

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.495 OF 2022

Babula Nayak and others

Petitioners

Mr. Prasanna Kumar Mishra, Advocate

-versus-

Smt. Santilata Satapathy and another

.... Opp. Parties

Miss Lopamudra Pradhan, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

08.07.2022

Order No.

3. 1. This matter is taken up through hybrid mode.
2. Petitioners in this CMP seek to assail the order dated 17th May, 2022 (Annexure-3) passed by learned Senior Civil Judge, Bhuaneswar in CS No.2461 of 2021, whereby learned trial Court refused to accept the memo filed by Defendant Nos.1 and 2 and set aside the *ex-parte* order passed against them.
3. Mr. Mishra, learned counsel for the Petitioners submits that Defendant Nos. 1 and 2 in the suit have already filed their written statement. However, due to pandemic of COVID-19, the Defendant Nos. 3 and 4 could not appear on the date fixed and were set *ex-parte* on 20th June, 2022. Thereafter, they filed an application to set aside the *ex-parte* order. Along with the petition, they also filed a memorandum to adopt the written statement filed by Defendant Nos.1 and 2. While considering the petition for setting aside the abatement as well as the memo filed by the Defendant Nos.3 and 4, learned trial Court

observed that the written statement filed by Defendant Nos. 1 and 2 was not signed by Defendant No.2. Verification of the written statement was also not signed by Defendant No.2. Hence, learned trial Court accepted the written statement filed by Defendant Nos.1 and 2 for Defendant No.1 only and also refused to accept the memo filed by Defendant Nos.3 and 4 and set aside the *ex-parte* order, as well and posted the matter to 20th June, 2022 for settlement of issues.

4. Mr. Mishra, learned counsel for the Petitioners submits that Petitioner No.1 in this CMP is Defendant No.2 in the suit and Petitioner Nos.2 and 3 are the Defendant Nos.3 and 4 respectively. It is his submission that the Defendant No.2 inadvertently could not sign the written statement jointly filed by Defendant Nos.1 and 2. If he is granted leave, he can file an affidavit supporting the pleadings made in the written statement filed by Defendant Nos.1 and 2. He further submits that learned trial Court, while rejecting the petition for setting aside the *ex-parte* order, did not assign any reason thereto. The rejection is probably due to the fact that the memo filed by Defendant Nos. 3 and 4 to adopt the written statement of Defendant Nos. 1 and 2 was not verified. Hence, he prays that Petitioner Nos.2 and 3 (Defendant Nos.3 and 4) may be permitted to file a fresh memo to that effect properly verifying the same. He further prays for setting aside the impugned order under Annexure-3 and to remit the matter back for fresh consideration subject to compliance of the aforesaid deficiencies.

5. Miss Pradhan, learned counsel for the Opposite Party No.1, refuting the submission made by learned counsel for the Petitioners, submits that the notice was duly served on Defendant Nos.3 and 4. They preferred not to appear and contest the suit on the date fixed. Only on 10th May, 2022, they entered appearance and filed a petition to set aside the *ex-parte* order. It further appears that the written statement filed by Defendant Nos. 1 and 2 was neither signed nor verified by Defendant No.2. Thus, learned trial Court has committed no error in accepting the written statement on behalf of Defendant No.1 only. Further, the memo filed by Defendant Nos.3 and 4 to adopt the written statement of Defendant Nos.1 and 2, was not verified by Defendant Nos. 3 and 4. Thus, the prayer made by learned counsel for the Petitioners in this CMP merits no consideration, as the irregularities are incurable. Hence, she prays for dismissal of the CMP.

6. Taking into consideration the rival contentions of the parties and on perusal of the record, it appears that the written statement filed by Defendant Nos.1 and 2 was only signed and verified by Defendant No.1. Although Defendant No.2 appears to have supported the case of Defendant No.1, but he did not sign or verify the written statement. The fact remains that Petitioner No.1/Defendant No.2 has no conflicting claim with Defendant No.1. Hence, the defect in not signing and verifying the written statement is curable one. The Defendant No.2 can file an affidavit adopting the written statement filed by Defendant No.1. Hence, the prayer made by learned counsel for the Petitioners should be accepted.

7. Accordingly, it is observed that Defendant No.2, if so advised, may file an affidavit accepting the pleadings made in the written statement filed on behalf of Defendant Nos.1 and 2 and move for its acceptance. In that event, learned trial Court shall do well to consider the same and pass necessary order thereon giving opportunity of hearing to the parties concerned.

8. So far as the order refusing to set aside the *ex-parte* order against Defendant Nos.3 and 4 is concerned, the same requires fresh consideration as no reason has been assigned by learned trial Court to reject the application. The Defendant Nos.3 and 4 may also file a fresh memo supported by verification and affidavit accepting the written statement of Defendant Nos. 1 and 2 within a period of two weeks hence.

9. If Petitioner Nos.2 and 3 (Defendant Nos.3 and 4 respectively) file a fresh memo, as aforesaid, within a period of two weeks hence, learned trial Court shall do well to consider the same, subject to the order to be passed in the petition for setting aside the *ex-parte* order.

10. With the observation and direction, as aforesaid, the writ petition is disposed of.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge