1. Sec. 100

Nasib Kaur and Ors. V. Col. Surat Singh (Deceased) Through L. Rs & Ors. 2013 (1) CLR (SC) - 817

A.K. PATNAIK AND H.L. GOKHALE, JJ.

Issue

Second appeal- Scope of powers

The Case-

Plaintiff-respondent filed a civil suit for declaration that he was the owner and was in possession of suit land – Plaintiff's case was that while he was in joint holding of some land, he sold some land out of his share without specifying any khasra Nos. to defendants 1 to 4 and thereafter these defendants sold the land in pieces to appellants, defendants 5 to 8 in the suit, specifying the Khasra Nos. – According to plaintiffs the specific Khasra Nos. which had been mutated in favour of defendants 3, 4 and 5 were not in accordance with the registered sale deed in favour of defendants 1 to 4 – Suit was partey decreed for correction of mutation entries – Trial Court held that it would in no manner have any effect upon the possession of parties to the suit which would be determined and finalized as and when partition proceedings to be taken up and decided – On appeal, first appellate Court held that plaintiff had not produce cogent evidence that he was the owner of the suit property – Possession of property was handed over to defendants 1 to 4 and they thereafter sold this land to appellants – Appellants were in lawful possession of said areas of land by virtue of two sale deeds – whether High Court was justified in reversing findings of the Trial Court and the first Appellate Court – Held, No.

The plaintiff, however, contended in the second appeal before the High Court that material evidence had not been taken into consideration by the first Appellate Court and the High Court has framed the following substantial question of law:

"whether the Courts below have failed to consider the material evidence on record?" Having framed the substantial question of law, the High Court should have pointed out in the impugned judgment the material evidence which had not been considered by the first Appellate Court, which if considered, would have established ownership of the plaintiff to the suit property. Instead of pointing out the material evidence which has not been considered by the first Appellate Court, the High Court has made its own assessment of the entire evidence as if it was the first Appellate Court and held that the plaintiff was the owner of the suit property and was entitled to possession of 17 karams X 45 karams of land depicted in letters EHGF in the site plan Ex. PW – 9/A and that he was also entitled to the relief of permanent injunction restraining the plaintiff from raising any construction in the said property or alienating the said property. The High Court has itself noticed in the impugned judgment that the land. Depicted in the site plan Ex. PW-9/A as EHGF was delivered to Col. Girdhar Singh and his family members at the time of execution of the sale deed by the plaintiff as Attorney of Nanak Singh on 19.07.1979 and the appellants had taken possession of the aforesaid land from Col. Girdhar Singh and his family members in 1987. The appellant were, thus, in legal possession of the suit property and the High Court in exercise of its powers under Section 100 CPC could not have reversed the findings of the Trial Court and the first Appellate Court and decreed the suits for declaration of title and for recovery of

possession and injunction in favour of the respondents so as to adversely affect such legal possession of the appellants.

In the result, these appeals are allowed and the impugned common judgment and decree of the High Court is set aside. Considering, however, the peculiar facts and circumstances of the case, the parties shall bear their own costs.

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2. S. 151

Anuja Prabhudessai v. State of Goa. AIR 2013 SC 1076

H. L. DATTU AND RANJAN GOGOI, JJ.

Issue

Expunction of adverse remark – Appellant judicial officer – Direction to initiate discipline- officer – Direction to initiate discipline – ary proceeding against appellant issued while discharging contempt proceedings – Supreme Court to prevent career of bright judicial officer from being imperilled and his further growth stunted, set aside observations.

The Case-

This appeal by special leave is directed against the judgment and order passed by the High Court of Judicature of Bombay at Goa in Contempt Appeal NO. 1 of 2006, dated 24.08.2007 (Reported in 2008 (3) AIR Bom R 689). By the impugned judgment and order, the High Court has dismissed the appeal filed by the appellant and confirmed the order passed by the learned single Judge of High Court in Criminal Writ Petition No. 1 of 2006, dated 17.07.2006, wherein certain observations were made while discharging the contempt notice issued to the appellant. The appellant before us is the District and Sessions Judge, North Goa at Panaji-Goa. For certain acts and omissions said to have been committed by her, the learned single Judge of t he High Court had initiated proceedings for civil contempt by issuing notice dated 15.06.2006. Vide order dated 17.07.2006, the learned single Judge had discharged the contempt proceedings and directed the Registrar General of the High Court to initiate appropriate disciplinary proceedings against the appellant.

The aforesaid direction was issued after discharge of the contempt proceedings. The same was questioned by the appellant before the Division Bench of the High Court in contempt Appeal No. 1 of 2006. The Division Bench by impugned judgment and order concurred with the observations made by the learned single Judge and further clarified that the said directions issued imply that the Registrar appropriate directions from the competent authority in respect of any disciplinary proceedings required to be initiated against the appellant and that the order did not disclose any aspect regarding finality of disciplinary proceedings. We have heard the learned counsel for the parties to the lis at length. The observations so made by the Court in the course of its judgment and order, in our considered view would cast a shadow on the judicial career of the appellant, which, in our opinion, should not be jeopardized especially at this crucial juncture of her professional development as a judicial officer. The career of a bright judicial officer must not, therefore, be imperilled such that her further growth is stunted. Therefore, without going into the details and finer aspects of the case at hand, we intend to set aside certain observations made by the High Court which Court which would affect the career of the appellant.

Accordingly, we allow this appeal and set aside the impugned judgment and order in Contempt Appeal No. 1 of 2006 dated 24.08.2007 *(Reported in 2008 (3) AIR Bom R 689*) and the impugned Judgment and order in Criminal Writ Petition No. 1 of 2006 dated 17.07.2008. We clarify that we have not disturbed the order passed by the High Court discharging the contempt proceedings initiated against the appellant. In view of the foregoing order passed in the Civil Appeal @ Special Leave Petition (C) No. 4100 of 2009, this Writ Petition is also disposed of. We further direct that the remarks contained in the letter dated 20.10.2008 stands deleted and the related Annual Confidential Reports be amended according.

Ordered accordingly.

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3. O. 1, R. 10, O. 22, R. 10

Bhanumani Sahu and others v. State of Orissa and another. AIR 2013 ORI 52

B.K. MISHRA, J.

Issue

Impleadment of parties – Title suit – Purchaser pendent elite – Can be added as proper party if his interest in subject-matter of suit which was substantial in nature – His coming up with separate suit to enforce his right would mean multiplicity of proceedings – Thus he would be entitled to be impleaded in title suit or other proceedings where his predecessor in interest was made party to litigation.

The Case-

The petitioners being aggrieved with the impugned order passed by the learned First Additional Civil Judge (Sr. Division, Bhubaneswar in Title Suit No. 17 of 2002 dated 19.03.2008 has approached this Court under Articles 226 and 227 of the Constitution of India praying therein to qash the impugned order under Annexure – 1 and permitting the petitioner No. 4 to be impleaded as a plaintiff in Title Suit No. 17 of 2002. Perused the impugned order passed by the learned First Additional Civil Judge (Sr. Division), Bhubaneswar dated 19.03.2008 as at Annexure – 1. The intervenor petitioner being a lis pendens purchaser of the suit land applied to the trial Court to be impleded as a plaintiff contending therein that he had purchased the suit property from the plaintiffs on the strength of a registered sale deed and obviously the same relief for the intervenor petitioner and thus he having vital interest in the litigation and for effective adjudication of the suit he may be impleaded as a plaintiff. The learned First Additional Civil Judge (Sr. Division), Bhubaneswar by the impugned order disallowed the prayer of the intervenor petitioner on the ground that the intervenor petitioner is a defendant in Civil Suit No. 455 of 2003 and when the said suit is being heard analogously along with Title Suit No. 17 of 2002 and plaintiffs in the said suit are taking steps and besides that when the plaintiffs have not arrayed the intervenor petitioner as a co-plaintiff, the prayer of the intervenor petitioner being devoid of merit is liable for rejection.

Mr. Sarangi, learned counsel appearing for the petitioners while challenging the impugned order contended that the learned Court below committed gross illegality in disallowing the prayer of the intervenor petitioner and the learned Court below failed to exercise the jurisdiction vested on it under Order 22, Rule 10 (1) of the C.P.C. as well as Order 1, Rule 10 of the C.P.C. and thus the impugned order at Annexure – 1 needs to be

set aside and the intervenor petitioner may be impleaded as a plaintiff in Title Suit No. 1 17 of 2002.

Learned Additional government Advocate on the other hand supporting the impugned order contended that the learned trial Court did not commit any jurisdictional error which calls for any interference by the Court under Article 227 of the Constitution of India.

The only question that needs determination as to whether the petitioner No. 4 being a pendent elite purchaser has locus standi to be impleaded as a party in Title Suit No. 17 of 2002. Perusal of the impugned order reveals that it is not a speaking order and a very cryptic and confusing one. From the impugned order it is seen that the learned trial Court has rejected the petitioner of the intervenor petitioner on the ground that since in Civil Suit No. 455 of 2003 the intervenor petitioner is one of the defendant and that suit is being heard with Title Suit No. 17 of 2002 and when in Title Suit No. 17 of 2002 the plaintiffs have not impleaded the intervenor petitioner as a co-plaintiff the intervenor petitioner cannot be impleaded as a co-plaintiff. Such conclusions of the learned trial Court and especially the reasoning's cannot be sustained in the eye of law and definitely I am in agreement with the contentions of Mr. Sarangi, learned counsel for the petitioners that failure of justice has occasioned. It is trite law that justice requires a pendent elite purchaser should be given opportunity to protect his right. The transferee pendent elite can be added as a proper party if his interest in the subject-matter of the suit which is substantial in nature. The pendent elite same legal rights and obligations of his vendor as may be eventually determined by the Court. In this context profitably I may refer to a very recent pronouncement of the Apex Court in the case of A. Nawab John & Others v. V.N. Subramaniyam, reported in 2012 (2) OJR 255 (SC): (2012 AIR SCW 4248) and another reported case i.e. Smt. Saila BalaDassi v. Nirmala Sundari Dassi and another, AIR 1958 SC 394. The Hon'ble Apex Court have observed that a pendente lite purchaser's application for impleadment should normally be allowed or considered liberally. The intervenor petitioner being a pendent elite purchaser is entitled to be heard and is entitled to be impleaded in the suit or other proceedings where his predecessor in interest is made a party to the litigation. Order 1, Rule 10, C.P.C. enables the Court to add any person as a party at any stage of the proceedings if his presence before the Court is necessary in order to enable the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the object of the said provision of Order 1, Rule 10 of the C.P.C. if the application for impleadment is thrown out without a decision on the said question it may be that the petitioner No. 4 (the intervenor) may come up with a separate suit to enforce his right which means multiplicity of proceedings. When from the impugned order at Annexure- 1 it is seen that the intervenor petitioner has been arrayed as a defendant in another suit i.e. C..S. No. 455 of 2003 and when the said suit is being tried analogously with T.S. No. 17 of 2000 it would have been prudent on the part of the learned trial Court in allowing the prayer of the intervenor petitioner, namely the present petitioner to be impleaded as a party.

In the premises, from the aforesaid discussions, the impugned order at Annexure-1 is quashed. The intervenor petitioner, namely, the present petitioner be added as a defendant in Title Suit No.17 of 2002 and the learned trial court shall afford opportunity to the newly added party, namely, the present petitioner of filing his written statement, if any, and the learned trial court would soon thereafter proceed to take up the hearing of the suits, as the same has been delayed for more than a decade.

Accordingly, the writ petition stands allowed. No costs.

Petition allowed.

4. Order 6 Rule 17

Jayanta kumar Sahu v. Laxmidhar Sahu. 2013 (1) CLR- 708

B.K. MISRA, J.

Issue

Proposed amendment to the plaint which are only elucidation of some facts which are already there on record can be allowed when the defendant would not be taken by surprise in view of the written statement filed by the plaintiff to his counter claim.

The Case-

It is the settled position of law that an amendment petition can be filed at any stage of the proceeding and delay is not always a factor to refuse the payer for amendment. The primary duty of the Court is to shorten the litigation and this Court is not required to go into the correctness or falsity of the case in the amendment. it is also the trite law that the Court while deciding a prayer for amendment of the pleading under Order 6, Rule 17 of the C.P.C. it should not adopt a hyper-technical approach but should take a liberal view taking into consideration the fact that the other side can be compensated with the costs. Technicalities of law should not be permitted to hinder the Courts in the ammonisation of justice between the parties. The Rules of procedure are intended to be a handmade to the administration of justice and a party cannot be refused just relief merely because of some mistake, negligence, in advertence or even infractions of the Rules of Procedure.

When no new facts are going to be introduced by incorporating the amendments to the plaint and when the proposed amendment are only elucidation of some facts which are already there on record and when the opposite party-defendant would not be taken by surprise in view of the written statement already filed by the plaintiff to his counter claim, the learned Court below should not have disallowed the prayer for amendment of the plaint. Accordingly, the impugned order at Annexure-6 is set aside. The application for amendment of the plaint as filed by the petitioner stands allowed subject to payment of cost of Rs. 2,000/-(Rupees two thousand) to the opposite party which shall be deposited by the petitioner within two weeks from the date of supply of certified copy of this order. In default of such payment of cost, the application for amendment of the plaint shall stand rejected. The learned Court below shall afford opportunity to the opposite party in filing additional written statement is he so desires, if the amendments are carried out.

Since the dispute is between the father and son, the learned Trial Court is directed to resort to the provisions of Section 89 of the C.P.C. and may refer the matter to the Permanent and Continuous Lok Adalat for brining out an amicable settlement to the dispute through mediation and conciliation and resolve the dispute as early as possible. The parties are directed to co-operate with the Court to see that their dispute is resolved through the alternate dispute resolution mechanism.

In the aforesaid premises, the impugned order dated 20.09.2011 at Annexure-6 passed by the learned Civil Judge (Jr. Divn.) Keonjhar is set aside and the writ petition stands allowed.

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5. O. 6, Rule- 2

The Rajasthan State Industrial Development and Investment Corporation & Anr. V. Diamond and Gem Development Corporation Ltd. & Anr. AIR 2013 SC 1241.

Dr. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.

Issue

Approbate and reprobate – Principle of – Inhere in rule of estoppel by selection.

A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts and benefits of a contract, or conveyance, or of an order, he is stopped from denying the validity or, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience. The doctrine of election is based on the rule of estoppels the principle inherent in it. The doctrine of estoppels by election is one among the species of estoppels in pais (or equitable estoppels), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

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6. Order- 6, Rule. 2

M/s. Gian Chand and Brothers and Anr. V. Rattan Lal alias Rattan Singh. AIR 2013 SUPREME COURT 1087

K.S. RADHAKRISHNAN AND DIPAK MISRA JJ.

Issue

Variance between pleadings and proof – Little variance between amount due and date pleaded in plaint and evidence adduced – Does not take defendant by surprise – Rule of secundum allegata et probate does not apply – Plaintiff cannot be non-suited.

The Case-

Applying the said principle to the pleadings and the evidence on record, we find no reason that the books of accounts maintained by the plaintiff firm in the regular course of business should have been rejected without any kind of rebuttal or discarded without any reason.

In view of the aforesaid analysis, we conclude and hold that the High Court has erroneously recorded that the findings returned by the courts below are perverse and warranted interference and, therefore, the judgment rendered by it is legally unsustainable and, accordingly, we allow the appeal, set aside the judgment of the High Court and restore that of the courts below. In the facts and circumstances of the case, there shall be no order as to costs.

Appeal allowed.

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7. Order VII Rule 14 r/w 151

Mr. Lalit Bagai v. M/s Gupta Building Material store. 2013 (1) CLR (SC) – 837

P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.

Issue

Production of documents and recalling witness – Scope of inherent powers of Court – Applications filed in order to overcome the lacuna in the plaint, pleadings and evidence, held, not maintainable.

The Case-

Respondent-plaintiff filed a suit against appellant for recovery of a sum of Rs: 4,35,250.18 along with interest- After the arguments were concluded in the suit, the matter was adjourned for judgment on 3.10.2009 – On 31.10.2009, respondent filed two applications, one under Order VII Rule 14 read with 151, CPC for placing on record certain documents and the other under Order XVIII Rule 17 read with 151, CPC for seeking permission to recall PW. 1 for proving certain documents by leading his additional evidence – Trial Court dismissed both the applications – Revision petition – High Court set aside the order passed by the Trial Court, while directing taking on record the bills which were proposed to be filed by plaintiff respondent and granted permission to recall PW. 1 to prove those bills – Those original bills had remained in exclusive possession of the plaintiff but the plaintiff had not placed those bills on record till the date of filing of such application – Whether the plaintiff could be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him- Held, No.

Held, The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons know to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the Trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the Trial Court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words ”at any stage” occurring in Order XVIII Rule 17 casually set aside the order of the Trial Court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of the court and Court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the Trial Court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 of CPC, the plaintiff cannot be permitted.

After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that

Courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the Trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

Appeal allowed.

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8. Order 8 Rule 6A

Pramila Das v. Smt. Jugmaprava Mohanty and others. 2013 (1) CLR- 778

B.K. PATEL. J.

Issue

Suit for eviction based on claim of title- Counter claim for declaration of title basing on the plea of adverse possession – Both the Courts below dismissed the Counter claim as being barred by limitation under Article 113 of the Limitation Act- Contention that Article 64 and 65 apply negative since the counter claim is not in the nature of a suit for possession.

The Case-

Admittedly, in the present case, plaintiff's suit is a suit for eviction based on claim of title whereas counter-claim of defendant No. 2 is for declaration of title on the basis of plea of adverse possession. The very basis of the counterclaim being plea of adverse possession, defendant No. 2 admits to be in possession of the suit property. Therefore, counter-claim is not in the nature of suit for possession. Both the Article 64 and 65 prescribe for period of limitation for suits for possession of immovable property or any interest thereon. Therefore, there is no basis for the appellant to urge that the period of limitation for the counter-claim in the present case is governed under Article 64 and 65 of the Limitation Act. Both the Courts below rightly held that the counter-claim of defendant No. 2 is barred under Article 113 of the Limitation Act.

There is no merit in the second appeal. Accordingly, the RSA is dismissed. No cost.

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9. Order 14, Rule 2(2)

Sri Shiba Prasad Das v. Vyas Teli Jatiya Samiti, Cuttack. 2013 (1) OLR – 601

M.M. Das, J.

Issue

With regard to maintainability of the suit, if involves mixed question of facts and law, cannot be decided as a preliminary issue.

Court can decide an issue as a preliminary issue if it is of the opinion that the case or any part thereof may be disposed of on an issue of law only.

The Case -

An issue which involves a mixed question of facts and law, cannot be tried as a preliminary issue which is required to be tried along with all other issues framed as contemplated under Order 14, Rule 2 (1) C.P.C. – Only in such event, it may try that issue first if the issue relates to the jurisdiction of the Court or a bar to the issue created by any law for the time being in force.

It is trite law by now that the Court can decide an issue as a preliminary issue if it is of the opinion that the case or any part thereof may be disposed of on an issue of law only and an issue which involves a mixed question of facts and law, cannot be tried as a preliminary issue which is required to be tried along with all other issues framed as contemplated under Order 14, Rule 2(1) C.P.C. Only in such event, it may try that issue first if the issue relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force.

In the facts of the present case, the issue sought to be decided as a preliminary issue by the petitioner does not come under any of the categories above. As contended by the learned counsel for the opp. Party, the claim of the plaintiff can only succeed if the plaintiff will prove the relationship of landlord and tenant between the parties and the claim of the defendant with regard to independent title over the disputed premises/shop rooms can also be gone into during the course of hearing of the suit and if the defendant succeeds in proving the same, it would negative the plea of the plaintiff that there exists a relationship of landlord and tenant between the parties on the basis of which recovery of house rent has been claimed by the plaintiff along with the damages and in such event, the plaintiff's suit would fail.

Considering the facts involved in the present case, this Court is of the view that the learned Trial Court was right in holding that the issue with regard to maintainability of the suit should not be decided as a preliminary issue inasmuch as the said issue is not an issue as contemplated under Order 14, Rule 2(2) C.P.C. and such an issue involves a mixed question of facts and law which also cannot be decided as a preliminary issue. This Court finds that the learned District Judge was right in holding that the Civil Revision was not maintainable in view of the amendment to Section 115 C.P. C.

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10. Order XXII Rule 4

Mata Prasad Mathur (dead) by LRs. V. Jwala Prasad Mathur & Ors. 2013 (1) CLR (SC) – 843

T.S. THAKUR AND GYAN SUDHA MISRA, JJ.

ISSUE

Substitution of legal representatives

Power of exemption under Order XXII Rule 4(4), CPC – This Court has adopted a liberal approach in setting aside abatement of suits.

