

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 239 of 2014

Rama Jena and others ***Petitioners***
Miss Prajna Sarita Mohanty, Advocate
on behalf of Mr. Samir Kumar Mishra,
Advocate

-versus-

Kela Jena and others ***Opp. Parties***
Mr. Dwarika Prasad Mohanty, Advocate
(Opposite Party Nos.1 to 4)

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
08.12.2022

Order No.

20. 1. This matter is taken up through Hybrid mode.
2. Petitioners in this CMP seek to assail the order dated 15th January, 2014 (Annexure-3) passed by learned District Judge, Puri in FAO No.93 of 2013, whereby dismissing the appeal learned appellate Court confirmed the order dated 28th September, 2013 (Annexure-2) passed by Additional Civil Judge (Senior Division), Puri in CMA No.111 of 2010 (arising out of CS No.13/37 of 2007-2003) dismissing an application filed under Order IX Rule 13 CPC.
3. Miss Mohanty, learned counsel appearing on behalf of Mr. Mishra, learned counsel for the Petitioners submits that CS No.13/37 of 2007-2003 was filed for partition of two plots, i.e., Plot No.773 and 774. Petitioner Nos.1 (A) to 1(E) are descendants of Rama Jena, who along with Raghu Jena and Jatadhari Jena were impleaded as Defendants in the suit. Said Jatadhari Jena was looking after the suit on behalf of the Defendants. As the Advocate engaged by them did not inform

said Jatadhari Jena about the proceedings of the suit they could not participate in the hearing and were set *ex-parte*. Subsequently, preliminary decree for partition was passed *ex-parte* allotting 50% share of the suit property in favour of the Defendants. They could not also participate in the final decree proceeding. However, receiving notice in Execution Case No.1 of 2010, the Defendants came to know about the *ex-parte* decree passed in the suit. Hence, they filed a petition under Order IX Rule 13 CPC in CMA No.111 of 2010 before learned Additional Civil Judge (Senior Division), Puri. The said CMA was dismissed vide order dated 28th September, 2013 (Annexure-2). Assailing the same, the Defendants preferred FAO No.93 of 2013 before learned District Judge, Puri, which was also dismissed by judgment and order dated 15th January, 2014. Hence, this CMP has been filed for the aforesaid relief.

3.1 Miss Mohanty, learned counsel for the Petitioners submits that Defendants had engaged one Sri P.C. Mohapatra, learned counsel to conduct the suit on their behalf. But he did not inform the Defendants more particularly Jatadhari Jena, who was looking after the case about the proceedings of the suit. Thus, the Defendants could not know about the development in the suit. As a result, preliminary decree was passed *ex-parte* allotting 50% to the Defendants. Likewise the final decree proceeding went undefended. Petitioners, however, are aggrieved by the allotment of share which includes a residential house of the Defendants. Unless the final decree allotting the homestead property in favour of the Plaintiffs is set aside, Petitioners will be highly prejudiced. It is his submission that

the Defendants have explained the delay in filing the petition under Order IX Rule 13 CPC properly, but neither the learned trial Court nor the appellate Court could appreciate the same and passed the impugned orders under Annexures-2 and 3. Hence, she prays for setting aside the impugned orders under Annexures-2 and 3 and to restore the final decree to file so that the Petitioners can contest the allotment of share of the suit property.

4. Mr. Mohanty, learned counsel for contesting Opposite Parties vehemently objects to the same and contends that the discussions made in the impugned orders clearly disclose that the Defendants had knowledge about the preliminary decree when the Amin went to the village for measurement of the land for allotment of share. It is his submission that the Amin measured the land on 10th/11th November, 2008 for allotment of share in the village and one of the Defendants was signatory to the measurement sheet. Thus, the Defendants had knowledge about the preliminary decree since 2008. But no explanation has been offered by the Defendants as to why they waited till receipt of notice in the execution case to file a petition under Order IX Rule 13 CPC.

4.1 Further, the allegation that the Defendants had engaged learned counsel, namely, Sri P.C. Mohapatra is not correct. They had, in fact, engaged Mr. P.C. Nanda, as their counsel to defend the suit, which is apparent from the certified copy of Ext. 'A' (Vakalatnama). Thus, the allegation that Sri. P.C. Mohapatra did not inform the Defendants about the development of the suit, is not correct. Discussing the materials

on record learned trial Court as well as learned appellate Court has categorically held that Petitioners had not explained the sufficient cause for non-appearance on the date of hearing of the suit. They have also not explained the delay in filing the petition under Order IX Rule 13 CPC properly. Thus, this Court in exercising power under Article 227 of the Constitution should not interfere in the impugned orders, which are based on findings of fact.

5. Taking into consideration the rival contentions of the parties, this Court scrutinized the record, more particularly the impugned orders passed under Annexures-2 and 3. On perusal of record, it appears that the allegation of Defendants was that after entering appearance in the suit their Advocate, Sri P.C. Mohapatra did not inform them about the developments of the suit. Jatadhari Jena (Defendant-Petitioner No.3), who was examined as PW-1 deposed that he was looking after the suit on behalf of the Defendants and had visited the Court about 20-25 times for taking steps in the matter and paid fees to the counsel engaged by them. However, Ext. 'A', i.e., certified copy of the Vakalatnama executed by the Defendants, reveals that the same was executed in favour of one Sri P. C. Nanda, Advocate instead of Sri P. C. Mohapatra, as alleged. It further appears that PW-1 in his evidence has categorically deposed that the *ex-parte* decree came to his knowledge, when the Amin visited the village for measurement of the land. OPW-1 has categorically stated that the Amin visited on 10th /11 November, 2008 and submitted his report in February, 2009. It further appears that one Raghu Jena/Defendant No.2 was a signatory to such

measurement made by the Amin. Thus, it is apparent that the Defendants had knowledge of the *ex-parte* decree since 10th /11th November, 2008. No explanation has been offered by the Defendants as to why they waited till receipt of notice in Execution Case No.1 of 2010 to file the petition under Order IX Rule 13 CPC. From the submission made by Mr. Mohanty, learned counsel for contesting Opposite Parties, it appears that the Petitioners have no objection to the preliminary decree. They only object the allotment of share of homestead property in possession of the Petitioners to the Plaintiffs. Thus, after being aware of the final decree they could have preferred an appeal against the final decree assailing the allotment of share.

6. It further appears that learned trial Court as well as the appellate Court has discussed the materials on record in detail and came to the conclusion that Defendants have neither shown sufficient cause for their non-appearance on the date of hearing nor they have explained the delay in the petition filed under Order IX Rule 13 CPC properly.

7. In view of the discussions made above, this Court is satisfied that the Petitioner have not made out any case for interference with the impugned orders under Annexures-2 and 3. Thus, the CMP fails being devoid of any merit and the same stands dismissed as such.

8. Interim order dated 20th March, 2014 passed in Misc. Case No.209 of 2014 stands vacated.

s.s.satapathy

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge