

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.9472 of 2005

In the matter of an application under Articles 226 & 227 of the
Constitution of India.

State of Orissa

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Petitioner

Versus

Khem Chand Agrawala & Ors.

Opposite Parties

For Petitioner

...

Mr.S.Ghose, Additional
Government Advocate

For Opposite Parties

...

Mr. T.Nanda, Advocate

J U D G M E N T

PRESENT:

THE HONOURABLE JUSTICE BISWANATH RATH

Date of Hearing and Judgment: 29.09.2022

Biswanath Rath, J. Background involving the case is the Petitioner as Appellant filed a Money Suit bearing No.122 of 1989 in the Court of the learned Sub-Judge, Balangir for a decree for a sum of Rs.45,526/- against the present Opposite Parties herein with cost of the suit and further interest @ of 15% per annum from 10.11.1983 till realization

of the full amount. Further background as disclosed in the M.J.C. No.7 of 1992 arising out of Money Suit No.122 of 1989 when the suit was posted to 17.08.1991, defendants applied for time for filing of written statement. It is claimed the case was postponed to 19.08.1991 for filing the written statement. Unfortunately the G.P. Clerk took note in the diary of posting of case to be 10.09.1991. In the meantime the suit was posted to 19.08.1991, there was no steps by G.P., the Plaintiff who appears to have filed Hazira as per their diary note.

2. It is alleged unfortunately the case was taken up in the meantime on 19.08.1991 next on 22.08.1991 then on 07.09.1991 and ultimately on 26.09.1991 and the suit has been dismissed for no steps by the Plaintiff resulting Plaintiff filed an application under Order 9 Rule 9 of C.P.C. read with Section 151 of C.P.C. in M.J.C. No. 7 of 1992 on 29.1.92 of course along with a Section 5 of the Limitation Petition, as the M.J.C. was filed almost after three months of the date of dismissal. Vide Annexure-4, this has been considered and disposed of with an order of dismissal on the finding therein. An Appeal being filed vide Annexure-5 came to be dismissed vide Annexure-6 on confirmation of the observation of the trial court.

3. Taking this Court to the plea herein as well as plea in the M.J.C. memorandum, Mr. Ghose, learned Additional Government Advocate appearing for the Petitioner submitted that there was bonafide and mistaken taking note of the date of posting of the suit by the clerk attached to the Government Pleader resulting no steps by G.P. on the subsequent dates. It is only when steps were taken as per diary note by the G.P. Clerk and not finding any subsequent date, the Plaintiff came

to find from record the suit has been dismissed in the meantime and after consultation at different level and necessary advise, the M.J.C. appears to have filed undisputedly two months after the limitation expires but however with a delay condonation application.

4. Taking this Court to the ground in the limitation Petition, Mr. Ghose, learned Additional Government Advocate contended there is no dispute that there has been some delay in filing the application but looking to the nature of the dispute a huge amount of the State was involved required to be recovered from the defendants in disposal of the money dispute.

In the event there was loss, if any, in the meantime to the defendants, nothing prevented the trial court in allowing the M.J.C. on award of cost. Taking this Court to the reasons assigning in the rejection of the M.J.C, Mr. Ghose, learned Additional Government Advocate also objected to the reasons in disposing of such important matter merely on technical grounds.

5. Taking this Court to the Appellate orders, Mr.Ghose, learned Additional Government Advocate appearing for the Petitioner contested the Appellate order vide Annexure-6 also on the same footing and alleged the Additional District Judge even did not apply his judicious mind looking to the nature of dispute. Taking this Court to the ground already raised hereinabove and the grounds taken in the Writ Petition, Mr.Ghose, learned Additional Government Advocate contested both the orders and requested this Court for allowing the Writ Petition by setting aside both the impugned order involved therein.

6. Mr.Nanda, learned counsel for contesting Opposite Parties, on the other hand, taking this Court through the records submitted, once the suit is at the instance of the present Petitioner and being the Plaintiff, it is the sole responsibility of the Plaintiff to take down the date of posting correctly. The G.P. Clerk taking down the date of posting mistakenly cannot be a ground in restoration of the suit and the defendants should not suffer for their no mistake involved.

7. Mr. Nanda, learned counsel for contesting Opposite Parties also contended even assuming that the suit was dismissed for some technical defects at the end of the Plaintiff, nothing prevented the Plaintiff to come up with an application under Order 9 Rule 9 of C.P.C. immediately after such order is passed. It is alleged there is also delay in filing the Order 9 Rule 9 of C.P.C. application and same has been rightly rejected as Petitioner unable to satisfy on the question of delay.

8. Mr. Nanda, learned counsel for the contesting Opposite Parties taking this Court to the impugned order at Annexure-4 attempted to justify the reasoning therein. Mr. Nanda, learned counsel also involving Annexure-6 advanced the same submission and attempted to support the Appellate order at Annexure-6. Bringing out certain additional developments taken place in the meantime inasmuch as there has been death of some of the defendants and no steps for substitution involved, Mr. Nanda, also attempted to obstruct the entertainability of the Writ Petition in absence of substitution of the same of the defendants in the meantime. In the process Mr.Nanda,

learned counsel for the Opposite Parties opposed entertainability of the Writ Petition.

9. Considering the rival contentions of the Parties, this Court on perusal of the application under Order 9 Rule 9 of C.P.C. finds, the suit was initially posted to 17.08.1991 for filing of written statement. It is for the defendants applying for time, the case was adjourned to 19.08.1991. This Court here finds, the proceeding involved a peculiar aspect such as if defendant asks for time to file written statement, no Court unless there is sufficient obstruction grants two days time to file written statement. There is however inadvertent taking down of the date by the G.P. Clerk as 10.09.1991. This Court from the records finds there has been posting of the suit involved next at least on three occasions but find a reason with the Plaintiff not to attend on such dates undisputedly for the reason of a wrong taking down of date by the G.P. Clerk. Further even assuming the Order 9 Rule 9 of C.P.C. application ought to have been filed within prescribed time, this Court finds, the litigation was fought by the State and there is naturally such travel framed to different tables and ultimately there is some loss of time.

It is quite natural that there should be some discussions at some level taking permission in coming up of such application. In the process there is naturally some delay in bringing an appropriate application but at the same time, this Court finds the defendant being the beneficiaries of dismissal of the suit and already in enjoyment of a dismissal of the suit suffered on account of delay attempt of the Plaintiff cannot also lose sight of.

10. It is keeping in view and as this Court finds there is no inordinate delay in bringing Order 9 Rule 9 of C.P.C. application by the Plaintiff, while keeping in view the prejudice to the defendants thereby, this Court finds, in considering such application, while keeping in view the nature of the suit the trial court ought to have considered for balancing order. In the process while allowing restoration of the suit, the defendants/ Opposite Parties could have provided sufficient cost to check such type of mistakes in future.

11. At this stage this Court enters into the reasoning by the trial court in rejecting application and finds there has been mechanical consideration of such application and the rejection of the M.J.C. purely on technical grounds. Same process also followed in Appeal.

12. In the process, this Court interferes with the impugned order at Annexure-4 and sets aside the same. This Court here taking into consideration the rival contentions of the parties vis-à-vis appellate order at Annexure-6 also finds, the Appellate Court also followed the same process as adopted by the trial and there has been no judicial exercise of mind by either of the Court. In the process this Court as a consequence of taking out of the order at Annexure-4 also takes out an order at Annexure-6. Both the orders at Annexures-4 & 6 are thus set aside.

13. In the fitness of the pleadings of the parties and taking into consideration a vital dispute involved the State authority, this Court to avoid further loss of time allows M.J.C. No.07 of 1992 and keeping in view the heavy loss of the time in the meantime and the Writ Petition is taken up after almost three decades of the dismissal of the suit, this

Court while allowing the M.J.C. No.07 of 1992 awards a cost of Rs.10,000/- as against the Petitioner to be deposited in the trial court for the benefit of the defendants at least within two weeks hence. On proper application the defendants shall be permitted to take this amount under deposit. On production of a copy of the order along with deposit receipt, the suit will be restored, heard and disposed of on its own merit. Defendants if not filed written statement are directed to file written statement within two weeks of the order.

14. So far as the submission of the learned counsel for the Opposite Party that suit is not properly represented, further there has been death of some of the defendants in the meantime while permitting the Plaintiff to bring substitution Petition at least within one week of appearance of both the Parties in the trial court on 12th October, 2022, this Court directs the trial court to take into account such allegation if raised in the process of trial.

15. The Writ Petition succeeds.

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BISWANATH RATH, J.

*Orissa High Court, Cuttack.
Dated the 29th day of September, 2022/Swarna, Junior Stenographer*