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

I N D E X

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Civil Procedure Code

1. Order 6 Rule 2

Dillip Kumar Sahoo v. Smt. Malati Rout and others 2013 (1) CLR-570

B.K. PATEL, J.

Issue

Pleading-No party should be permitted to travel beyond its pleading- In the absence of pleading evidence, if any, produced by the parties cannot be considered.

Extent of suit land in respect of which impugned sale deeds have been executed comprises of an area measuring Ac. 0.900 decimals. It is not disputed that the extent of suit property is well within 1/4th share of the suit plot measuring Ac. 4.750 decimals to which defendant No. 2 is entitled. As has been adverted to earlier, initially it was conceded on behalf of the contesting respondents that plaintiffs do not assail validity of sale deeds Exts. B and C is an admitted fact. P.W. 1 admits that they were present in the office of the Sub-Registrar on the date of execution of the sale deeds. There are explicit recitals in the sale deeds regarding receipt of consideration amount by defendant No. 2. Defendant No. 2 was the most competent person who could have adduced evidence regarding non-payment of consideration amount on the face of pleading and evidence of defendant No.1 that consideration amount was paid. However, defendant no. 2 did not choose the file any written statement and while deposing in court supported the plaintiffs. In the absence of any pleading by defendant No. 2 with regard to non-payment of consideration amount, assertion made by defendant No. 2 in Court while deposing as witness is of no consequence and is to be ignored. In Ram Sarup Gupta (dead) by L.Rs. vs. Bishun Narain Inter College and others: AIR 1987 SC 1242, cited by he learned counsel for the respondents, it has been pointed out that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. In such circumstances, there is no scope for the plaintiff to assail the sale deeds on the ground that there is no passing of consideration amount. Consequently, under the facts and circumstances of the case, sale deeds Exts. B and C have the effect of passing of title of the suit property to the purchaser upon execution and registration thereof.

In the result, the second appeal is allowed. Judgments passed by both the Courts below are set aside. Plaintiffs suit is dismissed. Parties shall bear their own cost.

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2. Order 18 Rule 16

Kamalakanta Parida & another v. Sri Saroj Badan Parida & others 2013 (1) CLR-598

M.M. Das, J.

Issue

Probate case - Petition filed by the petitioner for examination of one of the witnesses before recording the evidence of other witnesses – Conditions necessary for such examination.

Held, 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.

(Para 11)

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3. Order 39 Rule 7

Abdul Naim Khan & another v. Sk. Kefaittullah & others 2013 (1) CLR-606

B.K. Misra, J.

Issue

Local Inspection When can be ordered.

It is the trite law that the object of inspection is to give clear topography and the situation of the suit plot. In my humble view, assistance of the Court would be necessary where the party requiring such assistance is incapable of having the knowledge and cannot render evidence on the point. Furthermore, the Court has wide discretion in deputing advocate commissioner when it finds that in view of the evidence laid by both sides the report of the local inspection would assist the Court in assessing the evidence properly. Thus, when hearing of the suit has not yet commenced and when witnesses would be available to the plaintiffs to prove their assertions, the Trial Court is justified in arriving at a conclusion that direction for local inspection would amount to fishing out materials for the plaintiff.

Learned Trial Court disallowed such a prayer on the ground that those facts can be proved by leading evidence and therefore deputation of Commissioner would amount to collection of evidence especially when hearing of the suit has not yet commenced. It is the trite law that the object of inspection is to give clear

topography and the situation of the suit plot. In my humble view, assistance of the Court would be necessary where the party requiring such assistance is incapable of having the knowledge and cannot render evidence on the point. Furthermore, the Court has wide discretion in deputing advocate commissioner when it finds that in view of the evidence laid by both sides the report of the local inspection would assist the Court in assessing the evidence properly. Thus, when hearing of the suit has not yet commenced and when witnesses would be available to the plaintiffs to prove their assertions, the Trial Court is justified in arriving at a conclusion that direction for local inspection would amount to fishing out materials for the plaintiff. I do not find anything wrong in the approach of the learned Trial Court. When there is no failure of justice, in the instant case, by passing the impugned order in question and when there is nothing on record to show that the learned Trial Court exceeded its jurisdiction and passed the impugned order in flagrant dis-regard of law or the rules of procedure or acting in violation of the principles of natural justice, the Writ Court would refuse to exercise the certiorari jurisdiction as such powers are to be used sparingly.

In the result, there being no merit in this writ petition, the same stands dismissed, but without any cost.

I may make it clear that if in course of recording of evidence the learned Civil Judge (Jr. Divn.), Jagatsingpur would be satisfied that local inspection of the suit property would be necessary to arrive at the just decision of the case he may issue the direction on the application of either party. Further, it is directed that the Trial Court shall o well to take up the hearing of the main suit i.e. Civil Suit No. 139 of 2011 if pleadings are complete in all respect and the same shall be disposed of as expeditiously as possible, preferably, within a period of six months.

