

IN THE HIGH COURT OF ORISSA AT CUTTACK

SAO No.9 of 2020

In the matter of appeal under Order 43 Rule (1)(t) of the Code of Civil Procedure assailing the order dated 05.03.2020 passed by the learned 1st Additional District Judge, Rourkela in CMA No.13 of 2010 arising out of RFA No.26 of 2005.

Kario Oram & Others

....

Appellants

-versus-

Mahesh Kumar Parida & Another

....

Respondents

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellants - M/s.U.K. Samal,
M.R. Mohapatra, R.K. Singh,
S. Patra, S. Naik & N. Behera
(Advocate)

For Respondents - Mr.N.K.Sahu,
B.Swain & S.K.Nayak
(Advocate)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 20.06.2022 : Date of Judgment: 08.08.2022

D.Dash,J. The Appellants, by filing this Appeal, Order 43 Rule (1)(t) of the Code of Civil Procedure (for short, 'the Code') have assailed the order dated 05.03.2020 passed by the learned 1st Additional District Judge, Rourkela in CMA No.13 of 2010 arising out of RFA No.26 of 2005.

2. Facts necessary for the purpose are as under:-

One Balunkeswar Parida as the Plaintiff filed a suit, i.e., Title suit No.23 of 1999, which came to be decided by the learned Civil Judge (Sr. Division), Rourkela by its judgment dated 25.04.2005 followed by the decree. During the suit, said Balunkeswar Parida (Plaintiff) having died, his legal representatives came on record to pursue the suit as the Plaintiffs and they in the present Second Appeal are the Respondent Nos.1 and 2. The suit having been dismissed, these Respondent Nos.1 and 2 as the unsuccessful Plaintiffs carried the First Appeal under section 96 of the Code, which stood numbered as R.F.A. No.26 of 2005.

On 31.07.2007 the First Appellate Court remanded the suit to the Trial Court to provide opportunity to the parties to adduce further evidence and to decide the same afresh after framing certain additional issues as are necessary.

It may be stated here that although the Plaintiffs were different in another suit, i.e., Title Suit No.22 of 1999, the allegations as to the subject matter were the same where the Defendants remained unchanged. Therefore, those had been heard simultaneously and two First Appeals, i.e., R.F.A. No.6 of 2005 and R.F.A. No. 26 of 2005 had been filed by the unsuccessful Plaintiffs.

The First Appeals being disposed of by an order of remand as aforesaid, the Defendants being aggrieved had carried two Second

Appeals which stood numbered as SAO No.18 of 2007 arising out of R.F.A. No.6 of 2005 and SAO No.19 of 2007 arising out of R.F.A. No.26 of 2005. By judgment dated 23.06.2008, this Court disposed of both the Appeals as under:-

Judgement dated 26.03.2008 in S.A.O. No.18/ 2007

“Considering the aforesaid rival submissions of the parties, after verifying the record and analyzing the materials available on record which reveal that Chandu Oramin died on 12.10.2006. It is not in dispute that her LRs are already on record. Hence, the judgment passed by the lower appellate court need not be treated as a nullity on the ground that the said order is passed against a dead person without substituting the LRs. The second point is whether the lower appellate court is right in setting aside all the findings of the trial court and directing for fresh trial which is an open remand, instead of issuing direction under Order 41 Rule 23 of the Civil Procedure Code it had formulated the specific issue and the direction to the trial court to give opportunity to the parties to adduce additional evidence and decide the suit afresh is within the purview of order 41 Rule 25 of the Civil Procedure Code.”

Judgement dated 26.03.2008 in S.A.O. No.19/ 2007

“Another suit (Title Suit No.23 of 1999) was filed by one Balunkeswar Parida. After due permission from the competent authority, he had purchased Ac.2.00 of land from Lalu Oram and after his death his successors-in-interest have filed the suit for declaration of right, title and interest and confirmation of their possession over the suit land along with a prayer for temporary injunction restraining the defendants from interfering in the possession of the plaintiffs over the suit land, as the defendants were trying to raise construction of a boundary wall on the suit plot. In the said suit, defendants 1 and 3 were set ex-parte and defendants 2,4 and 8 filed their joint written statement.

Since Title Suit No.23 of 1999 and Title Suit No.22 of 1999 were interlinked and have been tried one after the

other, the defendants have filed two second appeals, i.e., the present appeal and SAO No.18 of 2007 before this Court. As the subject matter of these two appeals is similar, they were heard one after the other.

SAO No.18 of 2007 has been disposed of by this Court.

This Second Appeal is, therefore, disposed of in terms of the judgment passed by this Court in SAO No.18 of 2007 and the observations made therein shall also govern the case.”

3. The First Appellate Court then disposed of R.F.A. No.26 of 2005 ex parte against Respondent Nos.1 to 6 therein. The judgment and decree dated 25.04.2005 and 06.05.2005 respectively passed by the Trial Court stood set aside and the right, title and interest of the Plaintiffs in the suit was declared and their possession was confirmed. The Defendant Nos.2 and 3 were permanently enjoined.

It is pertinent to state at this stage that as against that judgment and decree passed by the First Appellate Court in R.F.A. No.6 of 2005; the Respondents therein, i.e., the Defendants in the suit (C.S. No.22 of 1999) had carried the Second Appeal before this Court which had been numbered as R.S.A. No.78 of 2009. That Second Appeal has been dismissed on 27.11.2017. Thus the judgment and decree passed in R.F.A. No.6 of 2005 have attained finality and that suit, i.e., C.S. No.22 of 1999 filed by the Respondents as the Plaintiffs has been decreed declaring their title on the basis of registered sale deed dated 29.03.1980 executed by Lalu Oram holding it to be valid.

4. The present Respondents in the said First Appeal and Defendants in the suit then filed an application under Order 41 Rule 21 of the Code to set aside the ex parte judgment and decree. That application was numbered as CMA No.35 of 2009. The said application was dismissed for noncompliance of the office note for default of the parties despite opportunity. Thereafter the present Appellants, who were the Respondents in the said First Appeal and Defendants in the suit filed another application under Order 41 Rule 21 of the Code, which came to be numbered as CMA No.13 of 2010. The prayer therein was also to set aside the ex parte judgment and decree passed in RFA No.26 of 2005. Since application was filed beyond the period of limitation, an application under Order 41 Rule 3(A) of the Code read with section 5 of the Limitation Act was also filed for condoning the delay of 204 days in filing that application under Order 41 Rule 21 of the Code.

5. The First Appellate Court then was pleased to allow the application by order dated 02.12.2010 in setting aside the ex parte judgment and decree passed therein; restoring the First Appeal, i.e., R.F.A. No.26 of 2005 for hearing afresh on merit and disposal in accordance with law subject to payment of cost of Rs.1,000/-

That order was challenged by the Respondents in those First Appeals, who are the Plaintiffs before the Trial Court by carrying a Writ Application vide W.P.(C) No.564 of 2011. This Court by order dated

12.07.2018 then set aside the said order passed in the Civil Miscellaneous Application No.13 of 2010 and directed the First Appellate Court to rehear the limitation petition first and pass appropriate order on the Civil Miscellaneous Application depending on the order in the limitation petition, keeping it open for the Appellants in the First Appeal and Plaintiffs in the suit to agitate the objection on the maintainability of the Civil Miscellaneous Application. Now the First Appellate Court having refused to condone the delay in filing the Application under Order 41 Rule 21 of the Code has dismissed the Application to set aside the ex parte judgment and decree passed in the First Appeal, i.e., R.F.A. No.26 of 2005.

6. Learned counsel for the Appellants submitted that the First Appellate Court in the facts and circumstances of the case has committed grave error and is thus not right in refusing to condone the delay of 204 days in filing the Application under Order-41 Rule 21 of the Code. He further submitted that the First Appellate Court ought to have held that these Appellants were prevented by sufficient cause in not filing the application under Order 41 Rule 21 of the Code within the period of limitation as prescribed. It was submitted that by refusing to condone the delay here a meritorious matter has been thrown out at the very threshold and thus the cause of justice has been defeated. It was submitted that in the facts and circumstances of the case, the First

Appellate Court ought to have held that the cause of substantial justice deserves to be preferred for the Respondents cannot claim to have vested right in injustice being done because of non-deliberate delay. He further submitted that even if it is taken that there was some lapse on the part of the Appellants that alone ought not to have been taken into account to turn down the plea and shut the door against them. He, therefore, urged for admission of this Appeal to answer the above as the substantial questions of law.

7. Learned counsel for the Respondents assisting this Court in course of admission hearing submitted that these Appellants having got the opportunity to contest the First Appeal when have remained absent despite repeated opportunity, the First Appellate Court had passed ex parte judgment and decree in the said First Appeal. He further submitted that these Appellants then having filed an application under Order 41 Rule 21 of the Code numbered as CMA No.35 of 2009d, that too stood dismissed for non-prosecution and then again after long lapse of time, the second application resorting to the very said provision contained under Order 41 Rule 21 of the Code having been filed with an application under Order 41(3)(A) read with section 5 of the Limitation Act; the First Appellate Court has rightly declined to accept that the Appellants were prevented by sufficient cause in not filing the application in time.

He submitted that liberal approach in the matter of condonation of delay does not mean that the same would be taken undue advantage of a party as here in the case by the Appellant by going on filing one application after another. He further submitted that when the first application under Order 41 Rule 21 of the Code vide CMA No.35 of 2009 has been dismissed, the subsequent application with the same prayer is not maintainable and in view of the all these the First Appellate Court is right in refusing to condone the delay in filing the application under Order 41 Rule 21 of the Code.

8. Keeping in view the submissions made, I have carefully read the order impugned in this Appeal. I have also gone through the earlier judgments passed in the Original Suit and all other orders subsequent thereto passed by the higher forum.

9. In the given case in the First Appeal (R.F.A. No.26 of 2005), ex parte judgment has been passed on 27.10.2009. In filing the present application under Order 41 Rule 21 of the Code, there has been delay of 204 days. At this juncture, an important fact emerges that prior to the filing of this Application, these Appellants had filed similar application under Order 41 Rule 21 of the Code, which had been numbered as CMA No.35 of 2009. The said application being not diligently prosecuted by these Appellants has been dismissed by order dated 05.04.2010, which stands as it is. So that very order passed by the First Appellate Court in

dismissing the application filed by these Appellants for setting aside the ex parte judgment and decree passed in the First Appeal very much stares at the face when this second Application being filed is taken up for consideration.

It is stated that the earlier application has been dismissed as the Appellants did not get any information about the date and they having remained under a bonafide belief that they have pursuing the matter; from the date of filing of the first application on 14.12.2009 till its dismissal on 05.04.2010, although not stated in clear term yet is seen to have been so hinted that said period be not taken for computing the period of delay. The relevant averments taken by the Appellants in the present application under Order 41 Rule 3(A) read with section 5 of the Limitation Act read as under:-

“That the Petitioners earlier filed C.M.A. No.35 of 2009 along with the O.P. No.6 Chandini Oram on 14.12.2009. However, the office pointed out that since she was a contesting respondent in the appeal and accordingly the petitioners were directed to remove the defects.

The petitioners filed the above misc. case on 14.12.2009 which was dismissed on 5.4.2010 for default of the petitioners as they could not comply the office note due to want of information about the date.

Since the petitioners on bonafide belief pursued the litigations during the above period, i.e., from 14.12.2009 to 05.04.2010.

That therefore the delay occurred owing to the above reason which is un-intentional and not deliberate.”

10. Admittedly, these Appellants being aware of the passing of the ex parte judgment and decree in the First Appeal had moved an application

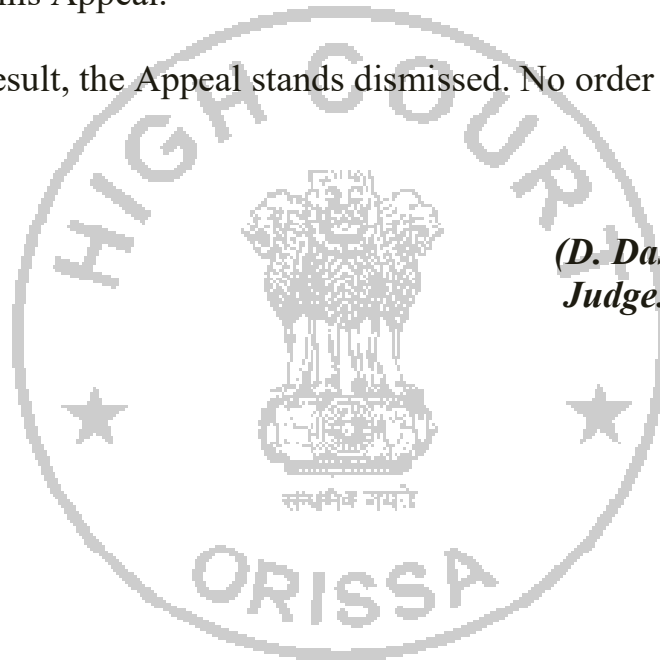
under Order 41 Rule 21 of the Code on 14.12.2009 to set aside the ex parte judgment passed on 27.10.2009 followed by the decree. No step has been taken as per law to get that order of dismissal of said application vide CMA No.35 of 2009 recalled and get it restored for further progress. Without that now the second application with the self-same prayer having been filed, the delay is sought to be explained in saying that since the Appellants had filed the earlier application and pursued it for some time, they were acting diligently and, therefore, the delay is not deliberate nor intentional.

The Appellants in the entire application have stated no such fact/s as to what prevented them in taking the proper step for pursuing the first application, which stood dismissed and then it is also not placed as to for what reason they again maintained silence for further period in coming to file the second application. All these reveal that the Appellants were not at all diligent in pursuing the matter. In the present application nothing as to any such cause/ causes to have stood on their way in not filing the application in time has/have been shown for the Court to arrive at a satisfaction that the Appellants were prevented by sufficient cause; more so when repeated filing of such applications in the name of serving cause of substantial justice and saying that it is ideal that the matter be disposed of on merit is not permitted in law as it would bring no end to the matter. This Court, therefore, finds that the First Appellate Court is

right in rejecting the application under Order 41 Rule 3(A) of the Code read with section 5 of the Limitation Act in refusing to condone the delay and thereby dismissing that Civil Miscellaneous Application vide CMA No.13 of 2010.

In that view of the matter, this Court is not in a position to accept the submission of the learned counsel for the Appellants that any such substantial question of law arises for being answered, meriting admission of this Appeal.

10. In the result, the Appeal stands dismissed. No order as to cost.



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

Himansu

