

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. No. 952 of 2022

Ashok Kumar Pradhan and others* *Petitioners
Mr. Soumya Ranjan Das, Advocate

-versus-

Ananta Kumar Bana* *Opp. Party

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
10.11.2022

Order No.

1. This matter is taken up through Hybrid mode.
2. Petitioners in this CMP seek to assail the order dated 17th August, 2022 (Annexure-2) passed by learned Civil Judge (Senior Division), Jaleswar in CS No.693 of 2021 (TS No.717 of 1996), whereby by a petition filed by Defendant Nos.11 to 13 and 15 to 17 with a prayer to accept their written statement by setting aside the ex parte order dated 9th September, 2002, has been rejected.
3. Mr. Das, learned counsel for the Petitioners submits that vide order dated 17th April, 2000, the above named Defendants were set ex parte. Subsequently they filed their written statement along with a petition to set aside the ex parte order. Vide order dated 28th June, 2002, learned Civil Judge (Senior Division), Jaleswar allowed their prayer subject to payment of cost of Rs.75/-. As above named Defendants did not pay cost they were again set ex parte vide order dated 9th September, 2002. However, the suit was dismissed for default and CMA No.75 of

2015 was filed by the Plaintiff for restoration of the suit. On receipt of summons in the said CMA, the above named Defendants appeared and contested the proceeding. After the suit was restored, Petitioners came up with the aforesaid petition. It is submitted by Mr. Das, learned counsel that learned trial Court proceeded under the misconception that the provision under Order VIII Rule 1 CPC is mandatory in nature. The said provision is mandatory in case of a commercial suit, but not in the case of a non-commercial suit. This material aspect was not taken into consideration by the learned trial Court. Mr. Das, learned counsel submits that the instant suit is for partition. Hence, it is a non-commercial suit. As such, the provision under Order VIII Rule 1 CPC is not mandatory in the instant case. He, therefore, prays for setting aside the impugned order and to issue direction to learned trial Court for consideration of the application afresh applying correct position of law.

4. Taking into consideration the submission of learned counsel for the Petitioner and on perusal of the impugned order under Annexure-2, learned trial Court has proceeded under misconception that provision of Order VIII Rule 1 CPC is mandatory in nature. The limitation provided under Order VIII Rule 1 CPC is mandatory in case of a commercial suit and not in a suit for partition. Further, after restoration of the suit, Petitioners have right to seek for filing of written statement, which requires consideration in accordance with law.

5. In that view of the matter, this Court has no hesitation to set aside the impugned order under Annexure-2 and remit the matter back to learned Civil Judge (Senior Division), Jaleswar to

adjudicate the matter afresh keeping in mind the correct position of law, which I direct.

6. Since the instant order is passed without issuing notice to the Opposite Party, he is at liberty to seek for variation of the same, if feels aggrieved.

7. The CMP is accordingly disposed of.

Issue urgent certified copy of the order on proper application.

