

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 580 of 2022

Sanjay Kumar Dey

.....

Petitioner

Mr. Debendra Kumar Sahoo-1, Advocate

-versus-

Basanti Dey @ Jena and others

....

Opp. Parties

Mr. Dwarika Prasad Mohanty, Advocate

(For Opposite Party No.1)

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

24.08.2022

Order No.

3. 1. This matter is taken up through Hybrid mode.
2. Petitioner in this CMP seeks to assail order dated 11th May, 2002 (Annexure-6) passed by learned 2nd Additional Senior Civil Judge, Balasore in CS No.621 of 2013-I, whereby he rejected an application under Order VIII Rule 9 CPC filed with a prayer to set aside *ex-parte* order and accept the written statement.
3. Mr. Sahoo, learned counsel submits that the Petitioner is Defendant No.1 in the aforesaid suit filed for declaration of the sale deed executed by Defendant Nos. 2 to 6 in favour of Defendant No.1 to be null and void along with ancillary relief. Pursuant to the summon issued, the Defendant No.1 appeared on 22nd August, 2019 and prayed for an adjournment to file written statement but could not file the same within the stipulated time for which he was precluded from filing the written statement vide order dated 27th November, 2019. However, he was allowed to contest the suit without filing

written statement. Subsequently, the Petitioner was set *ex-parte* on 21st March, 2020. Thereafter, the Plaintiff examined one witness, who was also cross-examined by Defendant Nos.2 to 6. It is his submission that as relevant documents could not be arranged in time and due to outbreak of COVID-19, the Defendant No.1 could not contact his counsel for which written statement could not be filed in time. However, upon arrangement of documents, Defendant No.1 filed a petition along with written statement for setting aside the *ex-parte* order and to accept the written statement. Learned trial Court rejected the petition on the ground that after taking several adjournments the Defendant No.1 did not file the written statement even after restrictions of COVID-19 was lifted. It was further observed by learned trial Court that since one witness of the Plaintiff has already been examined and cross examined by other defendants, allowing the application under Order VIII Rule 9 CPC would delay further proceedings of the suit. It is submitted that the grounds on which the petition under Order VIII Rule 9 CPC is rejected are not sustainable in law, as it would keep the principal contestant of the suit away from presenting his case. For the ends of justice, the Defendant No.1 should be provided with another opportunity to file the written statement and contest the suit.

3.1 In support of his case, he relied upon a decisions of the Hon'ble Supreme Court in the case of ***Sangram Singh Vs. Election Tribunal Kotah and another***, reported in AIR 1955 SC 425, wherein the Hon'ble Court held as under:-

“Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and

further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

Aforesaid case law has also been relied upon by the Hon'ble Supreme Court in a subsequent decision in the case of ***M/s R. N. Jadi and Brothers and others Vs. Subhaschandra***, reported in 2007 (II) OLR (SC) 498. This Court also in the case of ***Smt. Sarbati Devi Goinka Vs. Durga Prasad Agarwal***, reported in 2009 (I) OLR 48 placed reliance upon the aforesaid case law and reiterated the aforesaid principle.

3.2 In view of the above case laws, Mr. Sahoo, learned counsel for the Petitioner submits that there is no absolute bar under law to allow Defendant No.1 to submit his written statement even after commencement of hearing and examination of a witness on behalf of the Plaintiff. He, further, submits that rules of procedure are hand maid of justice and law has to bend before justice. Since the sale deed executed in favour of the present Petitioner is under challenge, he should be given another opportunity to defend his case failing which he will be highly prejudiced. He, therefore, prays for setting aside

the impugned order and to permit him to file the written statement so as to contest the suit.

4. Mr. Mohanty, learned counsel for Plaintiff/Opposite Party No.1, on the other hand objected to the above submission. He contends that even if the order setting the Petitioner/ Defendant No.1 *ex-parte* is set aside he cannot be relegated to the position before the date of hearing. In support of his case, Mr. Mohanty placed reliance on a decision of the Hon'ble Supreme Court in the case of **Arjun Singh Vs. Mohindra Kumar and others**, reported in AIR 1964 SC 993. It is his submission that Defendant No.1 was thoroughly negligent in participating the proceeding of the suit. On 27th November, 2019 he was precluded from filing the written statement. The said order has never been challenged. In view of the above, the Petitioner cannot be allowed to file written statement, as the order dated 27th November, 2019 has attained its finality being not challenged. Further, the Petitioner has been allowed to participate in the hearing of the suit without filing the written statement. Hence, the impugned order warrants no interference and the CMP is liable to be dismissed.

5. Taking into consideration the rival contentions of the parties and the case laws cited, this Court finds that Defendant No.1 is the main contestant in the suit, as the sale deed executed in his favour is under challenge. It is not disputed that PW-1 has been examined, cross-examined and discharged. It is, however, submitted by Mr. Sahoo, learned counsel for the Petitioner that Defendant No.1 had not cross-examined PW-1 as he was not informed by his counsel about the same. It also

appears that the Defendant No.1 was precluded from filing written statement vide order dated 27th November, 2019, which was not challenged. On the aforesaid backdrop, rival contentions of the parties are required to be considered.

6. This Court in ***Smt. Sarbati Devi Goinka (supra)*** relying upon the decision of the Hon'ble Supreme Court in the case of ***M/s R. N. Jadi and Brothers and others (supra)*** held as under:

4. *As per the provision of Order 8, Rule 1 of the Civil Procedure Code the Defendant shall file the written statement within 30 days from the date of service of summons to him and the said period can be extended by the court for the reasons to be recorded in writing but such time can be extended for a period of 90 days from the date of service of summons. This Amendment came into force with effect from 1.7.2002. The stipulation of 90 days for filing the written statement from the date of service of summons is not an iron tight jacket and the jurisdiction of the court either to accept the written statement is not discretionary. The said provision does not take away the power of the Court to accept the written statement though filed beyond the time as provided. The provision contained in Order 8, Rule 1 of the Code is procedural. It is not a, part of the substantive law and the intention of the provision to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the Plaintiffs and the Petitioners approaching the court for quick relief and also to the serious inconvenience of the Court faced with frequent prayers for adjournments.....*

All the rules of procedure are the hand maid of justice. The language employed by the draftsman of processual law may be liberal or stringent but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. Reference in this regard may be made to the decision reported in 2007 (II) OLR

(SC) 498 (*M/s. R.N.Jadi and Brothers and others v. Subhashchandra*).”

Of course, the ratio decided in *Arjun Singh (supra)* has not been taken into consideration either by the Hon’ble Supreme Court in *M/s. R. N. Jadi and Brothers (supra)* or in *Smt. Sarbati Devi Goinka (supra)*. But, it cannot be brushed aside that setting aside *ex-parte* order and/or acceptance of written statement is procedural law. And the Court, while dealing with such petition(s), is expected to exercise its discretion judicially keeping in mind the facts and circumstances of each case. In *Arjun Singh (supra)* also Hon’ble Supreme Court did not put an absolute legal bar in setting aside *ex-parte* order after commencement of hearing of the suit.

7. Taking into consideration the peculiar facts and circumstances of the case, the discussions made above and that only the PW-1 has been examined in the suit, this Court is of the considered opinion that Petitioner/Defendant No.1 should be allowed to file his written statement and contest the suit. It is more so because he is the principal contestant in the suit itself.

8. Since the suit is of the year 2013 and PW-1 has already been examined, the inconvenience caused to the Plaintiff should be adequately compensated.

9. In view of the above, the impugned order under Annexure-6 is set aside and the matter is remitted back to learned trial Court to allow the Petitioner/Defendant No.1 to contest the suit subject to payment of cost of Rs.7,500/- (rupees seven thousand five hundred only) to the Plaintiff within a period of fifteen days hence.

9.1 Considering pendency of the suit since 2013, learned trial Court should make an endeavour for early disposal of the suit. Parties are directed to co-operate with learned trial Court without asking for unnecessary adjournments.

10. The CMP is allowed to the above extent.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge



s.s.satapathy