

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 228 OF 2020

Mukunda Nayak

....

Petitioner

Mr. Prasanta Kumar Mohanty, Advocate

-versus-

Kuni Moharana and others

....

Opp. Parties

Mr. Swayambhu Mishra,
Additional Standing Counsel
(For Opposite Party Nos.4 to 9)

Mr. Himansu Sekhar Mohanty, Advocate
(For Opp. Party Nos.1 to 3)

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

05.09.2022

Order No.

10. 1. This matter is taken up through hybrid mode.
2. Although I.A. No. 789 of 2022 is listed for vacation of interim order filed by the Opposite Parties, but on consent of learned counsel for the parties, the CMP is taken up for final disposal.
3. The Petitioner in this CMP seeks to assail the order dated 15th February, 2020 (Annexure-10) passed by learned Civil Judge (Senior Division), Bhubaneswar in C.M.A. No.32 of 2020 (arising out of Execution Case No.35 of 2018), whereby restoration of I.A. No.1 of 2019 filed under Order XXI Rule 97 C.P.C. by the Petitioner has been dismissed.
4. Mr. Mohanty, learned counsel for the Petitioner submits that the Petitioner is a man of eighty-nine years old and is suffering from several geriatric diseases. The Petitioner had earlier filed an application under Order VI Rule 17 C.P.C. for

amendment of the petition under Order XXI Rule 97 C.P.C., which was rejected vide order dated 17th January, 2020 and accordingly, the matter was posted to 29th January, 2020 for adducing evidence on behalf of the Petitioner. On 29th January, 2020, although a petition for adjournment was filed, the matter was dismissed for default as none was present at the time of call on behalf of the Petitioner to press the petition. Accordingly, the Petitioner filed C.M.A. No.32 of 2020 for restoration of said petition. Although the petition for restoration was filed on 13th February, 2020, learned Civil Judge (Senior Division), Bhubaneswar in a hurry took up the matter on the same day, i.e. on 13th February, 2020 and posted the matter to 14th February, 2020 for adducing evidence on behalf of the Petitioner. However, due to the resolution passed by the Local Bar Association, the matter was again adjourned to 15th February, 2020. On that date, the Petitioner filed an application for adjournment. Rejecting the said application, learned executing Court proceeded to dismiss the C.M.A.. Hence, this CMP has been filed.

5. It is further submitted by Mr. Mohanty, learned counsel that looking at the age of the Petitioner, learned Civil Judge (Senior Division), Bhubaneswar should not have taken up the matter in a hurry and should have granted a breathing time to the Petitioner to get ready and adduce evidence in the matter. Although an application was filed on 15th February, 2020 for adjournment to adduce evidence, the same was not entertained. Hence, the impugned order is not sustainable in the eyes of law.

For the ends of justice, the Petitioner should be given an opportunity to press the C.M.A. No.32 of 2020 on merit.

6. Mr. Mohanty, learned counsel for the Opposite Parties-D.Hrs. vehemently objected to the same. It is his submission that assailing the judgment and decree passed in C.S. No.1739 of 2016 filed by the Opposite Parties-D.Hrs., the Petitioner had filed R.F.A. No.46 of 2019 before learned District Judge, Bhubaneswar. As no step for substitution was taken in the said appeal, the same was abated. Hence, the present CMP is not maintainable.

7. Mr. Mishra, learned Additional Standing Counsel for the State Opposite Party Nos.4 to 9-J.Drs. submits that the CMP itself is not maintainable as the order dismissing the petition under Order XXI Rule 97 C.P.C. is appealable one. He further submits that the Petitioner by filing the present CMP is trying to linger the proceeding. As such, the CMP being devoid of any merit is liable to be dismissed.

8. Taking into consideration the rival contentions of the parties and on perusal of the record, it appears that the Petitioner is thoroughly negligent in pursuing his application under Order XXI Rule 97 C.P.C. in I.A. No.1 of 2019, which was dismissed for default. It appears that the Petitioner was given opportunity to adduce evidence in the matter. Instead of adducing evidence, the Petitioner prayed for adjournment. It is trite law that the Court should make an endeavour to dispose of execution proceeding expeditiously. Although the petition under Order XXI Rule 97 C.P.C. (I.A. No.1 of 2019) was filed on 30th

October, 2019, the Petitioner failed to adduce evidence in support of his case and on 29th January, 2020, when the matter was posted for adducing evidence on behalf of the Petitioner, a time petition was filed for adjournment of hearing. But, neither anyone pressed the said application nor appeared at the time of call. As such, learned executing Court had no other option than to dismiss I.A. No.1 of 2019 for default. Subsequently, an application for restoration of I.A. No.1 of 2019 was filed. Although the matter was posted to 15th February, 2020 for adducing evidence on behalf of the Petitioner, but he failed to do so. As usual, he filed an application for adjournment. The plea that the Court proceeded with the matter in a hurry is not sustainable, as the Court should proceed with the execution proceeding expeditiously. The Court cannot proceed at the dictate of a party. It appears from the order sheet that the Petitioner was given opportunity to adduce evidence on his behalf vide order dated 15th February, 2020. Thus, the Petitioner cannot take exception to the day to day proceeding of the matter by learned executing Court.

9. In that view of the matter, I find no infirmity in the impugned order under Annexure-7.

10. Accordingly, the CMP being devoid of any merit stands dismissed.

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

(K.R. Mohapatra)
Judge