

AFR

THE HIGH COURT OF ORISSA AT CUTTACK
CMP No.778 of 2022

Urbasi Sethi

....

Petitioner

Mr. Bibekananda Bhuyan, Advocate

-versus-

Natha Barik and others

....

Opp. Parties

Mr. Narayan Prasad Parija, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

02.11.2022

Order No.

- 2.
1. This matter is taken up through hybrid mode.
 2. This CMP has been filed assailing the order dated 23rd July, 2019 (Annexure-3) passed by learned 1st Additional Senior Civil Judge, Cuttack in CS No.341 of 2019, whereby learned trial Court without adhering to the procedure laid down under Order X CPC posted the matter for hearing on the settlement of issues.
 3. Mr. Bhuyan, learned counsel for the Petitioner submits that there is delay in assailing the order impugned herein and delay has been explained at para-9 of the CMP, which reads as under:-

“9. That the aforesaid illegalities committed by the Ld. Civil Judge came to the knowledge of the petitioner first time on 29.07.2022 when the certified copy vide Annexure-3 was obtained for pursuing the hearing of CMP No.92 of 2022 before this Hon’ble Court and as such the same was not known to the petitioner beforehand. Therefore, there was no delay in challenging the same. Due to the COVID-19 pandemic the petitioner could not challenge the said order before hand though the Hon’ble Apex Court has excluded the period of limitation from 15.03.2020 till 28.02.2022 and the delay in preparing the present CMP is neither deliberate nor willful. Hence the delay in filing the

present CMP may be condoned and the present case be considered on its own merit.”

Mr. Bhuyan, learned counsel for the Petitioner submits that the ratio in the case of ***Manorama Mohanta Vs. Orissa State Financial Corporation and others***, reported in 2011 (I) OLR 709 is relevant for adjudication of the issue involved in this CMP, wherein it is held as follows:-

“5.At this stage, it is undisputed that the suit was posted for filing of draft issues on 24.10.2006. A suit should not be posted for filing of draft issues, rather a suit, after the pleadings are complete, should be posted for hearing under Order X, Rule 1 of the Code for ascertaining whether the allegations made in the pleadings are admitted or denied and for settlement of issues. There is no provision in the Code for posting of case for filing of the draft issues. Such a practice is not proper. Nevertheless, if the suit is posted for filing of draft issues, it cannot be held to be posted for hearing....”

He also relied upon the decision in the case of ***Rahul S. Shah Vs. Jinendra Kumar Gandhi and others***, reported in AIR 2021 SC 2161, in para 42.1 of which, Hon’ble Supreme Court held as under:-

“42. All courts dealing with suits and execution proceedings shall mandatorily follow the below mentioned directions:

42.1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order 10 in relation to third-party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third-party interest in such properties.

42.2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the court, the court may appoint Commissioner to assess the accurate description and status of the property.

42.3. After examination of parties under Order 10 or production of documents under Order 11 or receipt of Commission report, the court must add all necessary or proper parties to the suit, so as to avoid multiplicity of

proceedings and also make such joinder of cause of action in the same suit."

He, therefore, submits that without adhering to the procedure under Order X CPC learned trial Court could not have proceeded for hearing on the settlement of the issues, which is provided under Order XIV CPC. It is his submission that Petitioner/Defendant No.1 all along was under impression that the matter is posted for hearing under Order X Rule 1 CPC. When the counter-claim of the Petitioner was not accepted, she filed CMP No.92 of 2022 assailing the said order. After obtaining certified copy of the entire order sheet of the suit, which was required to assist the Court for adjudication of CMP No. 92 of 2022, learned counsel for the Petitioner came to know that on the date of appearance of the Petitioner, the matter was posted for hearing on settlement of issues as the Defendant No.1 filed her written statement on the very date of her appearance. The procedure adopted by learned trial Court is unknown to law. Code of Civil Procedure as well as case law mandates the Court to adhere to the procedure under Order X Rule 1 CPC after completion of pleadings before proceeding for settlement of issues. Although the Petitioner participated in the proceeding of the suit on 23rd July, 2019, but the same does not preclude the Petitioner from challenging the order dated 16th July, 2019, as there cannot be estoppel against the law. He, therefore, prays for setting aside the direction of learned trial Court for hearing on settlement of issues vide order dated 16th July, 2019 (Annexure-3) and prays for a direction to learned trial Court to adhere to the procedure provided under Order X Rule 1 CPC before proceeding ahead for hearing on settlement of issues.