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4. Order 39 Rule 1 & 2

Nakula Sahoo v. chief General Manager, 115 (2013) CLT 530

B.K. MISHRA, J.

Issue

No prima facie case in favour of the Petitioners since he is not in possession of the suit land- After acquisition suit land transferred in favour of O.P. No.1 for setting up of a power plant & construction work has already been started – No irreparable loss would be caused to the Petitioner if interim relief is not granted & balance of convenience does not lie in his favour – Petitioner in the suit he can be adequately compensated in terms of money – No injunction.

It is needless to reiterate here that while considering the question of grant of injunction, the court is required to consider three basic requirement, namely :-

Prima facie case;

Balance of convenience & inconvenience; &

Irreparable loss & injury.

When the Appellant-Plaintiff himself admits that the suit land was acquired by the Government for establishment of a power project & compensation was alleged to have been paid to Defendant Nos. 1 to 5 but not to him that shows that the Appellant-Plaintiff has no prima facie case for getting the equitable relief of injunction as prima-facie he is not in possession of the suit land. Similarly, when the Opp. Party No.1 has been given the land for setting up a power plant as per the Memorandum of Understanding entered into with IDCO & when the land in question has already been transferred to Opp. Party No. 1 Company for setting up of a 1,050 Megawatt Power Plant & when as per the contention of the Learned Counsel for Opp. Party No. 1 construction work has already been started over the suit land, if interim relief is not granted to the Petitioner-Plaintiff no irreparable loss would be caused to him & the balance of convenience does not lie in his favour. The Petitioner-Plaintiff on the eventuality of succeeding in the suit can be adequately compensated in terms of money.

Thus, when in the impugned order at Annexure-1 there is no error which is manifest & apparent on the face of the proceeding & when the Petitioner has failed to establish that grave injustice & there has been gross failure of justice by the impugned order at Annexure-1, this Court declines to interfere with the impugned order at Annexure- 1 & accordingly the impugned order at Annexure- 1 is affirmed & the Writ Petitions being devoid of merit stand dismissed.

However, taking into consideration the nature of dispute, it is necessary that the suit be disposed of as expeditiously as possible. The Learned Civil Judge (Sr. Divn.), Dhenkanal shall do well to dispose of the suit within six months hence by taking all possible steps. The parties are directed to cooperate with the Court & see that the lis comes to an end within the stipulated time. The lower Court shall refuse unnecessary adjournments while taking up hearing of the matter.

With the aforesaid observation, both the Writ Petitions stand disposed of.

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5.O. 23, R. 1

Tehri Hydro Dev. Corpn. Ltd. And Anr. v. Jai Prakash Asso. Ltd. AIR 2013 SC 920

R.M. LODHA, ANIL R. DAVE AND RANJAN GOGOI,JJ.

Issue

Successive arbitration- Tenability –First arbitration on issue of non-preparation of final bill and non-refund of security deposit – Second arbitration regarding claims that got crystallised on preparation of final bill- Issues in the two arbitrations were thus not same – Second arbitration cannot therefore be said to be barred by first arbitration.

Insofar as the jurisdiction of the Arbitrator to adjudicate on the two claims of Rs. 10,17,461/- and Rs,12.50 lakhs are concerned, the dispute is capable of

resolution within a short compass. The entitlement of the respondent-contractor to the aforesaid two amounts was not the subject-matter of the earlier proceeding before the Arbitrators which arose out of the grievance of the respondent-contractor that though the execution of the work had been completed, the final bill had not been prepared and placed before the Arbitrators the claim of the respondent-contractor got crystallized. It is these specific claims, after quantification, that had been referred to the Arbitrators in the proceeding in which the award has been passed. It will, therefore, not be correct to say that the arbitration proceeding in respect of the specific claims of the contractor stood barred in view of the earlier arbitration proceeding between the parties. That apart, from an order passed by the Arbitrators on 15th January, 1994, which is available on record as an enclosure to the counter affidavit of the respondent, it appears that the arbitrators in the aforesaid order dated 15th January, 1994 had clearly recorded that the ". . . .both the parties agree that we should adjudicate both the disputes relating to refund of deposit of Rs. 12.5 lakhs and payment of final bill to the tune of Rs. 10.00 lakhs and odd. . . . " in these circumstances, the award insofar as the claim of Rs. 10,17,461/- made by the learned Arbitrator and affirmed by the learned courts below will not require any further scrutiny by us.

In view of the foregoing discussions we allow this appeal in part and modify the order of the High Court dated 20th July, 2006 as indicated above.

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6.S. 11

Smt. Roshni & Ors. V. Commissioner, Rohatak Division & Ors. AIR 2013 P&H 46

RAJIVE BHALLA AND Mrs. REKHA MITTAL. JJ.

