

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.760 of 2021

Kamalakanti @ Kamala Mohanty* *Petitioner

Mr.Soumya Mishra, Advocate

-versus-

State of Odisha and another* *Opp. Parties

Mr. Swayambhu Mishra,
Additional Standing Counsel

**CORAM:
JUSTICE K.R. MOHAPATRA**

**ORDER
28.06.2022**

Order No.

2.
 1. This matter is taken up through Hybrid mode.
 2. Petitioner in this CMP seeks to assail the order dated 23rd November, 2021(Annexure-6) passed in RFA No.16/2013 (13/2010) whereby learned District Judge, Malkangiri accepting the additional cost of Rs.5,000/- as directed by this Court in CMP No.533 of 2021 after the stipulated date, took up the appeal for hearing.
 4. Mr. Mishra, learned counsel for the Petitioner submits that the State of Odisha represented though Collector, Malkangiri has filed the aforesaid First Appeal assailing judgment and decree dated 29th September, 2001 passed by learned Civil Judge (Junior Division), Malkangiri in TS No.10 of 2000. Vide order dated 19th January, 2011, learned Appellate Court condoned the delay of ten years in filing the appeal. Assailing the same, the Petitioner preferred W.P.(C) No.3374 of 2011, which was disposed of vide order dated 25th July, 2018 with the following direction.

*“Considering the rival contentions of the parties and looking at the decision of this Court in the case of **M.K.C.G. Medical College, represented by the Principal and others Versus Smt. Bidulata Mahapatra** as reported in 81 (1996) C.L.T. 643, this Court interfering in the impugned order to the extent of non-grant of cost while condoning such delay, imposes a cost of Rs.5,000/- (Rupees Five thousand only) on the State-appellant to be paid to the respondent in the court below within four weeks hence.*

This Court directs, after filing of receipt showing payment of such cost in the court below, the Regular First Appeal shall be taken up for final adjudication.

The writ petition stands disposed of with the above direction.”

Although a direction was made to pay the cost within a period of four weeks from the date of the said order, but the said order was not complied with till 2021 when an application was filed by the present Petitioner to dismiss the appeal for non-compliance of order of this Court.

4.1 Considering the fact that the cost has already been deposited by the time the petition was moved, learned District Judge dismissed the same. Assailing the said order, the Petitioner filed CMP No.533 of 2021. And considering the submissions of learned counsel for the parties, this Court disposed of the said CMP vide order dated 4th October, 2021 with the following direction.

“6. Taking into consideration the submissions made by learned counsel for the parties and on perusal of the materials on record, it appears that this Court vide order dated 25th July, 2018 passed in W.P.(C) No.3374 of 2011 has directed to pay the cost of Rs.5,000/- within a period of four weeks from the date of the said order as a condition of precedent for condonation of delay, but the same was not complied with within the time stipulated. When this Court has expressed its opinion for disposal of the first appeal on merit on payment of cost, I am not inclined to interfere so far as rejection of the application for dismissal of the appeal is concerned.

7. However, in view of the delay and latches on the part of the Opposite Parties-Appellants in payment of cost, the

loss caused to the present Petitioner, who is respondent in the appeal, can be compensated by payment of additional cost.

8. *Accordingly, this CMP is disposed of with a direction that on payment of additional cost of Rs.5,000/- over and above the cost already deposited within a period of one month hence, learned District Judge, Malkangiri shall proceed with the matter in accordance with law. It is made clear that non-payment of cost, as aforesaid, to the Petitioner-Respondent in the appeal, the RFA shall stand dismissed for non-prosecution."*

