

IN THE HIGH COURT OF ORISSA AT CUTTACK

C.M.P. No.517 of 2021

Sk. Pir Mahammad

....

Petitioner(s)

Mr. S. Mishra,
Advocate

-versus-

Sk. Abdul Raf & Ors.

....

Opposite Party(s)

Mr. S.K. Nayak,
Advocate

CORAM:

JUSTICE BISWANATH RATH

ORDER

27.04.2022

Order No.

02.

1. This matter involves rejection of an application U/o.9 Rule 7 of C.P.C at the instance of the defendant.
2. Taking this Court to the application involved Mr. Mishra, learned counsel for the defendant-Petitioner submitted that the suit was posted to 18.02.2020 requiring appearance of the defendants and on the said date it is averred that even though the family members of the defendant had received notice and the Petitioner has not been served with personally, but as the defendant was unwell, he could not make his appearance and in the result this defendant was set *ex parte* on 18.02.2020 itself. Through the application it appears, the defendant moved an application for exercise of power U/o.9 Rule 7 of C.P.C. but however on 8.07.2021 i.e. almost after one & half year, but however did have pleading on non-service of notice. Taking this Court to the position of the defendant on the date the suit was fixed and as the defendant was set *ex parte*, Mr. Mishra, learned counsel for the Petitioner submitted that unless the defendant is permitted to contest

the suit, there will be serious prejudice to the defendant, in the event the suit is decided against him. Further fact has been brought to the notice of this Court that the present suit involves declaration of the judgment and decree already obtained by the defendant himself and there is big stake involving the defendant. Mr. Mishra, learned counsel for the Petitioner, therefore, contended that looking to the nature of the suit there should be a decision in such suit in the contest of the parties. There is an allegation that the judgment and decree involved therein is also obtained behind back of the plaintiff.

It is, in the above background of the matter, taking this Court to the impugned order an attempt is made to demonstrate that there has been no proper consideration of the request involved therein and further the lower court has failed to appreciate the suffering of the defendant in not allowing the application U/o.9 Rule 7 of C.P.C. and undertaking an ex parte disposal of the suit involved.

3. Mr. Nayak, learned counsel for the Opposite Parties, on the other hand, in his opposition submitted that there is absolutely no head and tail in the application. It is further contended that even assuming that the defendant was unwell on 18.02.2020 but for the clear disclosures therein, nothing prevented the defendant to at least bring an application within a reasonable time. It is, on the premises of belatedness in the submission of application further having no support to the contention of illness, Mr. Nayak, learned counsel for the Opposite Parties contended that there has been right appreciation of all such aspect and there has been right rejection of the application U/o.9 Rule 7 of C.P.C. and there is no scope for interfering in the same.

It is, in the circumstance, Mr. Nayak, learned counsel for the Opposite Parties opposed the claim of the Petitioner.

4. Considering the rival contentions of the parties, this Court finds, there is no dispute that the suit was posted to 18.02.2020 and there is clear averment by the defendant that on the date of posting of the suit he was ill, which became an impediment for the defendant to appear in the Court. This Court here finds substance in the submission of Mr. Nayak, learned counsel for the Opposite Parties that even assuming that the defendant was ill on 18.02.2020, nothing prevented the defendant to approach the trial court at least within a reasonable time. However at this stage considering the nature of the suit involved and for the opinion of this Court, if such nature of the suit is allowed to be concluded *ex parte*, there will be serious prejudice and there may be further legal complications between the parties in several courts, to avoid any further loss of time and also further complications, this Court finds, the suit requires a contest disposal. At the same time the plight of the plaintiffs is also to be kept in mind not only for the delayed attempt by the defendant but also involvement of a mechanical application therein. As a whole, keeping in view the prejudice to the defendant, in the event the suit is allowed to be decided *ex parte*, this Court interferes in the impugned order and sets aside the same and at the same time this Court also permits the defendant to file written statement at least within a period of ten days from today.

Considering the plight of 15 plaintiffs for their suffering for no fault of them, this Court directs the defendant-Petitioner to pay a sum of Rs.15,000/- (rupees fifteen thousand) only to the Plaintiffs (Rs.1000/- rupees one thousand in favour of each of the Plaintiffs). Payment should be made prior to filing of written statement. Here considering the stage of the suit pending for judgment this Court directs, after filing of the written statement by the defendant, the evidence will be reopened and the plaintiffs will be permitted to have

their chief involving the written statement and defendants will also be permitted to have evidence and cross involving the written statement also with opportunity of cross examination to the plaintiffs. Entire exercise be concluded within a period of nine months. It is also made clear that cost be paid before filing of the written statement and if the defendant files receipt along with written statement, the written statement will be accepted and the proceeding will be undertaken in terms of the direction of this Court made hereinabove.

5. The C.M.P stands disposed of with the above direction.

(Biswanath Rath)
Judge

Ayaskanta Jena

