

**IN THE HIGH COURT OF ORISSA AT CUTTACK**  
**CMP NO.662 OF 2015**

(An application under Article 227 of the Constitution  
of India, 1950)  
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***Gopal Banka and others*** .... ***Petitioners***

*-versus-*

***Dinesh Agarwal*** .... ***Opp. Party***

*Advocate for the Parties*

For Petitioners : Mr. Abhisek Kejriwal, Advocate

For Opposite Party : Mr. N.C. Rout, Advocate

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Heard and disposed of on 31.07.2023  
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**CORAM:**

***KRUSHNA RAM MOHAPATRA, J.***

**JUDGMENT**

1. This matter is taken up through hybrid mode.
2. Judgment dated 21<sup>st</sup> February, 2015 (Annexure-7) passed by learned First Additional District Judge, Rourkela in F.A.O. No.02 of 2014 is under challenge in this CMP, whereby learned appellate Court while holding that the appeal is maintainable, directed the Petitioners from raising any construction, making alteration or alienation of the suit property till disposal of the suit and to maintain *status quo* over the suit property by not changing its nature and character till disposal of the suit.

3. Mr. Kejriwal, learned counsel being authorized by Mr. Sandipani Mishra, learned counsel for the Petitioners submits that C.S. No. 53 of 2013 has been filed by the Plaintiff-Opposite Party under Section 6 of the Specific Relief Act, 1963 (for brevity 'the Act'). In the said suit, an application under Order XXXIX Rules 1 and 2 CPC in I.A. No.35 of 2013 was filed, which was dismissed vide order dated 29<sup>th</sup> March, 2014 (Annexure-5). Assailing the same, the Plaintiff-Opposite Party preferred FAO No.02 of 2014 and the impugned order under Annexure-7 has been passed.

4. Submission of Mr. Kejriwal, learned counsel for the Petitioners in brief is that in view of Section 6(3) of the Act, no appeal against a decree or order passed in a suit under Section 6 of the Act is maintainable. Thus, an appeal against an order passed in a petition filed under Order XXXIX Rules 1 and 2 CPC in a suit under Section 6 of the Act is not maintainable. In support of his case, Mr. Kejriwal relied upon a decision in the case of ***Prasanna Kumar Singh Vrs. Golaka Chandra Madhual and Anr.***, reported in 1995 (II) OLR 394, wherein, this Court discussing the scope of Section 6(3) of the Act *vis-à-vis* the provision under Order XLIII Rule 1(r) CPC held that in view of clear provision under Section 6(3) of the Act, no appeal lies from an order under Order XXXIX Rules 1 and 2 CPC.

5. This Court in the case of ***Prasanna Kumar Singh (supra)*** explained the word '*Order*' observing as under:-

*"It is generally understood to be a command, direction or decision of the Court or Judge on some*

*intermediate point or issue in the case, but without finally disposing of the main issue or issues in the cause. Then, it is merely interlocutory.”*

**5.1** Discussing the law on this point, this Court held as under:-

*“8. As indicated above, the prohibition of an appeal against any order or decree in the suit is absolute. There can be no quarrel over the proposition that the order to which the prohibition applies must have nexus with the subject matter of dispute. In the case at hand, undisputedly the decision which was assailed in appeal was passed in adjudicating an application in terms of Order 39, Rules 1 and 2 of the Code. Whether the order is wrong or not, is not the question. What is relevant and what has to be considered is whether it is an order passed in the suit instituted under Sec.6 of the Act. The plain, simple and emphatic answer to the question is yes. However, the situation may be different where an order or decree is passed in a suit under Section 6; which has additional directions or prohibitions for example, a decree for possession and damages. Obviously, the decree does not have only nexus with the suit itself, which has restricted operation in term of Section 6. In such case the whole decree may be applied against, But that is not the case here. The dispute relates to correctness of the order passed in respect of the application under Order 39 rules 1 and 2 of the Code. The inevitable conclusion, therefore, is that the appeal was not maintainable and it has been rightly held to be so by the learned District Judge.”*

**5.2** He, therefore, submits that no appeal lies from an Order XXXIX Rules 1 and 2 CPC in a suit under Section 6 of the Act. He further submits that the prohibition under Section 6(3) of the Act, is of course, not applicable to letters patent appeals as held in ***Mohd. Mehtab Khan & Ors Vs. Khushnuma Ibrahim Khan and Ors.***, reported in AIR 2013 SC 1099 as under:-

*“13. While the bar under Section 6(3) of the SR Act may not apply to the instant case in view of the initial forum in which the suit was filed and the appeal arising from the interim order being under the letters patent issued to the*

*Bombay High Court, as held by a Constitution Bench of this Court in P.S. Sathappan v. Andhra Bank Ltd. [(2004) 11 SCC 672], what is ironical is that the correctness of the order passed in respect of the interim entitlement of the parties has reached this Court under Article 136 of the Constitution. Ordinarily and in the normal course, by this time, the suit itself should have been disposed of. Tragically, the logical conclusion to the suit is nowhere in sight and it is on account of the proverbial delays that have plagued the system that interim matters are being contested to the last court with the greatest of vehemence and fervour. Given the ground realities of the situation it is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the courts is neither feasible nor practicable. Courts, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any straitjacket formula or any precise laid down norms. The courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though experience has shown that observations and clarifications to the effect that the findings recorded are prima facie and tentative, meant or intended only for deciding the interim entitlement of the parties have not worked well and interim findings on issues concerning the main suit has had a telling effect in the process of final adjudication it is here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that may have a close connection with those arising in the main suit.”*

He, therefore, submits that impugned order under Annexure-7 is not sustainable and liable to be set aside.

