

ORISSA HIGH COURT : C U T T A C K

W.P.(C) NO.18293 OF 2008

*An application under Articles 226 & 227 of
the Constitution of India.*

Smt. Sumati Parida

: Petitioner

-Versus-

Nabin Kumar Barik

: Opposite Party

For Petitioner

: M/s.B.K.Sharma,
A.K.Mohapatra, P.K.Sahoo
& M.Jesthi

For O.P.

: M/s.D.K.Sahoo, P.Mishra
& B.K.Behera

J U D G M E N T

CORAM :

JUSTICE BISWANATH RATH

Date of Hearing & Judgment : 1.12.2022

1. The Writ Petition involves a challenge to the judgment passed by the Civil Judge (Jr.Divn.), Baripada allowing the Application at the instance of the present Opposite Party under Order 9 Rule 13 read with Section 151 of the Civil Procedure Code.

2. Undisputed fact remains to be a Civil Suit was filed by the present Petitioner bearing T.S. No.2/1973 involving the prayer for declaration of title and confirmation of possession in respect of property, vide Schedule-A.

3. For the nature of dispute involved herein allowing the Application under Order 9 Rule 13 of C.P.C. involving an ex parte decree, it is not necessary to go through the details of the suit history. So in minimizing its attempt, this Court confines to the relevant facts for the purpose of just decision on the issue involved herein, which appears to be as follows :-

Defendant Nos.1 to 8, present private O.Ps. were set ex parte on 17.7.1974. The suit was next posted to 20.1.1976 for hearing. Then the case was again adjourned to 19.8.1976. In the meantime, the suit was also dismissed. On an Application of the Plaintiff, the suit was restored on 24.7.1978. Ex parte hearing involving the suit dependent on the ex parte order dated 17.7.1974 was undertaken and a decree involving the above suit was drawn on 21.7.1981. On 13.1.1982 Defendant no.14 filed an Application under Order 9 Rule 13 of C.P.C. for setting aside the ex parte decree registered as M.J.C. No.1/1982, which got dismissed on 15.5.1982. It is made clear, this was an attempt by Defendant No.14. In the meantime, Execution Case No.17/1981 was commenced. It appears, in this proceeding, Defendant No.5, the present O.P. through her mother

filed M.J.C. No.3/1982 seeking declaration of ex parte decree null and void. On 18.12.1993, the Executing Court dismissed M.J.C. No.3/1982. The O.P. being aggrieved by this order preferred Civil Revision No.1/1994, which came to be disposed of on 2.1.1996. O.J.C. No.1652/1996 being undertaken against the dismissal of Revision involving dismissal of the M.J.C., the Writ Application came to be dismissed on 10.11.2004. In the meantime, it appears, the O.P. filed an Application under Order 21 Rule 97 of C.P.C. read with Rule 101 of C.P.C. numbered as I.A. No.26/2005 in the Execution Proceeding, where the O.P. pleaded, he was not properly represented and the decree not binding upon him. This Application came to be dismissed by the Civil Judge (Jr.Divn.), Baripada on 4.3.2006. Being aggrieved, the O.P. filed F.A.O. No.1/2007 before the District Judge, Mayurbhanj. This Appeal was dismissed on 8.5.2007. After exhausting all remedies, it appears, after lapse of 27 years, an Application under Order 9 Rule 13 of C.P.C. was undertaken by the O.P. seeking recalling the ex parte decree dated 14.7.1981 in the suit proceeding. The Petitioner then filed a Petition in Execution No.17/1981 before the Civil Judge (Jr.Div.) seeking police help to evict the O.P. from the suit land. On 5.2.2008 the Civil Judge allowed the Petition. Thereafter the O.P. filed W.P.(C) No.3289/2008 before this Court, which came to be disposed of on 21.7.2008 where it

appears, this Court has given a direction to hear the Application filed under Order 9 Rule 13 of C.P.C. pending and dispose of the same in accordance with law. Finally following the direction of this Court in disposal of W.P.(C) No.3289/2008, the Civil Judge (Jr.Divn.), Baripada in condonation of delay of 27 years allowed the Application under Order 9 Rule 13 of C.P.C. setting aside the ex parte decree dated 21.7.2008 giving rise to filing of the Writ Petition at hand.

4. Mr.B.K.Sharma, learned counsel for the Petitioner (Party in loss) challenges the case on the following grounds :-

“I. That the Opp.Party filed a petition CMA No.46/2007 u/S. read with Section 14 of the Limitation Act seeking condonation of delay of 26 years in preferring application under Order 9 Rule 13 of the Civil Procedure Code for setting aside ex-parte decree dtd.31.7.1981.

II. That in the said petition in Paragraph-13, the Opp.Party states as follows :-

That the petitioner humbly stated that in apprehension of the execution of the decree, which will ultimately cause dispossession of the petitioner from the suit land, where his residential house is standing, moved before the leaned Executing Court inadvertently at different times for getting proper relief of his legitimate claims, but the same has been denied, for which a petition under Order 9 Rule 13 read with Section 151 CPC is being filed today along with the application for setting aside the ex-parte decree passed in T.S. No.2/1973 in which there has been a delay of about 26 years.

III. Similarly, in Para-14, the Opp.Party states as follows :-

That the petitioner respectfully submits that there was no useful and deliberate latches or negligence on his part in filing the petition under Order 9 Rule 13 CPC in time for setting aside the ex-arte decree and it was due to aforesaid facts and circumstances, there has been a delay of about 26 years in filing such petition, which may kindly be condoned and further the petitioner has not

committed any mala fide preferring this Misc. Case to set aside the ex parte decree in delay;

Paragraph-15.

IV. That the petitioner respectfully submits that unless the delay caused in filing the petition for setting aside the ex-parte decree is condoned, the petitioner will suffer irreparable injury and sustain substantial loss, as he has bona fide filed petitions before the learned Executing Court at different times for getting proper relief of his legitimate claim.

V. That the Opp.Party has not explained to the Court as to what was the sufficient cause, which means an adequate and enough reason which prevented him to approach the Court within limitation. In case a party is found to be negligent or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be justified ground to condone the delay. In the present case, there is no sufficient cause shown by the Opp.Party seeking condonation of delay. (2013) Vol. 14 SCC 81).

VI. That while construing u/S.5 of the Limitation Act, it is relevant to bear in mind two important considerations, the first consideration is that the expiration of the period of limitation prescribed in making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. When the period of limitation prescribed has expired, the decree holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge and this legal right which has accrued to be decree holder by lapse of time should not be lightly disturbed [(2018)Supp.;2 OLR 129].

VII. Because ex-parte decree was passed on 21.07.1981, and the Application for setting aside the ex-parte decree was filed in July, 2007, gross negligence on the part of the defendant in taking steps as well as in filing application under Order 9 Rule 13, no interference [(2012) Vol.1 OLR 320], [(2007) Supp.1 OLR 1037].

VIII. That the Opp.Party in his petition Order 9 Rule 13 of the CPC took the plea that there was a minor and no effective, proper and legal steps had been taken in order to safeguard and protect his interest in the suit property over which the residential house of the Opp.Party is in existence, as they have joint interest in the said property.

IX. The Opp.Party has raised this point in all the Courts available except the Hon'ble apex Court. These averments were taken in;

- (i) Execution Case No.17/81 before the Executing Court;
- (ii) In Civil Revision No.1 of 1994 before the learned District Judge, Mayurbhanj.
- (iii) In OJC No.1652/1996 before this Hon'ble Court.
- (iv) Before the Court of learned Civil Judge (Jr.Division), Baripada in I.A. No.26/2005 in a petition filed under Order 21 rule 97 read with 101 of Civil Procedure Code.
- (v) In FAO No.17 of 2007/2006 in the Court of Addl. District Judge (F.T.C.), Baripada.

X. These contentions have already been rejected by all the Courts one after another right up to level of Hon'ble High Court. It does not lie in the mouth of judgment debtor to say that the decree against him is not effective as it was passed during his minority. In view of the fact that such contentions have been taken for umpteen times and having been rejected by all the Courts, the petition under Order 9 Rule 13 of the civil Procedure Code seeking setting aside of the ex-parte decree dtd.21.07.1981 on the selfsame grounds, after 27 years is not maintainable. The finding of the Executing Court and Revisional Court regarding service of summon upon the Opp.Party personally, through his father guardian and upon all his major brothers, who had same and identical interest in the suit, having been confirmed by the Hon'ble Court in its judgment dtd.10.11.2004 in OJC No.1652/1996, has attained finality and no more available to be re-agitated.”

5. In sum and substance, Mr.Sharma, learned counsel for the Petitioner contended, for there is gross delay of 27 years in moving such Application and the O.P. having not been benefited in his attempt in undertaking such exercise in the Execution Proceeding ended up to disposal of the Writ Petition in this Court and a decree already there in the pocket of the Plaintiff, submitted, in the event there is interference in such ex parte decree after such long delay, there will no doubt serious prejudice to the Plaintiff and again the Plaintiff will also be deprived of

enjoying the benefit of ex parte decree, which is remaining in the field for last so many decades.

6. Mr.D.K.Sahoo, learned counsel for the O.P. while not disputing the outcome in the attempt of predecessor of this O.P. ended in denial in the disposal of the Writ Petition undertaking the exercise commencing from the Executing Court, submits, the course measures taken in the Execution Proceeding in the restoration of the suit in taking out the ex parte decree appears to be under the misguidance of the Counsel, thus bound to fail as remains innocuous. Mr.Sahoo thus contended, for all endeavours and wastage of time in undertaking the futile exercise in the Execution Proceeding in restoration of the ex parte decree absolutely on wrong advice though ended in the Writ Proceeding here all became innocuous and futile. Mr.Sahoo, learned counsel for the O.P. thus contended, no Party should suffer on account of wrong advice of the Counsel. Thus, Mr.Sahoo requested this Court for not interfering with the impugned order and leaving the Parties to get involved in a contesting judgment and decree. Mr.Sahoo also submitted, no doubt there is wastage of lot of time if needed, the Petitioner, i.e., Plaintiff can be compensated by way of suitable cost.

7. Considering the rival contentions of the Parties and taking into account the process undertaken by the Predecessor of O.P., it appears, all

such process has been undertaken in the Execution Proceeding. Filing an Application for recalling of the ex parte decree under the guise of Section 47 or Order 21 read with Rule 101, for the opinion of this Court, remains innocuous as the actual course measure in this situation would have been moving of Application under Order 9 Rule 13 of C.P.C. in the suit proceeding itself. In the circumstance, this Court finds, there is undisputedly sufficient wastage of time in fighting litigations involving restoration of ex parte decree in the Execution Proceeding. This Court here finds, failure of legal exercise by the trial court even in Revisional Court, had this been detected at appropriate time, the Party would have had opportunity to move the Application under Order 9 Rule 13 of C.P.C. at appropriate time. This Court here also finds, all the courts involved herein also remain responsible for loss of time and engaging in such unnecessary dispute and untenable attempts. This apart, this Court again finds, in disposal of W.P.(C) No.3289/2008, there was direction to hear the Order 9 Rule13 Application in accordance with law giving rise to compulsory hearing of Order 9 Rule 13 Application.

8. For the clear submission and the course measures taken in the meantime, this Court has no hesitation to observe, all the course measures involving the Execution Proceeding up to decision in disposal of the Writ

Petition in this Court remained by futile exercise and undisputedly, the Petitioner fell to prey of the Counsel involved therein.

9. Considering the rival contentions of the Parties, this Court again finds, in disposal of W.P.(C) No.3289/2008 by order dated 21.7.2008, this Court has given clear direction for hearing the Application under Order 9 Rule 13 of C.P.C. and disposing of the same in accordance with law. In the above scenario, this Court finds, there was revival of hearing on the Order 9 Rule 13 of C.P.C. Application only at this stage of time. Keeping in view the rival contentions of the Parties and looking to the observation of the trial court in allowing the Application under Order 9 Rule 13 of C.P.C., this Court finds, the trial court has taken all the required aspects into consideration and ultimately found, for the settled position of law and the judgment and decree involving the ex parte nature of dispute involving the suit be decided in contest in the interference in the ex parte judgment and decree. This Court finds, for the reason therein, there is no scope for interfering in such orders. However, at this stage, this Court finds, the time lost on the Petitioner in spite of in enjoyment of ex parte judgment and decree for nearly three decades in the meantime cannot be lost sight of, particularly, when there is suffering of the Petitioner for no fault of her, it is in this view of the matter, since the effect of the ex parte judgment and decree is taken out by the impugned

order, while confirming the same, at the same time, keeping in view the long lapse of time in the meantime, and the Plaintiff will be prevented from getting the enjoyment of the ex parte judgment and decree and for no fault of the Plaintiff, the Plaintiff was since forced to fight the litigations in various Courts and in the meantime, has spent money in unnecessary litigations, this Court while confirming the impugned order imposes cost of Rs.50,000/- (rupees fifty thousand) at least to be paid by the O.P. to the Petitioner herein, as undertaken by Mr.Sahoo, learned counsel for the O.P., within two weeks hence. On production of copy of receipt of payment and the decisions of this Court, the trial court shall re-commence the trial in T.S. No.2/1973 and dispose of the same in the involvement of Defendant No.5, the O.P. herein. This Court again finds, in the interest of justice and to cut short the time of the litigation at hand being initiated in the year 1973, this Court also directs Defendant No.5 to file written statement on the date of appearance. The trial involving this Party shall be re-commenced and concluded at least within a period of three months from the date of appearance of the Parties on 15.12.2022. It is further directed, failure of appearance of the O.P. with receipt of payment on the date fixed, the order impugned herein shall be revived. This Court further clarifies, in the event there is payment of cost and the

suit is revived, the Execution Proceeding since remains innocuous will be dropped.

10. The Writ Petition succeeds. No costs.

(Biswanath Rath)
Judge

Orissa High Court, Cuttack.
The 1st December, 2022/M.K.Rout, A.R.-cum-Sr.Secy.

