

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO.520 of 2022

Banamali Bhoi

....

Petitioner

Mr.Satya Narayan Mishra, Advocate

-versus-

Narendra Prasad Behera and another

....

Opp. Parties

Mr. Rahul Mohanty, Advocate

(For Opposite Party No.1)

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

31.10.2022

Order No.

3. 1. This matter is taken up through hybrid mode.
2. 2. The CMP is restored to file pursuant to order of the event date passed in CMAPL No.400 of 2022.
3. 3. On consent of learned counsel for the parties, the CMP is taken up for final disposal.
4. 4. Order dated 13th May, 2022 (Annexure-4) passed in CS No.102 of 2015 is under challenge in this CMP, whereby learned Civil Judge (Junior Division), Basudevpur rejected an application under Order IX Rule 7 CPC filed by the Petitioner/Defendant No.1
5. 5. Mr. Mishra, learned counsel for the Petitioner submits that in CS No.102 of 2015, the Petitioner has been arrayed as Defendant No.1. Summons of the suit was not served on Defendant No.1 for which he could not know about the development and proceedings in the suit. When the suit was at the stage of argument, Petitioner/Defendant No.1 could know from the villagers and filed an application under Order IX Rule 7 CPC to set aside the ex-parte order dated 22nd November,

2021. He, therefore, submits that the Petitioner should not be penalized for no fault on his part. He, should be given an opportunity of hearing in the suit. In support of his case, Mr. Mishra, learned counsel for the Petitioner placed reliance upon a decision of Delhi High Court in the case of ***East India Cotton Manufacturing Vs. S.P.Gupta***, reported in 28 (1985) DLT 22. It is his submission that Delhi High Court taking into consideration the case law in the case of ***Arjun Singh Vs. Mohindera Kumar and others***, AIR 1964 SCC 993 and several other case laws, held as under:-

“....On the terms of O. IX, Rule 7 if the defendant appears on such adjourned date and satisfies the Court by 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.....”

He, therefore, submits that the Petitioner/Defendant No.1 ought to have been allowed to contest the suit, although he may not be allowed to file written statement in the suit.

6. Mr. Mohanty, learned counsel for Opposite Party No.1 objecting the above contends that summons of the suit was duly served on the Petitioner / Defendant No.1. Learned trial Court dealt with the same in detail and came to a conclusion that summons was duly served on him. Since the Petitioner intentionally did not participate in the proceedings of the suit he should not be allowed to file written statement at the fag end of the suit, i.e., at the stage of argument. He therefore, prays for dismissal of the CMP.

7. Considering the rival contentions of the parties, this Court finds that learned trial Court taking into consideration the materials on record and discussing the same has come to the conclusion that summons on Defendant No.1 was duly served on 23rd April, 2021. In spite of the same, Defendant No.1 preferred not to contest the suit and he was set ex-parte on 22nd July, 2021. Therefore, learned trial Court proceeded with trial of the suit and now the case is posted for argument. At this stage, application under Order IX Rule 7 CPC was filed by Defendant No.1 for setting aside the ex-parte order and to allow him to contest the suit. In view of the case law in the case of **Arjun Singh (supra)**, this Court is of the considered opinion that Defendant No.1 cannot be relegated back to the position before hearing of the suit. Accordingly, learned trial Court has committed no error in refusing to entertain application under Order IX Rule 7 CPC. It is, however, observed that the Petitioner/Defendant No.1, if so advised, may participate in the argument of the suit.

8. With the aforesaid observation, without interfering in the impugned order, the CMP is disposed of.

9. Interim order dated 24th June, 2022 passed in IA No.593 of 2022 stands vacated.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge