

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 420 OF 2022

Jogendra Jena and others ***Petitioners***

Mr. Lakshman Mishra, Advocate

-versus-

Bansidhar Jena and others ***Opp. Parties***

Mr. Tusar Kumar Mishra, Advocate

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
03.08.2022

Order No.

4. 1. This matter is taken up through hybrid mode.
2. Petitioners in this CMP seek to assail the order dated 5th April, 2022 (Annexure-4) passed by learned Civil Judge (Senior Division), Jajpur in C.S. No.288 of 2016, whereby an application to set aside the *ex parte* order dated 22nd February, 2019 passed against the Petitioners-Defendants has been allowed by rejecting the prayer to file written statement.
3. C.S. No.288 of 2016 has been filed for partition. The Defendant Nos.1 to 12 (Petitioners herein) appeared through their counsel on 26th April, 2016 and prayed for an adjournment to file written statement. Due to non-filing of written statement in spite of adjournments, they were precluded from filing written statement vide order dated 26th July, 2016. Subsequently, the Defendants were set *ex parte* on 22nd February, 2019 and P.W.1 was examined on that date. After a lapse of three years, on 22nd March, 2022, the Defendants filed an application to set aside the *ex parte* order dated 22nd February, 2019 and to accept their written statement. Learned trial Court although allowed the

prayer setting aside the *ex parte* order but refused to accept the written statement. Hence, this CMP has been filed.

4. Mr. Mishra, learned counsel for the Defendants-Petitioners submits that the Defendant No. 6, namely, Tanukanta Jena, who was looking after the suit on behalf of other Defendants, fell ill for which the written statement could not be filed in time. He relies upon the decision in the case of ***Rajinder Tiwari –v- Kedar Nath (Deceased) Thr. Lrs. and others***, reported in AIR 2019 SC 1659, wherein the Hon'ble Apex Court at paragraph-18 has held as under:

“18. It is a settled-law that all the contesting parties to the suit must get fair opportunity to contest the suit on merits in accordance with law. A decision rendered by the Courts in an unsatisfactory conducting of the trial of the suit is not legally sustainable. It is regardless of the fact that in whose favour the decision in the trial may go.”

4.1 He also relies upon the decision in the case of ***Sudhir Ranjan Patra (Dead) thr. L.Rs. and others –v- Himansu Sekhar Srichandan and others***, reported in AIR 2022 SC 2881, wherein the Hon'ble Apex Court in the subject matter of dispute **stated to be** akin to the present case, remitted the matter back to the learned trial Court to consider the prayer for acceptance of written statement of the Defendants. He also relies upon the decision in the case of ***Bharat Kalra –v- Raj Kishan Chabra***, reported in 2022 (I) OLR (SC) 1099, wherein the Hon'ble Supreme Court relying upon the decision in the case of ***Kailash –v- Nankhu and others***, reported in (2005) 4 SCC 480 has held that the time limit prescribed for filing of written statement under Order VIII Rule 1 C.P.C. is not mandatory. In view of the above, Mr. Mishra, learned counsel for the Defendants-Petitioners

5. Mr. Mishra, learned counsel for the Plaintiff-Opposite Party No.1, on the other hand, vehemently objected to such submission and contended that there cannot be any iota of doubt with regard to the law settled by the Hon'ble Apex Court. However, in the present case, the Defendants were given ample opportunity to file their written statement and contest the suit. But they have measurably failed to avail the opportunity afforded to them. The ground of illness of Defendant No.6 is myth as no documents were filed before learned trial Court along with the petition for setting aside the *ex parte* order and acceptance of the written statement. Hearing of the suit has already commenced. The suit is at the stage of argument. Thus, at this stage, if the Petitioners are permitted to file their written statement, it will not only prejudice the Plaintiffs but also result in an abuse of process of Court. He relies upon the decision in the case of **Arjun Singh -v- Mohindra Kumar and others**, reported in AIR 1964 SC 993, wherein the Hon'ble Supreme Court at paragraph-19 has held as under:

"19. xxx xxx xxx

The effect of proceeding exparte in the two sets of cases would obviously mean a great difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced. In that case Order IX, Rule 13 would come in. The defendant can, besides

filing an appeal or an application for review have recourse to an application under Order IX. Rule. 13 to set aside the ex parte decree. The entirety of the evidence of the plaintiff might not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. On the terms of Order IX. Rule. 7 if the defendant appears on such adjourned date and satisfies the court by the showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled — “set the clock back” and have the suit heard in his presence. On the other hand, he might fail in showing good cause. Even in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and Order IX. Rule. 7 and Order IX. Rule 13....”

(emphasis supplied)

He, therefore, submits that a party seeking set aside the *ex parte* order cannot be relegated to the position prior to hearing of the suit. Hence, he prays for dismissal of the CMP.

6. Taking into consideration the rival contentions of the parties and the case laws cited by learned counsel for the parties, this Court finds that the Defendants were thoroughly negligent in contesting the suit although they were provided with ample opportunity. It reveals from the record that the Defendants entered appearance on 24th June, 2016 and due to non-filing of written statement in spite of adjournments, they were precluded from filing of written statement on 26th July, 2016. Almost after three years, they were also set *ex parte*. Accordingly, they filed a petition to recall the said *ex parte* order and to accept the written

statement almost three years after the date, they were set *ex parte*. However, the hearing of the suit commenced on the date they were set *ex parte*. The only ground taken by the Defendants was that the Defendant No.6, who was looking after case on behalf of other Defendants, fell ill in support of which no document was filed. Learned trial Court taking into consideration the facts and circumstances of the case and the case laws cited, came to hold that there was laxity and gross negligence on the part of the Defendants in contesting the suit. Mr. Mishra, learned counsel for the Petitioners could not point out that the Defendants were reasonably prevented from filing of written statement in spite of providing opportunity.

7. In view of the above and the case law in *Arjun Singh (supra)*, this Court is of the considered view that learned trial Court has committed no error in allowing the Defendants to participate in the proceeding of the suit by setting aside the *ex parte* order and refusing to accept the prayer to file written statement.

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

9. Interim order dated 20th May, 2022 passed in IA No.479 of 2022 stands vacated.

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

(K.R. Mohapatra)
Judge