

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 510 OF 2022

Khirod Kumari Devi @ Khirode ***Petitioner***
Kumari Devi

Mr. Dayananda Mohapatra, Advocate
-versus-

Nalini Devi and others ***Opp. Parties***

Mr. Manoj Mishra, Senior Advocate
being assisted by Mr. Tanmay Mishra, Advocate
(For Opp. Party Nos.1 to 3)

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
12.09.2022

Order No.

8. 1. This matter is taken up through hybrid mode.
2. The Petitioner in this CMP seeks to assail the orders dated 18th May, 2022 and 19th May, 2022 (Annexure-2) and 20th May, 2022 (Annexure-3) passed by learned Civil Judge (Senior Division), Berhampur in T.S. No.75 of 1980.
3. Mr. Mohapatra, learned counsel for the Petitioner-Defendant No.2 submits that after closure of evidence from the side of the Plaintiffs on 25th March, 2022, the Defendant No.2 examined herself as D.W.1. The case was posted to 16th May, 2022 for recording evidence on behalf of D.W.1 (Defendant No.2) and examination-in-chief of D.W.1 could not be completed on that date. Hence, the suit was posted to 17th May, 2022 for further examination of D.W.1. On that day, the Defendant Nos.2 to 4 filed an application to accept few more documents and prayed for an adjournment. Accordingly, the matter was adjourned to 18th May, 2022 for further examination-in-chief of D.W.1. Due to her illness, the Petitioner-Defendant

No.2 (D.W.1) could not present herself in Court for further examination on 18th May, 2022. Accordingly, learned Civil Judge (Senior Division), Berhampur recorded as under:

“.....Since the D.W.1 is absent, who could not be cross-examined by the learned counsel for the plaintiff, the evidences already recorded (both oral as well as documentary) of DW.1 stands hereby exonerated/discarded. The office is directed to endorse this fact on the list of documents exhibited by DW.1 in the remarks column. Since no other witness is present on behalf of the defendants, the evidence from the side of the defendants is hereby closed. Put up at 3.00 P.M. today for hearing of the argument in the suit. The learned counsels representing the parties are hereby informed to remain present at the scheduled time.”

Thereafter, the matter was posted to next day i.e. on 19th May, 2022 for hearing of argument at 2.00 P.M. On that date, Defendant Nos.2 to 4 filed an application to recall the order dated 18th May, 2022 and permit the D.W.1 to adduce evidence. The said petition was rejected on the same day, i.e. on 19th May, 2022 and the matter was posted to 20th May, 2022 for argument on which date learned trial Court closed the argument and posted the matter for pronouncement of the judgment. At this stage, the Petitioner moved this Court for the aforesaid relief.

4. Taking into consideration the submission made by learned counsel for the Petitioner, this Court vide order dated 28th June, 2022 passed an interim order directing learned trial Court not to deliver the judgment till the next date. The said order is in force. It is his submission that as the Petitioner-Defendant No.2, who is being examined as D.W.1, was ill on the next date of examination, i.e. on 18th May, 2022 for which she could not present herself for further examination-in-chief.

Absence of the Petitioner was not intentional and it was beyond her control. If another opportunity is given, she will present herself to adduce further evidence. It is also undertaken by learned counsel for the Petitioner that no further document will be produced on behalf of the Defendant Nos.2 to 4 in the suit. It is his submission that due to the circumstance beyond control of the Petitioner, she could not appear and lead evidence. Hence, another opportunity should be given to her to lead her evidence for the ends of justice. He, therefore, prays for setting aside the impugned orders under Annexures-2 and 3 and to direct learned trial Court to record the evidence of Petitioner-D.W.1.

5. Mr. Mishra, learned Senior Advocate appearing for the Plaintiff-Opposite Party No.1 submits that the suit is of the year 1980. The evidence of the Plaintiff has been closed since March, 2022. But the Defendants Nos.2 to 4 are adopting dilatory tactics to linger the suit. When the matter was posted on 18th May, 2022, the Petitioner-D.W.1 could not present herself for further examination and cross-examination. As such, learned trial Court has committed no error in passing the impugned orders under Annexures-2 and 3.

6. Taking into consideration the rival contentions of the parties, this Court is of the considered opinion that due to illness of the Petitioner-D.W.1, she could not present herself in Court for further examination as well as for cross-examination and the impugned order dated 18th May, 2022 was passed. On the very next date, she filed an application to recall the order and permit her to lead evidence. Thus, it appears that the Petitioner has

shown bona fide in filing a petition immediately to recall the order dated 18th May, 2022 and to permit her to lead further evidence and for cross-examination.

7. In view of the above, this Court finds that the Petitioner-D.W.1 should be given another opportunity to lead evidence in the matter. Accordingly, this Court sets aside the order dated 18th May, 2022, 19th May, 2022 (Annexure-2) and 20th May, 2022 (Annexure-3) passed in T.S. No. 75 of 1980 and directs the Petitioner-D.W.1 to be present on 20th September, 2022 along with certified copy of this order and make herself available to lead further evidence on her behalf and for cross-examination. Keeping in view that the suit is of the year 1980 and the Petitioner on the date of her examination could not make herself available, the Petitioner-D.W.1 shall be permitted to lead evidence in the matter subject to payment of cost of Rs.5,000/- to the learned counsel for the Plaintiffs-Opposite Parties on the date of her appearance, i.e. on 20th September, 2022.

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

(K.R. Mohapatra)
Judge