conflict with the technicality of law is to be preferred so as to provide an opportunity to the petitioners. Taking that view in the matter, the impugned order is set aside and the application for restoration of Misc. Case No. 38 of 1994 is allowed subject to payment of cost of Rs. 5,000/- (five thousands) by the petitioners to the plaintiff/opp. party within a period of four weeks. Payment of cost is the condition precedent for restoration of Misc. Case No. 38 of 1994. In the event the cost is paid, then the Court below shall hear and dispose of the application under Order 9, Rule 13, C.P.C. within a period of four weeks from that date. In that respect the Court below shall bear in mind that it is the plaintiff/opp. party who is the sole opposite party to render contest to the application under Order 9, Rule 13, C.P.C. At the stage of hearing of the application under Order 9, Rule 13, C.P.C. either of the parties applying for adjournment shall be granted

such adjournment for a reasonable period not exceeding one week and each adjournment shall cost the party applying for time a cost of Rs. 5,000/- (five thousands) and it shall be the condition precedent for such adjournments. As this Court feels the conduct of the parties to the proceeding is such that they can be controlled in their attempt to delay the proceeding by imposing heavy cost instead of passing order of dismissal and entertaining application for restoration. However, when the method of saddling cost will not enure any positive result, then the Court below may resort to other provision of law in case of default committed by either of the parties.

The Civil Revision is accordingly allowed. Parties are directed to bear their respective cost of litigation so far this forum is concerned. Hearing fee is assessed at contested scale.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com