The Case-

Suit filed by plaintiffs- respondents seeking a decree of declaration, partition and injunction against appellants-Abatement of suit on failure of plaintiffs to file an application for substitution of legal representatives of 'V', one of the defendants- Trial Court, when approached by the plaintiffs for deletion of name of the decreased and setting aside of abatement, held that the suit had abated in toto and accordingly dismissed it- On appeal, the First Appellate Court with the observation that the demise of 'V' defendant was proceeded ex-parte as he had to appeared to contest the suit or filed a written statement – Whether substitution of legal representatives of such a defendant could be dispensed with by the Trial Court in view of provisions of Order XXII Rule 4, CPC – Held, Yes.

Held, it would appear from the above that the Legislature incorporated the provision of Order XXII Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant-Virendra Kumar . We have no manner of doubt that the view taken by the First Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII Rule 4(4) of the CPC.

Appeal dismissed.

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11. Order 23, Rule - 3

Mahalaxmi Co-operative Housing Society Ltd. & etc. v. Ashabhai Atmaram Patel (D) through L Rs. and Ors. AIR 2013 SC 961

K. S. RADHAKRISHNAN AND DIPAK MISRA, JJ.

Issue

Compromise of suit

Objection- Tenability – Suit for cancellation of sale deed – Settlement reached between plaintiff firm and defendant-purchaser – One of partners who held power of attorney of other partners acknowledging receipt of payment from defendant – Also executing deed of declaration cum indemnity of title of defendant – Pursis filed withdrawing all contentions raised by plaintiff in suit allowed – Objection raised by heirs of two partners – Held not tenable as suit as regards one partner had abated due to non-substitution – And ancester of other heirs had ratified documents executed in terms of settlement.

O. 23, R. 1,3

Withdrawal of suit – And compromise of suit – Distinction explained – Pursis falls under O. 23, R. 3. Rule of O. 23 speaks of withdrawal of suit or abandonment of part of claim. R. 1 of O. 23 covers two types of cases (i) Where the plaintiff withdraws a suit or part of a claim with the permission of the Court to bring in fresh suit on the same subject matter and (ii) where the plaintiff withdraws a suit without the permission of the Court. Rule 3 of O. 23, on the other hand, speaks of compromise of suit. Rule 3 of Or. 23 refers to distinct classes of compromise in suits. The first part refers to lawful agreement or compromise arrived at by the parties out of Court, which is under 1976 amendment of the CPC required to be in writing and signed by the parties. The second part of Rule deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from first part of R. 3. The expression 'agreement ' or 'compromise' refer to first part and not the second part of R. 3. The second part gives emphasis to the expression 'satisfaction'. The word 'satisfaction' has been used in contradistinction to the word 'adjustment' by agreement or compromise by the parties. The requirement of "in writing and signed by the parties" does not apply to the second part where the defendant satisfies the plaintiff in respect of whole or part of the subject matter of the suit. Pursis falls under O. 23, R. 3 since the defendant has satisfied the plaintiffs in respect of whole of the subject matter of the suit.

S. 24, O. 23, R. 3

Transfer of suit for joint trial compromise in one suit – So is the case when suits are consolidated – Even after consideration suit does not lose its independent identity.

S. 151

Consolidation of suits- Power of – Can be exercised under S. 151 – Code does not contain specified provision providing for consolidation of suits.

Section 24 of the CPC only provides for transfer of any suit from one Court to another. There is no specific provision in the CPC for consolidation of suits. Such a power has to be exercised only under S. 151 of the CPC. The purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials.

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12. Order 26, Rule 9

Pitambar Nath v. Gourang Ch. Pati. 2013 (1) OLR- 653

B. K. MISHRA

Issue

Appointment of Civil Court Commissioner – Power is wide and discretionary.

The Case -

Appointment of a Commissioner would depend upon the nature of the dispute and the facts and circumstances of each case – In the present case held, keeping in mind the peculiar nature of disputes, local investigation with regard to the measurement appears

to be essential by engaging a person qualified to conduct investigation and measurement.

The power to appoint a Commissioner under Order 26, Rule 9 of the C.P.C. is wide and discretionary. It is also the settled position of law that the report of the Commissioner under Order 26, Rule 10 of the C.P.C. is a piece of evidence which can be rebutted by other evidence. Thus, appointment of a Commissioner would depend upon the nature of the dispute and the facts and circumstances of each case.

Learned counsel for the petitioner by placing reliance on two decisions of this Court as reported in 1987 CLT (Supp.) 521, Niranjan Patra and others v. Narahari Acharya and others, and Sitaram Nayak v. Smt. Usharani Das, 2003 (1) OLR 370 contended that where a party can on his own endeavour collect the materials through experts, Court need not depute a Commissioner because it may amount to assisting a party or collecting evidence for a party. Such contention of the learned counsel for the petitioner was met with stiff opposition from the side of the opposite party. It was contended by the learned counsel for the opposite party that the learned Court below has correctly exercised its judicial discretion in directing issuance of writ to the Civil Court Commissioner in view of the nature of dispute i.e. with regard to the identification and measurement of the suit land and with regard to the construction if any being carried over the same as such a report would help the Court in proper adjudication of the dispute when evidence would be led by the parties. In that context reliance was placed on two judgments of this Court reported in Vol. 112 (2011) CLT 405, Kartik Chandra Nayak v. BIra Kishore Nayak and others, vol. 64 (1987) CLT 722, Mahendranath Parida v. Purnananda Parida and others, Vol. 64 (1987) CLT 304, K. Raghunath Rao v. Smt. Tumala Jailaxmi and a decision of the Apex Court reported in 2009 (II) OLR (SC) 57, Haryana Waqf Board v. Shanti Sarup and others. In Haryana Waqf Board case (supra) their Lordships of the Apex-Court have categorically observed that where the controversy between the parties is regarding demarcation of an adjacent land Commissioner ought to have been appointed for such demarcation of the land.

In the instant case the controversy in between the parties is with regard to the possession of the land and construction alleged to have been made by the opposite party over plot No. 4070/4987 appertaining to Khata No. 721 measuring 20 decimals of land. According to the learned counsel for the present opposite party excess 20 decimals of land has been wrongly recorded in favour of the writ petitioner.

Thus, taking into consideration the nature of dispute the learned Court below allowed the prayer of the defendant-opposite party vide impugned order at Annexure-5 and directed deputation of the Civil Court Commissioner for making local investigation with regard to the suit schedule land i.e. with regard to the location of the suit Plot No. 4070/4987 measuring 20 decimals and to submit its report.

By keeping in mind the position of law enunciated by the Hon'ble Apex Court in Haryana Waqf Board (supra) and the decision of this Court in Kartik Chandra Nayak (supra) so also Mahendranath Parida case (supra) and keeping in mind the peculiar nature of dispute in my considered view in such cases local investigation with regard to the measurement appears to be essential by engaging a person qualified to conduct investigation and measurement. Accordingly, when the learned Trial Court exercised its judicial discretion, this Court in exercise of its extraordinary jurisdiction under Article 227 of the Constitution of India declines to interfere with the impugned order as there is no

material on record to show that the learned Civil Judge (Jr. Divn.) , Salipur acted in flagrant disregard of law or rules of procedures or acted in violation of principles of natural justice and transgressed its jurisdiction. In Surya Dev Rai v. Ram Chander Rai and others as reported in 96 (2003) CLT 625 (SC), their Lordships of the Apex Court have held that where two inferences are reasonably possible and the subordinate Court has chosen to take one view, the error cannot be called gross or patent and therefore, a writ of certiorari or the exercise of supervisory jurisdiction is not available.

Thus, for the aforesaid reasons. I do not find any compelling material on record to interfere with the impugned order at Annexure-5/.

Accordingly, the writ petition being devoid of merit stands dismissed but in the circumstances without any costs.

Petition dismissed.

13. Order 39, Rule1

Mohd. Mehtab Khan & Ors. V. Khushunma Ibrahim & Ors. AIR 2013 SC 1099

P. SATHASIVAM AND RANJAN GOGOI, JJ.

Issue

Mandatory interim relief – Grant of – Requires highest degree of satisfaction of Court – Much higher than case involving grant of prohibitory injunction.

The Case –

There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the Appellate Bench of the High Court in the present case is a mandatory direction to handover possession to the plaintiffs. Grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in Dorab Cawasji Warden v. Coomi Sorab Warden and others has come to be firmly embedded in our jurisprudence. Para 16 and 17 (of SCC) : (Paras 14 and 15 of AIR) of the judgment in Dorab Cawaden (supra), extracted below, may be usefully remembered in this regard:

The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But sine the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
3) The balance of convenience is in favour of the one seeking such relief.

Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

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