

IN THE HIGH COURT OF ORISSA AT CUTTACK

FAO No.464 of 2014

Benudhar Behera

Appellant
.....
Mr.A.Tripathy, Advocate

-versus-

Kunjabehari Behera and others

Respondents
.....
Mr.S.R.Patnaik, Advocate for Respondent Nos.1 & 2
Mr.G.P.Samal, Advocate
for Respondent Nos.3 to 10, 13 to 16 and 42 of 54.

CORAM:
JUSTICE B. P. ROUTRAY

ORDER
21.7.2022

Order No.

30.

1. The matter is taken up through Hybrid mode.
2. Heard Mr.Tripathy, learned counsel for the Appellant and Mr.Patnaik, learned counsel for Respondent Nos.1 & 2 and Mr.G.P.Samal, learned counsel for Respondent Nos.3 to 10, 13 to 16 and 42 to 54.
3. The present appeal is directed against the impugned order dated 31st July, 2014 of the learned Civil Judge (Sr.Division), Kamakhyanagar in C.M.A.No.47 of 2012 arising out of a petition under Order 9 Rule 13 C.P.C.

4. At the outset all the parties present before this Court agrees for disposal of the appeal by this Court instead of sending the same to the court of the learned District Judge.

5. The background facts of the case is that present original Respondent No.1 and 2 were the plaintiffs before the learned trial court and filed Civil Suit No.49 of 2010 praying for partition. The present Appellant was defendant no.13 and rest of the Respondents were the respective defendants in the suit. After filing of the written statement by defendant no.13, the suit was posted to 16th August, 2022 and then posted to 22nd August, 2022 for hearing/evidence. On 22nd August, 2022 no step was taken by defendant no.13. As such he was set ex parte. Thereafter the evidence was taken in his absence and judgment was pronounced on 31st August, 2022 on contest against defendant nos.31 to 35 and ex-parte against rest of the defendants including defendant no.13. Knowing about the judgment, Defendant No. 13 approached the learned trial court under Order 9 Rule 13 C.P.C. on 29th September, 2012 to set aside the ex-parte judgment against him, which was registered as C.M.A. No.47 of 2012. Learned trial court rejected the prayer of defendant no.13 by the impugned order dated 31st July, 2012, which is the subject matter of challenge in the present appeal.

6. In the impugned order, learned trial court has emphasized upon the stated illness of defendant no.13 and disbelieving the medical documents as well as evidence of defendant no.13 has rejected his prayer.

7. From the narration of facts, it is clear that after defendant no.13 was set ex-parte on 22nd August, 2012, the ex parte judgment was pronounced on 31st August, 2012. So within nine days the evidence was completed, hearing was concluded and judgment was pronounced and when the only contesting defendant no.13 prayed to set aside the ex-parte judgment and to give him opportunity of hearing, the same was also rejected by the learned trial court.

8. In course of hearing, the notice of the Court was drawn to W.S. filed by defendant no.13 where the specific averment has been taken on his behalf that there was earlier partition of the suit property. This Court had an occasion to see the judgment dated 31st August, 2012 passed in C.S.No.49 of 2010, which was supplied by the parties in course of hearing. It is seen from the said judgment of the learned trial court that the issue relating to earlier partition has been answered against the pleading of Defendant No.13. However, since main judgment of the suit

dated 31st August, 2012 is not the subject matter of the present appeal, this Court refrains itself from entering into the merit of the same.

9. But it is seen from the development of facts that the evidence was taken, completed and judgment dated 31st August, 2012 was pronounced within nine days after defendant no.13 was set ex-parte. Thus it is felt that defendant no.13 has been deprived of substantial opportunity of hearing in the matter. As such, the impugned order dated 31st July, 2014 is set aside and the matter is remanded back to the learned trial court for fresh adjudication from the stage as on 22nd August, 2012. Further considering time elapsed in the meantime, Defendant no.13 is directed to pay cost of Rs.2,000/- (Two thousand) to the plaintiffs within a period of fifteen days from the date of appearance of the parties before the trial court.

10. The parties present before this Court are directed to appear before the learned trial court on 22nd August, 2022 and the learned trial court shall take all endeavor to dispose of the suit within a period of three months from the said date. The parties are also directed to cooperate with the trial of the suit and not to take any adjournment.

11. The appeal is disposed of in terms of the above direction.

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

(B.P. Routray)
Judge

C.R.Biswal

