REVIEW OF CASE LAWS ON C.P.C, 2013 (FEB)

I N D E X

CIVIL PROCEDURE CODE

1. O.14,R.2/O.41,R.23

Chandradhoja Sahoo V. State of Orissa and others. AIR 2013 SC 367

P.SATHASIVAM AND RANJAN GOGAI , JJ.

Issue

Court passing Appealable orders –To decide lis on all issues –Such course would avoid necessity to make order of remand and consequential delay.

We also deem it necessary to reiterate herein a fundamental principle of law that all courts whose orders are not final and appealable, should take notice of. All such courts should decide the lis before it on all issues as may be raised by the parties though in its comprehension the same can be decided on a single or any given issue without going into the other questions raised or that may have arisen. Such a course of action is necessary to enable the next court in the hierarchy to bring the proceeding before it to a full and complete conclusion instead of causing a remand of the matter for a decision on the issue(s) that may have been left undetermined as has happened in the present case. The above may provide a small solution to the inevitable delays that occur in rendering the final verdict in a given case.

In the light of what has been discussed and the conclusions reached by us we are of the view that in the present case the order of the High Court should receive our interference and the matter should be remanded to the High Court for a de novo decision which may be rendered as expeditiously as possible. Accordingly, we set aside the order dated 13.05.2009 of the High Court and allow these appeals as indicated above.

Order accordingly.

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2. S.11

Bihar State Govt. Secondary School Teachers Association V. Bihar Education Service Association & Ors.

And

Bihar State Govt. Secondary School Teachers Association V. Anup Mukherjee & Ors. AIR 2013 SC 487

SURINDER SINGH NIJJAR AND H.L.GOKHALE, JJ.

Issue

Constitution of India, Art.141 –Precedent –Judgement of Supreme Court –High Court has to accept it –And should not in collateral proceedings write contrary judgement –Controversy over Govt. Resolution-Supreme Court interpreting it one way- Reopening of Controversy by High Court in collateral proceedings – Approach of High Court deprecated –Principle of res-judicata also do not permit re-examination.

In this Case the hierarchy of the Courts requires the High Courts also to accept the decision of this Court, and its interpretation of the orders issued by the executive. Any departure therefrom will lead only to indiscipline and anarchy. The High Court's cannot ignore Article 141 of the Constitution which clearly states, that the law declared by this Court is binding on all Courts within the territory of India. As observed by this Court in para 28 of the State of West Bengal and others Vs. Shivananda Pathak and others reported in 1998 (5) SCC 513:(AIR 1998 SC 2050):-

> "If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to that judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment....."

In the same view we may state that when the judgment of a Court is confirmed by the higher court, the judicial discipline requires that Court to accept that judgment, and it should not in collateral proceedings write a judgment contrary to the confirmed judgment. We may as well note the observations of Krishna Iyer, J. in Fuzlunbi Vs. K. Khader Vali and another reported in 1980 (4) SCC 125:(AIR 1980 SC 1730):-

> "…….No judge in India, except a larger Bench of the Supreme court, without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio of the judgment of the Supreme Court."

Much emphasis was laid by the Bihar Education Service Association on the absence of common service rules, to oppose the merger of the subordinate service employees into the State Service Class-II. In this context we must note that the decision to merge the cadre is a matter of policy as held by this Court in S.P. Shivprasad Pipal Vs. Union of India and others reported in 1998 (4) SCC 598:(AIR 1998 SC 1882). It is for the state to decide as to which cadres should be merged so long as the decision is not arbitrary or unreasonable. As stated earlier, the resolution dated 7.7.2006 is well reasoned and justified, and cannot be called arbitrary or unreasonable to be hit by Article 14. It deserved to be upheld. It is possible that the merger may affect the prospects of some employees but this cannot be a reason to set-aside the merger. Once the State Govt. has taken the necessary decision to merge the two cadres in a given case, the State Govt. is expected to follow it by framing the necessary rules.

This entire discussion leads us to only one conclusion that the learned Single Judge who heard the petition CWJC No.10091/2006, which began the third round of litigation filed on behalf of the Bihar Education Service Association, had no business to re-open the entire controversy, even otherwise. The State Govt. had already passed a resolution dated 7.7.2006 after the order of this Court dated 19.4.2006. While examining the legality of that resolution (which was defended by the State Govt. at this stage before the learned Single Judge) the entire controversy was once again gone into. The law of finality of decisions which is enshrined in the principle of res-judicata or principles analogous thereto, does not permit any such re-examination, and the learned Judge clearly failed to recognize the same.

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3. O.41 , R.11,17

Satyabhama Pattanaik v. Bijendra Mohapatra and others . AIR 2013 ORI 26

M. M. DAS, J.

Issue

Appeal – Dismissal for non-filing of certified copy of decree along with memo of appeal –Validity –Once an appeal is not dismissed under provisions of R.11 of O.41,appeal is to be admitted and date of hearing is to be fixed and notice of such date of hearing is to be served on respondent –Only provision ,which authorizes appellate Court to dismiss the appeal thereafter is under R.17 for non –appearance of appellant –Appeal admitted and summons issued to respondent -Dismissal of appeal for improper presentation of appeal not proper.

It is, therefore, clear from the provisions of Order – 41 C.P.C. that once an appeal is not dismissed under the provisions of Rule – 11 thereof, the appeal is to be admitted and a date of hearing is to be fixed and notice of such date of hearing is to be served on the respondent. The only provision, which authorizes the appellate Court to dismiss the appeal thereafter is under Rule – 17 of Order – 41 C.P.C., which provides in sub-rule(1) thereof that where on the day fixed, or on any other day, to which the hearing of an appeal is adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal is dismissed. In the explanation to this rule, it has been provided that nothing in the said sub-rule shall be construed as empowering the court to dismiss the appeal on merit. When an appeal is dismissed under sub-rule (1) of Rule – 17 the provision for restoration of the appeal commonly called as readmission of the appeal dismissed for default is prescribed under Rule - 19.

In the facts of the present case, the appeal being admitted by the learned lower appellate court and summons having been issued to the respondent, the learned lower appellate court was not authorized under law to dismiss the appeal on the ground that there was no proper presentation of the appeal, as the certified copy of the decree was not filed along with the memo of appeal.

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4. S. 41, Rule 22

Hardevinder Singh v. Paramjit Singh & others. 2013 (I) CLR (SC) 389

K.S.RADHAKRISHANAN AND DIPAK MISRA , JJ.

Issue

Appeal –Maintainability –Person aggrieved

Plaintiff filed civil suit for possession of suit land to the extent of his share treating the will alleged to have been executed in favour of defendants 1 to 4 as null and void –It was pleaded that the suit land in hands of his father was ancestral coparcentary and joint family property and he, along with his brothers , defendants 5 and 6 , constituted a joint Hindu Family –It was alleged that defendants 1 to 4 , on the basis of a forged will ,forcibly took possession of the land – Defendants 5 filed an independent written statement admitting claim of plaintiff –Trial Court decreed the suit while holding the will was null and void and that the plaintiff and other natural heirs of the testator were entitled to get possession of the suit land –On appeal filed by beneficiaries of the will , the Appellate Court dismissed the suit while holding that the property held by father of plaintiff was not ancestral – Original plaintiff had withdrawn from the litigation on account of settlement with the appellants before the Appellant Court –Defendant 5 filed second appeal before the High Court –Single Judge of the High Court dismissed the appeal as not maintainable –High Court held that defendant 5 could not be regarded as an aggrieved party as assail the impugned decree –Whether defendant 5 was a person aggrieved and was prejudicially affected by the decree –Held , yes –Whether appeal filed by defendant 5 was maintainable – Held ,yes.

Held , Presently, it is apt to note that Sections 96 and 100 of the Code make provisions for preferring an appeal from any original appeal or from a decree in an appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. If a judgment and decree prejudicially affects a person, needless to emphasize, he can prefer an appeal (Para 13).

After the 1976 amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory o his part to file the cross-objection. (Para 18).

It has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category No. 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But Post amendment, read in the light of explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection lying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the un-amended Code.

The Court has clearly stated that if a person is prejudicially or adversely affected by the decree, he can maintain an appeal. In the prese3nt case, as we find, the plaintiff claiming to be a co-sharer filed the suit and challenged the will. The defendant No. 5, the brother of the plaintiff, supported his case. In an appeal at the instance of the defendant Nos. 1 to 4, the judgment and decree was overturned. The plaintiff entered into a settlement with the contesting defendants who had preferred the appeal. Such a decree, we are disposed to think, prejudicially affects the defendant No. 5 and, therefore, he could have preferred an appeal. It is worthy to note that the grievance pertained to the nature and character of the property and the trial Court had decreed the suit. He stood benefited by such a decree. The same having been unsettled, the benefit accrued in his favour became extinct. It deeds no special emphasis to state that he had suffered a legal injury by virtue of the overturning of the decree. His legal right has been affected.

Thus, indubitably, the present appellant was a person aggrieved and was prejudicially affected by the decree and, hence, the appeal could not have been thrown overboard treating as not maintainable.

Referred:			***Para***
(i)	AIR 1974 SC 1126: Smt. Ganga v. Vijay	.....	6
(ii)	AIR 2003 SC 1989: Banarsi v. Ram	.....	6
(iii)	Air 1971 SC 374: Smt. Jatan v. M/s. Golcha	.....	13
(iv)	AIR 1974 SC 994: State v. Amar	.....	14
(v)	(2003) 1 SCC 34: Baldev v. Surinder	.....	15
(vi)	(1970) 1 SCC 685: Sahadu v. Special Deputy	.....	17
Relied:			
(i)	2012 (11) SCALE 39: Ayaaukhan v. The State	.....	19

Appeal allowed.

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5. Order 16 rule 10(2)

Sri Dilip kumar Pattanaik v.Bimal kishore mohapatra & anr. 2013 (I) CLR 418

M.M.DAS , J.

Issue

Proclamation to give evidence –When can be issued –Nothing on record to show that the evidence of persons against whom Proclamation was sought in material and summons have been served on them and they have intentionally avoided service of such summons –Hence the prayer for issuance of summons rightly rejected.

In the instance case , nothing is shown either before the Learned Court below or before this Court that the evidence of the persons against whom proclamation was sought to be issued by the petitioner are according to the Court material and further summons have been served on them and they have been intentionally avoided service of such summons .The petitioner produced no material before the Court to show that he has served the summons by hand on priti mohanty as claimed by him .He neither examined himself to prove such service of summons nor produced any material in that regard.

The Learned District Judge also has rightly come to the conclusion that the evidence of said priti mohanty and Dilip Mohanty , who have filed no objection to the application for probate of the will are in no way material for the case. The learned Court, however, has rightly come to the conclusion that the evidence of Dr. Kasturi Das is material, has passed necessary direction in that regard, in the impugned order. Since there is no finding of the learned Court below that the evidence of the witnesses against whom proclamation was sought to be issued are material for the purpose of deciding the cases witnesses have intentionally avoided service of summons, he has rightly rejected the prayer made by the petitioner for issuance of proclamation against them. This Court finds no reason to interfere with the impugned order and the writ application accordingly stands dismissed.

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6. Order 1 rule 10

Sadhu Charan Biswal v. Bombay Cardio Vascular & Surgical Pvt. Ltd. Represented through its Managing Director And others. 2013 (1) CLR – 421

B.K. MISHRA, J.

Issue

Pendente lite purchaser – Properiety of being impleaded as a party to the suit.

In the instant case, the intervenor petitioner was granted permanent lease of an area Ac.3.60 decimals of land pertaining to revenue Plot No. 332/1882 under Khata No. 619 in Mouza-Chandrashekharpur, Bhubaneswar in the year, 2006 pending in different Civil Courts. After getting the lease of the land the same was mutated in the name of the intervenor petitioner as well as the record of right has also been prepared in the name of the purchaser Dr. R.K. Panda, Managing Director of Bombay Cardiovascular Surgical Pvt. Ltd., who is the present opposite party No. 1 in this writ petition and was also intervenor petitioner in the Court below. Without going into the merits of the cases of the parties and whether the transfer of the property to opposite party No. 1 that is the intervenor petitioner is valid or invalid at this stage for deciding the propriety of the impugned order (Annexure-1), suffice is to say that the intervenor petitioner being a pendente lite purchaser is entitled to be heard in the matter on the merits of the case and is entitled to be impleaded in the suit or other proceedings where his predecessor in the internet 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 to effectively and completely adjudicate upon the settle all the questions involved in the suit. Avoidance of multiplicity proceedings is also one of the object of the said provision in the Code. The plea raised by the present opposite party No. 1 that he was a bonafide transferee for value in good faith is a question to be decided by the Court. If the application for impleadment is thrown out without a decision on the said question it may be that the opposite party No. 1 may come up with a separate suit to enforce his right which means

multiplicity of proceedings and therefore it cannot be said that the opposite party No. 1 is neither necessary nor proper party to the suit in question.

I do not find anything wrong in the approach of the learned Trial Court by allowing the prayer of the intervenor petitioner by the impugned order at Annexue-1. The present petitioner, in my humble view, does not suffer from any prejudice and his rights are in no way would be affected when the opposite party No. 1 would be impleaded as a party defendant in Tital Suit No. 753 of 2001. I find the impugned order at Annexure-1 is a speaking order and it cannot be said that such order has been passed in flagrant violation of the principles of law or rule of procedure or there has been gross jurisdiction error. When the impugned order shows that the prayer of the intervenor petitioner was allowed by the learned Court below not only in the best interest of justice but also to avoid multiplicity of proceeding, I am not inclined to interfere with the same.

Issue

Transfer of Property Act. 1882-Section 52-Lispendens purchaser-Rights and liabilities of.

It is the settled legal position that the effect of Section 52 of the Transfer of Property Act is not to render transfers effected ruing pendency of a suit by a party to the suit void but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually determined in the suit. In order words, the transfer remains valid subject of course to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court

Accordingly, the writ petition stands dismissed. No costs.

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7.Order 2 ,rule 2 (2) and (3)

M/s Virgo Industries (Eng.) p.Ltd v. M/s Venturetech Solutions p. Ltd. 2013 (I) OLR (SC) 290

P.SATHASIVAM AND RANJAN GOGAI, JJ.

Issue

Two suits –Cause of action for both set of suits same –Maintainability - Two sub rules of order 2 rule 2 contemplates two different situations, namely , where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and secondly where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in a suit –It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit.

Order II Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the which he is entitled to make. If the plaintiff so acts, Order II Rule 2 of CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order II Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order II Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded except in a situation where leave of the Court had been obtained.

The object behind enactment of Order II Rule 2(2) and (3) of the CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, through available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons.

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8. Secs. 151 and 152

Santosh Kumar Sahoo V. Radhanath Sahoo and four others. 2013 (1) OLR – 363

M.M. DAS, J.

Issue

Suit decreed on compromise – Correction of final decree – Prayer rejected – Writ – Mistake is a bona fide one and since both the parties agree for such correction, it cannot cause injustice to any of them inasmuch as by correcting the plaint and the compromise petition by way of amendment as well as the final decree, the same would not affect the right accrued in favour of any of the parties – Trial Court directed to allow the amendment of the plaint and the compromise petition as well as correction in the final decree.

Applying the above ratio to the facts of the present case, it is seen that all the factors as mentioned above are satisfied in the present case as the mistake is a bona fide one and since both the parties agree for such correction, it cannot cause injustice to any of them in as much as by correcting the plaint and the compromise petition by way of amendment as well as the final decree, the same would not affect the right accrued in favour of any of the parties. Rather incorrect description of the property would lead to a complex situation which may give rise to further proceedings in as much as the incorrect final decree neither can be worked out nor will beneficial to any of the parties.

I, therefore, find that the trial Court is not correct in rejecting the applications under Section 151 and 152 C.P.C. for correction. In that view of the matter, the Trial Court is directed to allow the amendment of the plaint and the compromise petition as well as the correction in the final decree. A consolidated copy of the plaint shall b filed by the petitioner after correction along with a fresh compromise petition giving correct description of the property after being signed and sworn to by the parties except Radhanath Sahu, who was the original defendant No. 1 and has expired in the meantime and no substitution is necessary as all his legal heirs are already on record. Upon filing of the consolidated copy of the plaint and fresh compromise petition, the trial Court shall correct the final decree which shall be

resubmitted for carrying out such correction. Parties may thereafter approach the revenue authorities for mutating their names in respect of their lands which have fallen to their respective shares as per the corrected final decree.

This writ petition is accordingly dispose of.

Urgent certified copy of this order be granted on proper application. Petition disposed of.

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9. Order 18, Rule 16

Kamalakanta Parida and other V. Sri Saroj Badan Parida and others 2013 (1) OLR – 412

M.M. DAS, J.

Issue

Probate proceeding – Application seeking examination of a witness allowed – Writ – On fulfillment of any of the two conditions, jurisdiction under the said provision can be exercised, the first being where the witness sought to be examined is about to leave the jurisdiction of the Court and the second is where sufficient cause is shown to the satisfaction of the Court with regard to his or her immediate examination – Wide discretion vested on the Court to exercise jurisdiction under Order 18, Rule 16 CPC which is required to be exercised with circumspection and subject to satisfaction in a judicious manner and not just for asking of the same – Court, in order to find out as to whether the second condition is fulfilled in given case, has to record his satisfaction that sufficient cause exists for examining a witness immediately and such sufficient cause must be shown to be existing by the applicant – Held, learned Trial Court has not done so while passing the impugned order, for which, the said order is unsustainable – Order quashed.

The above provision is unambiguous and clearly provides that on fulfillment of any of the two conditions, jurisdiction under the said provision can be exercised, the first being where the witness sought to be examined is about to leave the jurisdiction of the Court and the second is where sufficient cause is shown to the satisfaction of the Court with regard to his or her immediate examination.

In the facts of the present case, fulfillment of the first condition does not arise, as the opposite parties, in their application under Order 18, Rule 16 CPC, have not made out any case that the said Benudhar Pati is about to leave the jurisdiction of the Court . Therefore, the petition was clearly based on the second condition.

From the impugned order, as quoted above, it would be clear that the learned Trial Court has assigned absolutely no reason as to in what manner, the evidence of the said witness Benudhar Pati is relevant for just decision of the probate case and, if he is not examined immediately, there will be no scope for examining such witness by the petitioners at a later stage except stating that the said Benudhar Pati is on the point of death, which fact was not supported by any material, such as, medical documents etc. produced before him. The learned Court has also not given any reason in support of his finding that the said case will become infructuous for non-examination of the said witness while allowing the prayer made under Order 18, Rule 16 CPC. It is seen that the second condition as enumerated above is also not satisfied.

This Court , therefore, is of the view that the wide discretion vested on the Court to exercise jurisdiction under Order 18, Rule 16 CPC, which is required to be exercised with circumspection and subject to satisfaction in a judicious manner and not just for asking of the same and the learned Trial Court has not done so while passing the impugned order, for which, the said order is unsustainable and the same is accordingly quashed.

The writ application stands allowed. All pending Misc. cases stand disposed of.

The interim order passed earlier stands vacated.

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