

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 1347 OF 2011

***Mahavir Bazar Laxmi Puja Committee Petitioners
and another***

Mr. Debendra Kumar Sahoo, Advocate
-versus-

Prafulla Kumar Behera and others Opp. Parties
Mr. D.P. Mohanty, Advocate

**CORAM:
JUSTICE K.R. MOHAPATRA**

ORDER

08.08.2022

Order No.

6. 1. This matter is taken up through hybrid mode.
2. The Petitioners in this writ petition seek to assail the order dated 9th September, 2010 (Annexure-7) passed by learned District Judge, Dhenkanal in Civil Revision No.06 of 2007, whereby he set aside the order dated 22nd June, 2007 passed by learned Civil Judge (Senior Division), Dhenkanal in C.M.A. No.12 of 2004 allowing an application under Order IX Rule 13 C.P.C. filed by them.
3. The Petitioners in this writ petition were Defendants in T.S. No.29 of 1998 filed by the Plaintiff-Opposite Party No.1 for declaration of right, title and interest and recovery of possession as well as for permanent injunction. Since the Defendants took a plea of adverse possession in their written statement, learned trial Court had directed them to begin the hearing of the suit. On the date of hearing, although learned counsel for the Defendants was present, he filed an application for adjournment, which was rejected and the matter was posted after lunch for leading evidence on behalf of the Defendants.

But learned counsel for Defendants being present in Court did not produce any witness for leading evidence on behalf of the Defendants. Accordingly, the evidence on behalf of the Defendants was closed and the matter was posted for leading evidence on behalf of the Plaintiffs. On recording of the evidence from the side of Plaintiffs, the suit was disposed of on 1st May, 2004. Subsequently, an application under Order IX Rule 13 C.P.C. in C.M.A. No.12 of 2004 was filed by Defendants, which was allowed by learned Civil Judge (Senior Division), Dhenkanal vide order dated 22nd June, 2007. Assailing the same, the Plaintiff preferred Civil Revision No.6 of 2007, which was allowed vide order dated 9th September, 2010 under Annexure-7 holding that the revision is maintainable and that since the suit was disposed of on contest, no petition under Order IX Rule 13 C.P.C. was maintainable. As such, the civil revision was allowed on contest by setting aside the order dated 22nd June, 2007 passed in CMA No. 12 of 2004 under Order IX Rule 13 C.P.C.

4. Mr. Sahoo, learned counsel for the Petitioners relies upon the decision in the case of ***Abhi Dehury and others –v- Dakshya Dehury and others***, reported in 113 (2012) CLT 4 and submits that since the Defendants were absent on the date of hearing, learned trial Court ought to have proceeded under Order IX C.P.C. by setting them *ex parte* and passed an *ex parte* decree. Instead, learned trial Court has passed the judgment and decree showing it to be contested one. Thus, the ratio decided in the case of ***Abhi Dehury and others*** (supra) is

squarely applicable to the case at hand, in which it is observed at paragraph-8 as under:

“8. In this case, the Learned Civil Judge proceeded to dispose of the suit as a contested one instead of resorting to Order IX of the Code. In spite of such disposal, the judgment is an ex parte one. Hence, the aggrieved party has two options; firstly, he may file an appeal against such judgment. The Defendants having preferred an application under Order IX, Rule 13 of the Code, the Learned Civil Judge should have entertained the same & allowed the Petitioners to examine all such witnesses & produce such documentary evidence to establish the plea that they were prevented by sufficient cause from appearing in the Court on the date posted for hearing. The Court of original jurisdiction having failed to do so, this Court has no hesitation to hold that the procedure adopted by the learned Civil Judge (Junior Division), which has been upheld by the Learned District Judge is erroneous & requires interference of this Court.”

5. Learned revisional Court without taking into consideration the same allowed the revision. Hence, the order under Annexure-7 is not sustainable in the eyes of law. It is his submission that once a party remains absent on the date of hearing, the Court has no other option than to proceed under Order IX C.P.C.. The said procedure having not been followed, the decree even if shown to have been passed on contest, it is an *ex parte* decree and application under Order IX Rule 13 C.P.C. was maintainable.

6. Mr. Mohanty, learned counsel for the Plaintiff-Opposite Party No.1 objecting to the same submitted that the ratio decided in ***Abhi Dehury and others*** (supra) is not applicable to the case at hand. On the date of posting of the suit for leading evidence on behalf of the Defendants, learned counsel for the Defendants filed an application for adjournment. The said

application was rejected and the matter was posted after lunch interval of the same day for leading evidence on behalf of the Defendants. Being present in Court, they failed to produce any witness for leading evidence on their behalf. As such, the evidence from the side of Defendants was closed and learned trial Court proceeded to record the evidence on behalf of the Plaintiffs and passed a contested decree. Neither said order was challenged before any higher forum nor can it be said that the Defendants were absent on the date of hearing of the suit. As such, learned revisional Court has committed no error in passing the impugned order under Annexure-7. He, therefore, prays for dismissal of the writ petition.

7. Taking into consideration the rival contentions of the parties and case law cited, it is apparent that following the provision under Order XVIII Rule 1 C.P.C., the Defendants were directed to begin the hearing of the suit. On the date the matter was posted for leading evidence on behalf of the Defendants, learned counsel for the Defendants being present filed an application for adjournment. The said application was rejected and the matter was posted for leading evidence on behalf of the defendants after lunch break of the same day. Although learned counsel for the Defendants was present when the matter was called for hearing, he did not prefer to produce any witness on behalf of the Defendants. Thus, it cannot be said that the Defendants were absent on the date of hearing of the suit. They were very much present and preferred not to lead any evidence on their behalf.

8. In view of the peculiar facts and circumstances of the case, the ratio decided in the case of *Abhi Dehury and others* (supra) is not applicable to the case at hand.

9. Thus, in view of the discussion made above, learned revisional Court has committed no error in allowing the revision by setting aside the impugned order under Annexure-7 holding that the provision under Order IX Rule 13 C.P.C. is not applicable to the case at hand.

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

11. The interim order dated 12th May, 2011 passed in Misc. Case No.6461 of 2011 stands vacated.

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

(K.R. Mohapatra)
Judge

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