Dambarudhar Bhunya Vs. Muralidhar Bhunya and ors.

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Court : Orissa

Decided On : Aug-03-1984

Reported in : AIR1986Ori15

Judge : K.P. Mohapatra, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 35 and 96

Appeal No. : Civil Revn. No. 152 of 1982

Appellant : Dambarudhar Bhunya

Respondent : Muralidhar Bhunya and ors.

Advocate for Def. : N.C. Pati, Adv.

Advocate for Pet/Ap. : A. Mukherjee and ;A.K. Misra, Advs.

Disposition : Revision rejected

Judgement :

K.P. Mohapatra, J.

1. This revision is directed against the order dt. 27-11-80 passed by the learned Subordinate Judge, Kendrapara refusing the prayer of the petitioner to the effect that he is not liable to pay the costs of the suit decreed against him.

2. The undisputed facts may be stated in brief. Opposite party 1 was plaintiff, the petitioner was defendant 1 and opposite parties 2, 3, and 4 were the other defendants in Title Suit No. 90 of 1968 of the Court of the Subordinate Judge, Kendrapara. It was a suit for partition. The suit was decreed in favour of opposite party 1 with costs of Rs. 685.89 paise to be paid by the petitioner and opposite parties 2, 3 and 4 to opposite party 1. The petitioner preferred First Appeal No. 177 of 1971 in this Court The appeal was allowed in part and the parties were directed to bear their respective costs. Opposite party 1 levied execution in execution Case No. 85 of 1971 against the petitioner and opposite parties 2 to 4 for recovery of costs of the suit amounting the Rs. 685.89 paise. During the pendency of the execution proceeding, the petitioner on 6-11-1980 raised an objection to the effect that he was not liable for the costs under execution because, in First Appeal 177 of 1971 the parties were directed to bear their respective costs. On hearing both parties in the matter, the learned Subordinate Judge held that in the First Appeal, the parties thereto were directed to bear their respective costs, but as there was no direction that the parties should bear their costs throughout, the petitioner and opposite parties 2 to 4 were bound to pay the costs of

the suit decreed against them. Accordingly, he overruled the petitioner's objection.

3. Learned counsel appearing for the petitioner contended that according to the doctrine of merger, the judgment and decree passed by the trial Court merged with those of the Court of appeal. As the Court of appeal directed that the parties should bear their respective costs, it necessarily meant that parties should bear their respective costs incurred both in the suit as well as in the appeal. Therefore, the petitioner is not liable to pay the costs of the suit. Learned counsel appearing for opposite party 1, on the other hand, urged that the doctrine of merger has no application to a case of payment of costs. Since in the First Appeal there was no direction that the parties should bear their respective costs throughout, opposite party 1 is entitled to realise the costs of the suit.

4. According to Section 35 of the Civil P. G, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid. In exercise of the discretion conferred by law, the trial Court decreed the costs of the suit in favour of opposite party 1. In First Appeal, this Court exercised its discretion in the matter and directed that the parties shall bear their respective costs. If the intention of this Court was that the parties should bear their respective costs both in the suit, as well as, in the First Appeal, there would have been a clear direction as is usually done to the effect that the parties shall bear their respective costs throughout. In that even there would have been justification on the part of the learned counsel to contend that the petitioner was not liable for the decree of costs in the suit. The aforesaid view finds support from a Division Bench decision of the Calcutta High Court the leading judgment being rendered by Sir Asutosh Mookerjee, J. and reported in (1912) 15 Cal LJ 658, Surendra Nath Roy Choudhury v. Girija Nath Roy Choudhury. It was held as follows :

'It has been contended in the second place on behalf of the petitioners that the decree ought not to have contained a direction for payment of the costs of the Court below by the defendants to the plaintiffs. It appears that the suit had been dismissed on a preliminary ground, namely, that it had been improperly framed. Upon appeal, that decision was reversed, and the order of the Court was that the appeal be allowed with costs; that clearly means the costs of the High Court. It has been suggested however that the learned Judges intended to allow the then plaintiffs the costs of the original Court as well; such an interpretation is, in our opinion, entirely inadmissible.'

In another decision reported in AIR 1939 Bom 493, Yadav Vishvanath Gandre v. Bachoo Abraham David Awaskar, Chief Justice Beaumont directly dealt with a similar issue and held as follows :

' 'Appeal dismissed with costs' is the ordinary expression which the Judge uses, when he means that the appellant has to pay costs having failed in the appeal. When the order comes to be drawn up, it is usually framed in such a way as to direct the appellant to pay the respondent's costs when taxed, but if in drawing up the order, the same expression is used as the Judge normally uses, 'Appeal dismissed with costs,' it can only have one meaning, and that is that the appellant has to pay the costs of the respondent of the appeal.'

The 'Doctrine of Merger' is quite well known and according to the decision reported

in AIR 1967 SC 681, State of Madras v. Madurai Mills Co. Ltd., it is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject matter of the appeal or revisional order and the scope of appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provision conferring the appellate or revisional jurisdiction. This being the concept, the doctrine of merger cannot be stretched to the extent that when there is a fusion of the order of the inferior Court with that of the superior Court, it shall have a direct bearing on the costs awarded irrespective of the directions given by the said Courts in exercise of their discretion conferred by Section 35 of the Civil P. C. No decision or authority could be cited to support such a theory;

5. In consideration of the provisions of Section 35 of the Civil P. C, the decisions discussed above and the general practice prevailing in the Courts of the State I am of the view that the 'Doctrine of Merger' is not applicable in the matter of realisation of costs awarded in a suit or appeal. On the other hand, for realisation of costs, the specific order of the Courts passed in exercise of their discretion conferred by Section 35 of the Civil P. C. shall be the guiding factor. If the Court of appeal passes an order that the parties shall bear their respective or own costs, such a direction is confined to the costs of the appeal alone. If, on the other hand, the direction is to the effect that the parties shall bear their respective or own costs throughout, the parties shall bear their respective costs both in the Court of appeal, as well as, in the trial Court. If, in appeal a direction is given to the effect that any one of the parties shall bear the costs of the appeal or suit, such party shall bear the costs accordingly. In the aforesaid view of the matter and having regard to the discretion exercised by this Court in First Appeal No. 177 of 1971 awarding costs, the learned Subordinate Judge arrived at the correct conclusion in holding that opposite party No. 1 was entitled to realise the costs of the suit. The impugned order is, therefore, unassailable.

6. For the reasons stated above, the Civil Revision is without merits and is rejected. In the circumstances of the case parties shall bear their own costs.