4. Mr. Parija, learned counsel for the Plaintiff/Opposite Party vehemently objected to the above submission and contends that filing of the present CMP is an afterthought and is a novel attempt to patch up the lacunae on the part of Defendant No.1 in challenging the order dated 29th July, 2022, whereby filing of counter-claim of the Defendant No.1 was not accepted. It is his submission that Defendant No.1/Petitioner all throughout participated in the suit without raising any objection with regard to procedure adopted by learned trial Court. Explanation given at para-9 of the CMP is an afterthought. Since the Petitioner has participated in the hearing on settlement of issues on 23rd July, 2019; hence she cannot raise any objection afterward with regard to non-adherence of procedure adopted under Order X Rule 1 CPC. The Petitioner at that stage could have made a submission to learned trial Court to adhere to the procedure under Order X Rule 1 CPC. No doubt, the procedure provided under Order X Rule 1 CPC is mandatory in nature as laid down by this Court as well as Hon'ble Supreme Court. But, that does not give leverage to the Petitioner/Defendant No.1 to assail the order directing hearing on settlement of issues after lapse of almost two years. Hence, he prays that the CMP merits no consideration.

5. Upon hearing learned counsel for the parties and on perusal of record, it appears that the impugned order was passed on 16th July, 2019 directing hearing on settlement of issues. Admittedly, the impugned order was assailed before this Court after the lapse of almost two years. The Petitioner at para-9 of the CMP has explained that she could come to know that the Court has directed hearing on settlement of issues when she obtained

the certified copy of order dated 29th July, 2022, by which prayer for acceptance of counter-claim of the Petitioner was rejected and was challenged in CMP No.92 of 2022. While arguing the matter, the Petitioner applied for certified copy of the order sheet in CS No.341 of 2019 and came to know about non-adherence of mandatory provision under Order X Rule 1 CPC. It has also been stated that due to COVID-19 pandemic, period from 15th March, 2020 till 28th February, 2022 has been excluded from limitation. Thus, there is hardly any delay in challenging the order dated 16th July, 2019. No period of limitation is provided to file application under Articles 226 and 227 of the Constitution. In that view of the matter and more particularly when the point of law is raised in the CMP, this Court feels that delay, if any, in filing the CMP should be condoned and it is so ordered.

6. The language of Order X Rule 1 CPC makes the procedure laid down therein mandatory. Further, the ratio laid down in *Manorama Mohanta (supra)* and *Rahul S. Shah (supra)* also makes it clear that the procedure provided under Order X Rule 1 CPC is mandatory in nature. In addition to the above, Order XIV provides the procedure for settlement of issues. Sub-rule 5 of Rule 1 of the said Order provides as under:

“At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material proposition of fact or law the parties are at variance, and shall thereupon proceed to frame and record issue on which the right decision of the case appears to depend.”

Thus, it is abundantly clear that hearing on settlement of issues must be preceded by hearing under Order X Rule 1 CPC. In view

of the above, learned trial Court should have adhered the procedure under Order X Rule 1 CPC before resorting to hearing on settlement of issues.

7. This Court, accordingly, sets aside the direction for hearing on settlement of issues vide order dated 16th July, 2019 and consequential orders passed pursuant thereto and direct the learned trial Court to adhere to the procedure provided under Order X Rule 1 CPC and proceed accordingly.

8. The CMP is allowed to the aforesaid extent. No cost.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge

s.s.satapathy

