



## IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO.463 OF 2024

(In the matter of an application under  
Article 227 of the Constitution of India)

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*Panchanana Jena* ... . *Petitioner*

-versus-

*Rekha Jatania* ... . *Opp. Party*

Advocate for the Parties :

For Petitioner : Mr. Susanta Kumar Dash, Advocate

For Opposite Party : Mr. Vivekananda Jena, Advocate

**CORAM:**

**JUSTICE K.R. MOHAPATRA**

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Heard and disposed of on 05.09.2024  
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**JUDGMENT**

1. This matter is taken up through hybrid mode.
2. Order dated 2<sup>nd</sup> April, 2024 (Annexure-4) passed in RFA No.111 of 2022 is under challenge in this CMP, whereby learned 1<sup>st</sup> Additional District Judge, Rourkela rejected a petition filed by the Petitioner under Order XLI Rule 3 read with Order VI Rule 17 and Section 151 CPC.



3. Mr. Dash, learned counsel for the Petitioner submits that RFA No.111 of 2022 arises out of CS No.195 of 2016 of the Court of learned Senior Civil Judge, Rourkela. In the said suit, the Defendant-Petitioner has suffered a decree of eviction. As the appeal was filed in a hurry, some relevant grounds of facts and law could not be stated in the memorandum of appeal. Thus, before commencement of hearing of the appeal, the Defendant-Petitioner filed the aforesaid petition for amendment of the memorandum of appeal to incorporate some additional grounds. Neither the grounds sought to be incorporated will change the nature and character of the suit nor will the Opposite Party-Respondent be prejudiced in any manner. Learned appellate Court, however, misconstruing the law involved, dismissed the petition applying the Proviso to Order VI Rule 17 CPC. Mr. Dash, learned counsel for the Petitioner refers to the provision under Order XLI Rule 2 CPC and submits that the Appellant cannot except with leave of the Court be heard on any grounds of objection not set forth in the memorandum of appeal. If the amendment sought for is not allowed, the Petitioner-Appellant will be seriously prejudiced. He further submits that in view of the provision under Order XLI Rule 2 CPC, the Petitioner-Appellant may with the leave of the Court raise any additional ground in the appeal. But, if at the time of hearing, such leave is not granted, the Appellant-Petitioner will be remediless. When Proviso to Order XLI



Rule 2 CPC clearly stipulates that the Court may decide an appeal on any additional ground not raised by the Appellant giving opportunity of hearing to the party likely to be affected, there is no reason as to why a petition, as aforesaid, should not be allowed. Although, the petition was filed under Order VI Rule 17 CPC, but in essence, it was one under Order XLI Rule 2 CPC to state certain additional grounds in the memorandum of appeal to be raised at the time of hearing so that the Respondent being aware of the same, come prepared for hearing. These vital aspects were lost sight of by learned appellate Court, while adjudicating the petition. Hence, he prays for setting aside the impugned order under Annexure-4 and to allow the petition, as aforesaid.

4. Mr. Jena, learned counsel for the Respondent-Opposite Party vehemently objects to the same. It is his submission that additional grounds sought to be raised by way of amendment was not taken in the written statement. He further submits that the grounds sought to be raised are not relevant/necessary for adjudication of the appeal. On verification of the pleadings and evidence of the parties together with materials available on record, learned appellate Court can decide the appeal. He further submits that the Appellant-Petitioner suffers a decree of eviction. Thus, in order to linger the appeal, he is adopting different tactics. Learned appellate Court has rightly applied the Proviso to Order VI Rule 17 CPC to the instant case and rejected the



petition. As such, the impugned order under Annexure-4 should not be interfered with.

5. Taking into consideration the submission made by learned counsel for the parties and on perusal of record, it appears that the petition under Order XLI Rule 3 read with Order VI Rule 17 and Section 151 CPC was filed during pendency of the appeal to incorporate certain additional grounds in the memorandum of appeal. Learned appellate Court rejected the petition holding that the petition was filed at a belated stage. It is also observed that the proposed amendment, if allowed, will change the nature and character of the suit.

6. Before delving into the merits of the case of the parties, this Court feels that provision under Order XLI Rule 2 CPC should be kept in mind. For ready reference, the provision under Order XLI Rule 2 CPC is quoted hereunder:

*“ 2. Grounds which may be taken in appeal; The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule:*

*Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”*

7. On a close reading of the aforesaid provision, it is apparent that the Appellant cannot be heard on any ground of objection not set



forth in the memorandum of appeal except by leave of the Court. Thus, there is no absolute bar under the statute to take any additional ground of objection at the time of hearing of the appeal. But, such ground(s) can be taken only with the leave of the Court. Needless to mention here that the grounds of appeal may be on facts or law or the both. The Proviso to Order XLI Rule 2 CPC makes it clear that the Court in its discretion may rest its decision on any other grounds provided that the party likely to be affected by the decision on such grounds is given an opportunity of hearing. Thus, by providing an opportunity of hearing, learned appellate Court may also rest its decision on any additional grounds not taken specifically in the memorandum of appeal providing opportunity of hearing to the party likely to be affected by the said decision.

**8.** In view of the clear Provision of Rule 2 to Order XLI CPC, this Court feels that learned appellate Court should have granted leave to the Petitioner to raise additional grounds in his memorandum of appeal. Granting leave to urge any additional ground in the memorandum of appeal does not amount to accepting the same on merit. Merit of such ground, if permitted to be urged, can only be gone into at the time of hearing of the appeal. Although the nomenclature of the petition has been stated to be one under Order XLI Rule 3 read with Order VI Rule 17 and Section 151 CPC, but in



essence, the same was filed under Order XLI Rule 2 CPC, as rightly submitted by Mr. Dash, learned counsel for the Appellant-Petitioner.

**9.** On perusal of the impugned order, it appears that learned appellate Court has made some observations in respect of the merits of the grounds sought to be incorporated. While considering the petition under Order VI Rule 17 CPC as well as Order XLI Rule 2 CPC, learned appellate Court should not express any opinion on the merits of grounds sought to be raised at the time of hearing by the Appellant. In view of the above, the impugned order under Annexure-4 is not sustainable in the eye of law and is accordingly set aside.

**10.** It is, however, submitted by Mr. Jena, learned counsel for Opposite Party that earlier, this Court in CMP No.1227 of 2023, has directed for early disposal of the appeal.

**11.** Taking into consideration the nature of the dispute involved, this Court directs that learned appellate Court shall permit the Petitioner to urge the additional grounds morefully stated in the petition under Annexure-3 series and adjudicate the appeal expeditiously. However, the appeal shall be adjudicated on the grounds available in the memorandum of appeal including the additional grounds taken in the petition and a decision shall be taken on merit giving opportunity of hearing to the parties concerned.



**12.** With the aforesaid observations and directions, this CMP is disposed of.

**13.** Interim order dated 7<sup>th</sup> May, 2024 passed in I.A. No.499 of 2024 stands vacated.

**14.** In the circumstances, there shall be no order as to cost.

Issue urgent certified copy of this judgment on proper application.

**(K.R. Mohapatra)**  
**Judge**

*High Court of Orissa, Cuttack*

*The 5<sup>th</sup> Day of September, 2024//Rojalin//*