

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.226 of 2020

Krushna Chandra Patra ***Petitioner***
Mr. Alok Kumar Mohanty, Advocate

-versus-

Alekh Chandra Mahakud and ***Opp. Parties***
another

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER

05.12.2022

Order No.

- 5.
1. This matter is taken up through Hybrid mode.
 2. Petitioner in this CMP seeks to assail the order dated 25th January, 2020 (Annexure-6) passed by learned Additional District Judge-cum-Special Judge (Vigilance), Dhenkanal in FAO No.4 of 2019, whereby dismissing the appeal, learned appellate Court confirmed the order dated 21st January, 2019 (Annexure-3 series) passed by learned Civil Judge (Senior Division), Dhenkanal in CMA No.90 of 2018 dismissing an application under Section 5 of the Limitation Act, 1963 and consequently dismissing an application under Order IX Rule 13 CPC.
 3. Mr. Mohanty, learned counsel strenuously submits that CS No.331 of 2013 was filed by the Plaintiff /Opposite Party No.1 with a prayer to declare the sale deed executed by Defendant No.2/Opposite Party No.2 in favour of the Petitioner as null and void and not binding on him and for other consequential and ancillary reliefs. The suit was decreed *ex-parte* vide judgment dated 12th April, 2016, as summons of the

suit was allegedly not served upon the Petitioner/Defendant No.1, he could not know about pendency and proceedings of the suit. He further submits that during the relevant period, the Petitioner was contesting for MLA in the general election of the year, 2014 and after being defeated he left Dhenkanal for a period of six months and resided at Baripada. As such, he filed CMA No.90 of 2018 under Order IX Rule 13 CPC along with an application under Section 5 of the Limitation Act for condonation of delay. Learned trial Court, vide order dated 21st January, 2019, dismissed the application under Section 5 of the Limitation Act and consequentially dismissed the petition under Order IX Rule 13 CPC. Assailing the same, the Petitioner preferred FAO No.4 of 2019, which was also dismissed on contest. Hence, this CMP has been filed.

4. Mr. Mohanty, learned counsel strenuously argued the matter challenging the sustainability of the impugned order submitting that since the Petitioner has a meritorious case to be considered in the suit and by virtue of the *ex-parte* decree a valuable civil right has been taken away; he should have been given an opportunity of hearing. Neither learned trial Court nor the learned appellate Court considered this material aspect, while adjudicating the matter. Accordingly, he prays for setting aside the impugned order.

5. This Court scrutinized the record in the light of the submission made by learned counsel for the Petitioner. On perusal of the petition under Section 5 of the Limitation Act, it appears that although the submissions made by learned counsel for the petitioner has been reflected therein, but there is no

specific averments as to when the Petitioner came to know about the *ex-parte* decree and what steps he has taken thereafter to file the petition under Order IX Rule 13 CPC. It further appears that the Petitioner had also taken the plea that summons were not duly served on him.

5.1 A petition under Order IX Rule 13 CPC can be filed either on the ground that summons were not duly served on the Petitioner or he is prevented by sufficient cause to appear in Court on the date of hearing of the suit. On perusal of the record, it appears that the Petitioner has submitted that the summons was not duly served on him. However, the plea was rejected by the Courts referring to the order sheet of the suit. No convincing material is placed before this Court to appreciate such a plea. Moreover, it is incumbent on the Petitioner to establish that when the *ex-parte* decree came to his knowledge, which is conspicuously absent. There is also no explanation as to what steps the Petitioner has taken to file the petition under Order IX Rule 13 CPC after the *ex parte* decree came to his knowledge. Plea taken by the Petitioner that he was contesting the general election for the year, 2014 and after being defeated he left Dhenkanal for six months cannot be a ground to allow the petition for condonation of delay of more than two years in filing the petition under Order IX Rule 13 CPC, more particularly in absence of detailed particulars to that effect. Mr. Mohanty, learned counsel for the Petitioner placed reliance upon a case law of this Court in the case of ***Umesh Ch. Singh Vs. Union of India 2 Others***, reported in 2014 (II) OLR 750 , in which it is held as follows:-

“ In the instant case, the facts are different. Here, in the O.A. No. 259 of 2014, since the engaged counsel was not interested to prosecute the case, the O.A. was dismissed for default and the said fact was also not communicated to the petitioner. The petitioner after knowing about dismissal of the O.A. from other sources, came to the Tribunal and filed restoration application along with the petition for condonation of delay through another counsel. Therefore, the petitioner should not suffer due to laches on the part of his counsel. In both the Supreme Court judgments, referred to above, facts do not involve lack of diligence on the part of the lawyer to prosecute the case. It is well settled that for the fault of the Advocate, a party should not be penalized. (See93 (2002) CLT 794 (Balajinath Padhi v. Central Administrative Tribunal and others). In the instant case, delay has been explained by the petitioner properly. Therefore, the Tribunal should not have rejected the petitions filed by the petitioner. In the case reported in (2000) 10 SCC 264 (Mahkali Engineering Corporation and another v. R.C. Subramanyam and others), it has been held that where order impugned in review petition was passed in absence of counsel for review petitioner, the High Court ought to have allowed the review petition and heard the matter on merits.”

(emphasis supplied)

When the Petitioner has failed to lay a foundation to consider the application under Section 5 of the Limitation Act, the case law cited supra will of no assistance to him.

6. In view of the above, I do not find any infirmity in the impugned order. Accordingly, the CMP being devoid of any merit, stands dismissed.

(K.R. Mohapatra)
Judge