6. Mr. Rout, learned counsel for the Plaintiff-Opposite Party vehemently objects to the above. It is his submission that since the Plaintiff-Opposite Party has a right under the CPC to prefer an appeal against an order under Order XXXIX Rules 1 and 2 CPC, the same cannot be taken away so lightly in view of Section 6(3) of the Act. No restriction has been imposed in the provision under Order XLIII Rule 1(r) CPC taking away the right of appeal against an order passed in a suit for possession under Section 6 of the Act. Thus, the unfettered right under Order XLIII Rule 1(r) CPC enables the Court to entertain an appeal against an order under Order XXXIX Rules 1 and 2 CPC, even if in a suit under Section 6 of the Act. In support of his case, he relied upon a decision in the case of **Rajashree Pravin Sonawane Sonawane and Ors. Vs. Arvind Kumar Fatechand**, reported in 2014 (2) Mh.L.J. in which Bombay High Court relying upon a catena of decisions including of Hon'ble Supreme Court, held as under:-

*“6. Admittedly, the application under Order 39, Rules 1 and 2 of Civil Procedure Code once filed and decided, the remedy under the law to challenge the same is by invoking Order 43, Rule 1 of Civil Procedure Code. The submission that, in view of section 6 of the Specific Relief Act the Appeal is not maintainable, is unacceptable for simple reason that the suit is not yet finally decided nor there is decree and/or final order is passed.”*

He also placed reliance on a decision in the case of **Vinita M. Khanolkar Vs. Pragna M. Pai and others**, reported in (1998) 1 SCC 500 in which, it is held as under:-

*“3. Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory*

*enactment concerned expressly excludes appeals under letters patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by learned counsel for the respondents that if clause 15 of the Letters Patent is invoked then the order would be appealable. Consequently, in our view, on the clear language of clause 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by learned Single Judge of the High Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed.”*

**6.1** It is his submission that similar view has been taken by Andhra Pradesh High Court in the case of *A.N.Paramkusha Bai Vs. K.Krishna and another*, reported in 2000 (4) ALD 159 that an appeal is maintainable against an order under Order XXXIX Rules 1 and 2 CPC in a suit under Section 6 of the Act. It is further submitted that question of maintainability was not raised by the Petitioners before learned appellate Court. Thus, this Court should not delve into the question of maintainability of the appeal while exercising the power under Article 227 of the Constitution. Hence, he prays for dismissal of the CMP.

**7.** In order to appreciate the submissions made by learned counsel for the parties, this Court perused Section 6 of the Act which reads as under:

**“6. Suit by person dispossessed of immovable property-(1)** *If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person through whom he has been in possession or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.*

**(2)** *No suit under this Section shall be brought-*

**(a)** *after the expiry of six months from the date of dispossession; or*

**(b)** *against the Government.*

**(3)** *No appeal shall lie from any order or decree passed in any suit instituted under this section, nor*

*shall any review of any such order or decree be allowed.*

*(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.”*

7.1 Sub-section (3) clearly provides that no appeal shall lie from any order or decree passed in any suit instituted under the Section. Thus, the provision itself makes it clear that no appeal shall lie from any ‘Order’ including the order under Order XXXIX Rules 1 and 2 CPC made in a suit under Section 6 of the Act. It has been so held by this Court in the case of ***Prasanna Kumar Singh (supra)***. The decisions, which are relied upon by Mr. Rout, learned counsel for the Opposite Party, are not applicable to the instant case, as the Bombay High Court has relied upon a decision of the Hon’ble Supreme Court to hold so, which deals with an issue as to whether a letters patent appeal would lie against an order passed in a suit under Section 6 of the Act. It has been categorically held therein that statutory power barring an appeal or revision cannot cut across the Constitutional power of the High Court. Thus, I am not persuaded to apply the ratio in the case of ***Rajashree Pravin (supra)*** to the case at hand. It is equally held so by Andhra Pradesh High Court, which does not persuade this Court in view of the clear provision under Section 6(3) of the Act, which has been elaborately discussed in the case of ***Prasanna Kumar Singh (supra)***, wherein this Court considered the scope and ambit of the provision under Section 6(3) of the Act *vis-à-vis* Order XLIII Rule 1(r) CPC.

8. The question of maintainability is a pure question of law which touches the root of the matter. Thus, it can be raised for the

first time even in a proceeding under Article 227 of the Constitution. Thus, I am not persuaded by the submission made by Mr. Rout, learned counsel for the Opposite Party.

**8.1** Accepting the submission of Mr. Kejriwal, learned counsel for the petitioners, this Court sets aside the order under Annexure-7 passed by learned First Additional District Judge, Rourkela in FAO No.02 of 2014.

**9.** Since the suit is of the year 2013, learned trial Court should make all endeavours to see that the suit is disposed of at an early date in accordance with law. The parties are directed to co-operate with learned trial Court for early disposal of the suit.

**10.** Interim order dated 13<sup>th</sup> May, 2015 passed in Misc. Case No.665 of 2015 stands vacated.

Urgent certified copy of this judgment be granted on proper application.

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