4.2 It is submitted by Mr. Mishra, learned counsel for the Petitioner that although a specific direction was issued to pay an additional cost of Rs.5,000/- within a period of one month from the date of the said order and it was further directed that the First Appeal will stand dismissed for non-prosecution, if the order is not complied with, the cost remained un-paid till 21st November, 2021. The additional cost as directed by this Court in the earlier CMP was deposited only on 22nd November, 2021, which cannot be said to be compliance of this Court's order. Due to non-compliance of the order passed by this Court within the time stipulated in CMP No.533 of 2021, the default clause has already operated and the First Appeal should have been dismissed for non-prosecution. He further submitted that the order passed in CMP No.533 of 2021 was neither challenged nor any application under Section 148 CPC was filed for enlargement of time to comply with the said order. On the other hand, learned District Judge, Malkangiri finding fault with the present Petitioner (Respondent in the First Appeal) for non-submission of certified copy of the said order accepted the cost paid after the due date and proceeded to hear the First Appeal. The procedure adopted by learned District Judge, Malkangiri is

unknown to law and in violation of order of this Court passed in CMP No. 533 of 2021. When the cost was not paid within the time stipulated by this Court, learned District Judge had no other option than to dismiss the First Appeal for non-prosecution. It is his submission that the observation of learned District Judge is also self-contradictory, as in one hand he observed that filing of the Appeal as well as mode of approach adopted by the Additional Government Pleader, Malkangiri indicates laches on its part, on the other hand in the very next line, learned District Judge observed that as the additional cost has already been deposited, that shows the *bona fide* on the part of the present Opposite Parties (Appellants in the First Appeal). He, therefore, prays for setting aside the impugned order under Annexure-6 and to direct dismissal of the appeal for non-prosecution.

5. Mr. Mishra, learned ASC refutes the above submission and submits that although the Petitioner (Respondent in the First Appeal) informed learned District Judge about order passed in CMP No.533 of 2021 to pay additional cost, but the certified copy of the said order was not produced in spite of several opportunities given to the Petitioner. As rightly observed by learned District Judge, Malkangiri, the Petitioner waited till lapse of time to file certified copy to ensure default on the part of the Appellants and dismissal of the First Appeal for such default. It appears that there are some lapses on the part of the Opposite Parties (Appellants) in paying additional cost as directed by this Court, but that should not stand on the way of adjudication of the appeal in which a substantial right of the State-Appellants is involved. It is his submission that

although after the stipulated date the order passed in CMP No.533 of 2021 has already been complied with and the learned Appellate Court has proceeded with hearing of the Appeal. Thus, the impugned order should not be interfered with at this stage. The property in question is a valuable piece of land in the heart of Malkangiri town. Taking into consideration the facts and circumstances of the case, on learned District Judge had condoned the delay in filing the appeal, which has been confirmed twice by this Court on payment of substantial amount of cost as well as additional cost, which has already been paid. Thus, the impugned order warrants no interference.

6. Taking into consideration the submissions of learned counsel for the parties, this Court finds force in the submission of Mr. Mishra, learned counsel for the Petitioner to the effect that the order passed in CMP No.533 of 2021 has not been complied with in its letter and spirit. Further no petition under Section 148 CPC was filed for enlargement of time to pay said cost. It is also observed by learned District Judge that filing of the appeal as well as mode of approach adopted by learned Additional Government Pleader, Malkangiri indicates laches on its part. It is well-settled that for the laches on the part of learned counsel a party should not suffer. The Court however, expresses its concern over the conduct of the government officials in complying with the direction of this Court. The Collector, Malkangiri should look into the matter and if required should fix responsibility for such lapses in complying direction of this Court in time. Further, learned Appellate Court should have acted within its bounds while accepting the

cost, which is admittedly deposited after the stipulated time granted by this Court. However, order of condonation of delay in filing the appeal has been confirmed by this Court subject to payment of cost as well as additional cost as directed by this Court in different proceedings and the same have already been deposited. Further, the First Appeal involves a substantial right of the State of Odisha over a valuable piece of land in Malkangiri town, which is posted for hearing. Hence, this Court feels that the matter should be given a quietus. As such, this Court declines to interfere with the impugned order.

7. Accordingly, the CMP is disposed of with an observation that the government officials and their representative(s) in Court are to be careful in participating in the proceedings and complying with the direction of the Court within time. Learned Government Pleader/AGP attached to the Court of learned District Judge, Malkangiri shall make over a copy of this order to do the needful.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge