

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 268 OF 2022

Safoora Begum

....

Petitioner

Mr. S.S. Rao, Advocate

-versus-

Latif Khan and another

....

Opp. Parties

Mr. Satrughna Dash, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

11.08.2022

Order No.

4. 1. This matter is taken up through hybrid mode.
2. The Petitioner in this CMP seeks to assail the order dated 15th March, 2022 (Annexure-14) passed by learned Civil Judge (Senior Division), 2nd Court, Cuttack in C.M.A. No.133 of 2016 (arising out of Civil Suit No.128 of 2002), whereby he rejected an application filed by the Petitioner to hear the petition for limitation ahead taking up the petition under Order IX Rule 13 C.P.C. (C.M.A. No.133 of 2016) on merit.
3. The genesis of the case, which is relevant for adjudication of the CMP, is as under:
- 3.1 C.S. No.128 of 2002 was decreed *ex parte* in favour of the Plaintiff-Petitioner. The Defendants-Opposite Parties filed an application under Order IX Rule 13 C.P.C. in C.M.A. No.133 of 2016 along with a petition under Section 5 of the Limitation Act, 1963 (for short 'the Act') for condonation of delay of more than six years and four months in filing the CMA. Notices were issued in the limitation petition. The Plaintiff-Petitioner pursuant to the said notice appeared and filed her objection. When the matter stood thus, the Plaintiff-Petitioner filed an application under Order XIV Rule 1 C.P.C. with the following prayer:

“It is therefore prayed that your honour be graciously be pleased to put up the above said matter of limitation petition for first hearing and after going through the limitation petition and the show cause of this Opp party further be pleased to frame issues in the material proposition of facts and law in which the parties are at variance.

And for this act of your kindness, this opp party shall as in duty bound ever pray.”

The said application was allowed vide order dated 21st October, 2017 under Annexure-4, which reads as under:

“Petitioner is present and filed hazira. OP filed hazira. The petition u/o-14, R-1 CPC is taken up for hearing. Heard. The said petition is allowed. Issue are settled. Put up on 08.11.2017 for hearing of CMA.”

3.2 Although the issues were settled on 21st October, 2017 under Annexure-4 by allowing the petition under Order XIV Rule 1 C.P.C., but the sheet containing heading of the issues was not found in the case record. Therefore, an application was filed by the Plaintiff-Petitioner on 15th February, 2020 under Annexure-7 with the following prayer:

“It is prayer that your honour would be graciously pleased to frame issues basing on the pleading of the parties on the Limitation petition which is pending for disposal.”

Accordingly, learned Civil Judge (Senior Division), 2nd Court, Cuttack vide his order dated 28th August, 2021 held as under:

“On going through the case record it is found that on 21.10.2017 the issues are settled on the petition filed by the opp. Parties u/o.14 rule-1 of CPC. However, the heading of the issue has not been found with the case record. Therefore I found it proper to prepare the same today. Accordingly put up on 06.09.2021 for ARGUMENT.”

And learned Civil Judge accordingly prepared the same on 28th August, 2021 under Annexure-9, which reads as under:

“ISSUES

- (i) Whether the CMA is maintainable?*
- (ii) Whether the delay in filing the CMA is liable to be condoned?*
- (iii) Whether there is sufficient cause shown by the petitioners to restore the original suit by set aside the order/ex-parte judgment?”*

3.3. Thereafter, an application was filed by the Plaintiff-Petitioner on 6th September, 2021 under Annexure-10 with a prayer to strike off Issue No.1 and 3 and to frame certain issues as additional issue for determining the controversy between the parties as described in Paragraph-17 of the said petition.

Paragraph-17 of the said petition reads as under:

- “17. That main issues of controversy involved in this condonation of delay petition is*
- i) As to whether this petitioner had knowledge about Execution Case no.10/2010 arises out of Ex parte Decree passed in C.S. No.128/2002?*
 - ii) As to whether petitioners have come to Court in clean hands with sufficient cause for condonation of delay?*
 - iii) As to whether plea taken by the petitioners that they are victim of fraud played by advocate clerk?”*

The said application was taken up by learned Civil Judge on 9th September, 2021 under Annexure-11 and was rejected. Assailing the same, the Petitioner moved this Court in CMP No.514 of 2021, which was disposed of on 11th January, 2022 under Annexure-12 with the following order:

“3. On his own submission of Mr. Mishra, learned counsel for the petitioner, both limitation petition as well as CMA under Order 9 Rule 13 of the Code of Civil Procedure is still pending. Mr. Mishra, filing the CMP requests this Court to direct the trial court to first undertake the exercise involving Section 5 application before proceeding to decide the application under Order 9 rule 13 of the Code of

Civil Procedure. For the opinion of this Court, any such direction can be given to trial court. When trial court is already is seisin of all these applications, the same are required to be disposed of in accordance with law.

4. With this observation, the C.M.P. stands disposed of. As a consequence, interim order dated 08.12.2021 stands vacated.”

Accordingly, the Petitioner filed an application on 22nd January, 2022 under Annexure-13 with the following prayer:

“it is therefore prayed that your honour be graciously pleased to put up Limitation petition filed by these petitioners and objection of this opposite party to the said limitation petition for first hearing and hearing both the parties further be pleased to frame the issues on the proposition of facts and laws in which parties at variance in respect of the said limitation petition and objection of this opposite party as per earlier order passed by this Hon’ble Court dated 21/10/2021 and 28/08/2021.

And for this act of your kindness, this opposite party shall as in duty bound ever pray.”

Considering the same, the impugned order under Annexure-14 has been passed.

4. Mr. Rao, learned counsel for the Petitioner submits that when the petition under Order IX Rule 13 C.P.C. was admittedly filed beyond the statutory period, learned Civil Judge ought to have heard the petition under Section 5 of the Act before proceeding to take up the petition under Order IX Rule 13 C.P.C. on merit. Unless the delay is condoned, the petition under Order IX Rule 13 C.P.C. cannot be admitted. It is his submission that by filing an application under Order XIV Rule 1 C.P.C., the Petitioner has not waived her right to contest the limitation petition. It is also his submission that the nomenclature of the petition is not relevant for consideration of the subject matter of

dispute. The relief claimed in the petition is relevant for consideration. Vide order dated 21st October, 2017, the petition under Order XIV Rule 1 C.P.C. was allowed. Hence, the Court was obliged to hear the petition under Section 5 of the Act independently before proceeding with recording of the evidence in C.M.A. No.133 of 2016. Although this Court in CMP No.514 of 2021 has directed to hear both the limitation petition as well as petition under Order IX Rule 13 C.P.C. in accordance with law, learned trial Court in utter defiance to that order proceeded to hear the CMA without taking up the limitation petition for hearing. He, therefore, prays for setting aside the impugned order and to direct learned trial Court to hear the petition under Section 5 of the Act independently before proceeding with C.M.A. No.133 of 2016 on merit. It is his submission that the Petitioner with a *bona fide* belief that the Court is recording evidence in the petition for condonation of delay, has led evidence only in the matter of limitation. She has not even filed any objection to the petition under Order IX Rule 13 C.P.C, as delay in filing the CMA has not yet condoned. In that view of the matter, the impugned order under Annexure-14 is not sustainable in the eyes of law and is liable to be set aside.

5. Mr. Dash, learned counsel for the Opposite Parties submits that filing of the petition under Order XIV Rule 1 C.P.C. itself indicates that the Petitioner has prayed for framing of issues on limitation in the CMA itself and to hear it first. Since the issue of limitation is mixed question of fact and law, it cannot be heard as a preliminary issue. In support of his case, he relies upon the decision in the case of **Kamalakar Eknath Salunkhe –v–**

Baburav Vishnu Javalkar and others, reported in (2015) 7 SCC 321, wherein it has been held at Paragraph-19 as under:

“19. The provision contemplates that when an issue of jurisdiction is raised, the said issue should be decided at first as expeditiously as possible, and not be adjourned to a later date. The primary reason is that if the court comes to finding that it does not have jurisdiction vested in it in law, then no further enquiry is needed and saves a lot of valuable judicial time.”

6. He, however, submits that all throughout the Petitioner has participated in the hearing of C.M.A. in which limitation is an issue. Nothing prevented her to lead evidence on the merit of Order IX Rule 13 C.P.C. This Court while disposing of CMP No.514 of 2021 has not given any direction to hear the petition under Section 5 of the Act first before proceeding with CMA No.133 of 2016. What the Court has said that since both the petitions are before learned Civil Judge, he should proceed with the matter in accordance with law. By the time the CMP No.514 of 2021 was disposed of, evidence on behalf of the parties in C.M.A. No.133 of 2016 was already led. Hence, learned trial Court has committed no error in passing the impugned order under Annexure-14 rejecting the application to hear the petition for condonation of delay.

7. Heard learned counsel for the parties and perused the materials on record.

8. It appears that pursuant to the notice in the matter of limitation, the Petitioner appeared and filed her show cause. Subsequently, she filed an application under Order XIV Rule 1 C.P.C. to frame an issue on limitation and hear the same first. Learned trial Court allowed the said petition by settling the issues and posted the matter to 8th November, 2017 for hearing of CMA

No. 133 of 2016. The said order dated 21st October, 2017 was never challenged. Further, on the petition filed by the Petitioner to frame issues basing upon the pleadings of the parties on the limitation petition, learned trial Court verified the record and found that although the issues are settled on 21st October, 2017 but the sheet framing the issue was not available in the case record. To regularize the same, learned trial Court has only prepared the sheet containing the issues on 28th August, 2021 and placed the same on record and posted the matter to 6th September, 2021 for argument. It transpires from the record that the Petitioner never challenged framing of issues, which contained the issue of limitation along with merit of the CMA. Be that as it may, parties have led evidence on the issues framed in CMA. Although the prayer under Order XLI Rule 5 C.P.C. has been made to delete Issue Nos.1 and 3, but the said petition was filed at a belated stage after recording of the evidence on the issues framed.

9. There is no bar under law to take up the issue of limitation along with the petition under Order IX Rule 13 C.P.C., which learned Civil Judge has adopted. Hence, no exception can be taken to the procedure adopted by learned Civil Judge in dealing with the matter. The Petitioner was well aware of settlement of issues as the same were framed on her petition only.

10. This Court while disposing of CMP No.514 of 2021 has not directed to deal with the petition for limitation ahead of hearing of C.M.A. No.133 of 2016 on merit. This Court has only directed that since all the petitions are pending consideration before learned Civil Judge, it should deal with the same in

accordance with law. As the evidence had already commenced in the CMA by the time CMP No.514 of 2021 was disposed of, learned trial Court thought it proper to take up all the issues together and decide the C.M.A. No.133 of 2016 on merit, in which limitation is an issue. As the issue of limitation in the case at hand is a mixed question of fact and law, it cannot be decided as a preliminary issue.

11. Accordingly, I find no infirmity in the impugned order under Annexure-14.

12. Hence, this CMP being devoid of any merit stands dismissed.

13. The interim order dated 6th April, 2022 passed in I.A. No.314 of 2022 stands vacated.

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

(K.R. Mohapatra)
Judge

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