Issue

Suit for eviction – Bar of res judicate – Gram Panchayat had earlier filed application for eviction which were dismissed on ground that land did not belong to Gram Panchayat – S. 7 provides summary procedure for ejectment of unauthorized occupants of Shamilat Deh – Summary adjudications do not operate as res judicate in proceedings before adjudicatory forum assigned with jurisdiction to decide question of title – Suit for eviction not barred by res judicate.

The dispute, in the present case, pertains to proprietary and possessory rights in the land, in dispute. The Gram Panchayat, Village Urlana Khurd, District Panipat, claims that the land, in dispute, was reserved during consolidation for the village Panchayat and other common purposes of the village as Jumal Mushtarka Malkan, whereas the petitioners, claim that the land was not so reserved and, therefore, belongs to proprietors.

The Gram Panchayat filed a petition under Section 7 of the Punjab Village Common Lands (Regulation) Act, 1961 (as applicable to the State of Haryana) (hereinafter referred to as the '1961 Act,) for eviction of the petitioners from the

land, in dispute. The petitioners filed a reply inter alia raising objection that as two earlier applications filed by the Gram Panchayat have been dismissed, the application should be rejected, summarily. The petitioner also pleaded that as they are in cultivating possession of the land since 1961 as per the jamabandi for the year 1961-62, the question of title so raised should be decided before proceeding any further.

Vide order dated 30.11.2004, the Assistant Collector, Ist Grade, dismissed the application filed by the Gram Panchayat filed an appeal. Vide order dated 17.11.2005, the Collector allowed the appeal and directed the Assistant Collector to decide the question of title so raised by parties.

The Assistant Collector, 1st Grade, accordingly, framed the following issues :-

"1. Whether the land in dispute does not come under the jurisdiction of Gram Panchayat and mutation No. 1454 is liable to set aside (Liable to decide) ? OPP

2. Whether the land in dispute never remain in the jurisdiction of Gram Panchayat and never used for common purposes ? OPP

3. Whether there is no right to plaintiff to file case ? OPD

4. Whether this case is not maintainable legally in this situation ? OPD

5. Relief."

After framing of issues, parties were allowed to lead evidence. After re-consideration of pleadings and arguments addressed, the Assistant Collector, 1st Grade, held that the land, in dispute, belongs to the Gram Panchayat.

Aggrieved by this order, the petitioners filed an appeal. The Deputy Commissioner-cum-Collector, dismissed the appeal on 25.02.2009 by holding that the petitioners are not proprietors as they purchased land in village Urlana Khurda, District Panipat, on 20.05.1965 and 13.06.1973 and have failed to prove their cultivating possession before 26.01.1950. the petitioners filed a revision before the Commissioner, Rohtak Division, Rohtak, which was also dismissed.

In view of what has been stated hereinabove, we dismiss the writ petitions but with no order as to costs.

This petition is filed to challenge orders passed under Section 13-A of the 1961 Act……..determining questions have been filed to challenge orders under Section 7 of the 1961 Act.

Counsel for the parties are ad-idem that decision in CWP No.3903 of 2010 would decide the fate of other writ petitions as orders passed by the Assistant Collector, 1st Grade, the Collector and the Commissioner holding that the Gram Panchayat is owner of the land, in dispute, are affirmed, orders passed under Section 7 of the petitioners would necessary have to be affirmed.

Petition dismissed.

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7. O. 9, R. 4

Smt. Gitarani Rakshit v. State of West Bengal & Ors. AIR 2013 CAL 59

BISWANATH SOMADDER, J.

Issue

Resolution Application

Negligence on part, applicant – Effect – Applicant had not come in support of restoration application when it was taken up for consideration – Presumption can be drawn that applicant was not diligent in conducting her case – No urgent necessity apparent to have main matter restored to its original file and number for purpose of having it heard on merit – Keeping restoration application pending indefinitely thus would be unreasonable – Application liable to be dismissed.

This restoration application has been taken out pursuant to the leave granted to the applicant/petitioner by this Court on 3rd August, 2012, when the Court had dismissed the applicant's previous restoration application, being CAN 4201 of 2012.

It has been stated in the instant application, inter alia, that the applicant/petitioner is not at fault. She all along has been diligent in conducting the case and there has been no laches and negligence on her part

The fact that no one comes in support of the instant application when it is taken up for consideration is an indicator that the applicant/petitioner is not at all diligent in conducting her case. There cannot be any plausible reason for keeping an application for restoration pending indefinitely, since such an application is only taken out when a matter is dismissed for default and there is an urgent necessity to have the main matter resorted to its original file and number for the purpose of having it heard on merit. An application for restoration ought to be pursued vigorously and prosecuted with right earnest and not kept pending for an indefinite period of time. If a restoration application is not prosecuted with due diligence and prompt not prosecuted with due diligence and prompt dispatch, the Court will necessarily presume that the applicant/petitioner has been negligent conducting his/her case.

For reasons stated above, the instant application is liable to be dismissed and is accordingly dismissed.

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

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