

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.257 OF 2019

In the matter of an Appeal under Section-100 of the Code of Civil Procedure has assailed the order passed by the learned District Judge, Cuttack, in RFA No. 176 of 2016 by dismissing the judgment and decree passed by the learned Civil Judge (Junior Division), 1st Additional Civil Judge (Senior Division), Cuttack in Civil Suit No.123 of 2005.

Sameer @ Samir Kumar Dash* ::: *Appellant

-versus-

Hari Narayan Prasad @ Ram & Another* ::: *Respondents

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

***For Appellant* :::: M/s. M.K. Mishra,
P. Mishra, G.K. Dash,
Advocates.**

***For Respondents* :::: M/s. N.C. Jena,
U. Sahoo, Advocates.**

**CORAM:
MR. JUSTICE D.DASH**

DATE OF HEARING:: 28.09.2022, DATE OF JUDGMENT:: 20.10.2022

These Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the order dated 06.07.2019 passed by the learned District Judge, Cuttack, in RFA No. 176 of 2016.

By the same, the Appeal filed by this Appellant(Defendant) under Section-96 of the Code challenging the judgment and decree passed by

the learned 1st Additional Civil Judge (Senior Division), Cuttack in Civil Suit No.132 of 2005 filed by the Respondent (Plaintiff) has been dismissed by refusing to condone the delay in filing the said Appeal. Thereby, the judgment and decree under challenge in that First Appeal have held the field.

2. This Appeal has been admitted to answer the following substantial question of law:-

“Whether the First Appellate Court is justified in refusing to condone the delay of 946 days in preferring First Appeal?”

3. Heard learned Counsel for the Appellant and the learned Counsel for the Respondent.

4. Keeping in view the submission, I have carefully read the order passed by the First Appellate Court which has been called in question here in this Second Appeal.

5. The Respondent as the Plaintiff had filed the suit for declaration of his right, title and interest over the suit property, with further prayer for eviction of the Appellant (Defendant) therefrom in seeking a decree for permanent injunction.

6. The suit having been decreed by judgment dated 31.01.2014 followed by the decree dated 07.02.2014, the present Appellant (Defendant) being aggrieved thereunder had filed the First Appeal by

presenting the Memorandum of Appeal on 25.10.2016. Along with the Memorandum of Appeal, an Application under Section-5 of the Limitation Act having been filed to condone the delay in filing that Appeal under Section-96 of the Code, the same has been rejected and hence this Second Appeal.

7. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

8. The Plaintiff's suit stood decreed by passing of the judgment on 31.01.2014 and drawal of the decree on 07.02.2014. The Memorandum of Appeal has been presented before the First Appellate Court on 25.10.2016. Thus, there has been a delay of 946 days in preferring the First Appeal.

9. The Defendant in seeking the condonation of delay has submitted that during pendency of the suit, there was a talk of compromise with the original Plaintiff as also her son, who was the Defendant No.2 and later on transposed as the Plaintiff in view of the death of the original Plaintiff and prosecuted the suit. It is said that the Defendant believed that accordingly the dispute got resolved which makes out no sense and is also not to be taken cognizance of as per law for the reason that when the lis was pending, the settlement of dispute outside the Court, is of no

value and the Defendant thus had no reason to entertain such a belief. It is further stated that as the Defendant was to look after his physically challenged daughter and his Advocate did not inform him the progress or disposal of the suit. He came to know about the said judgment only on 28.08.2016, when pursuant to the order passed in Execution Proceeding arising out of suit; he was evicted from the suit house. The conduct of the Defendant in leaving the possession in view of the process issued in the execution proceeding without any resistance whatsoever or complain before the Executing Court on any such ground at that point of time rather is suggestive of the fact that the resolution of dispute was in that light of leaving the possession and not otherwise. It is also submitted that as it took some time for arranging a house for the Defendant for his residence, sometime thereafter when his original Advocate declined to help him, he engaged another and then filed the Appeal.

10. It may be stated here that the son of the original Plaintiff, who was prosecuting the suit having died in the meantime in the First Appeal, his legal representatives have been made parties and they submitted their objection that the Defendant was not at all prevented by sufficient cause/ reason in not filing the First Appeal for such a long period. It is stated that the Defendant time and again during the suit deliberately absented himself and thereafter on being evicted through the process of the Court

being ill-advised and with an ulterior motive has filed the First Appeal again to protract the litigation and harass the Plaintiff by coining an imaginary story.

11. The Defendant in the suit appeared on 12.05.2005, filed his written statement on 28.07.2005. Having remained present till 03.05.2012, he then absented without taking any step. No evidence was let in by the Defendant nor cross-examination from his side to any of the witnesses examined from the side of the Plaintiff was made.

Be that as it may, when on 29.01.2014, the learned Advocate of the Defendant participated in the argument and then the matter was posted to 31.01.2014 for judgment as is seen from the order sheet, the learned Advocate for the Defendant was very much present at the time of pronouncement of the judgment. The Plaintiff-decree holder then levied Execution Case No.2276 of 2014. The Defendant as it appears from the order-sheet refused to receive the notice in that Execution Proceeding. Therefore, finally on 29.08.2016, the vacant possession of the suit house was delivered to the decree holder, when the Defendant vacated the possession of the same without any protest or opposition. The First Appeal has thereafter been filed on 25.10.2016.

12. When it has been stated in a general manner by the Defendant that the Advocate did not communicate him about disposal or result of the

suit, the Defendant being in physical possession of the suit house has rightly been said by the Court below to be grossly negligent as he had not bothered to take any information about the result of the suit although that was his primary duty, more particularly when the suit was progressing before the Trial Court. The facts stated in support of the sufficient cause standing on the way of the Defendant to file the Appeal within the time and that too for filing the same after lapse of two(2) years, one and half (1½) months being too general and casual are per se not acceptable.

13. In view of such inordinate delay in filing the Appeal, when here the same remains unexplained, even though the Court in such matters ordinarily takes lenient view keeping in mind the position that a litigant does not stand to gain by approaching the Court late, yet in the given facts and circumstances, the Defendant having filed the Appeal after such long delay that too after fruitful execution of the decree, the order passed by the First Appellate Court cannot be found fault with as in such matters, the Court at the same time cannot shut its eyes to the fact that a valuable right for such inaction by the Defendant stretching over a long period has accord in favour of the Plaintiff which in the absence of any such compelling reason is not liable to be taken away as that would

amount to doing injustice to the person who is not at all the fault and thereby bringing him to the arena of litigation at such belated stage.

The aforesaid answers the substantial question of law which runs in dismissing this Appeal.

14. In the result, the Appeal stands dismissed. However, there shall be no order as to cost.

**(D. Dash),
Judge.**

Narayan

