AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.1612 of 2023

An application under Article 227 of the Constitution of India.

Kishore Meher @ Rajkishore Meher ... ... **Petitioner**

-Versus-

1. **Nirmal Chandra Behera**
2. **Bhargabi Meher**
3. **Prasanna Meher**
4. **Prasanta Meher**
5. **Pramod Mehere**
6. **Prakash Mehere**
7. **Pradeep Mehere**
8. **Prafulla Meher**
9. **Pravasini Meher**
10. **Pramila Meher**
11. **Pramita Meher**
12. **Priya Meher**
13. **Preeti Meher**
14. **Prativa Meher**

... ... **Opp. Parties**

Advocates appeared in the case:

For Petitioner : Mr. Rama Chandra Rath, Advocate

For Opp. Parties : Mr. Digambar Sethi, Advocate

CORAM:
THE HON'BLE MR. JUSTICE MRUGANKA SEKHAR SAHOO

J U D G M E N T

Date of hearing : 22.09.2026 & 07.10.2026
Date of Judgment: 30.10.2026

MRUGANKA SEKHAR SAHOO, J.

1. Invoking Articles 226 and 227 of the Constitution of India the Writ Application has been filed, challenging the order dated 30.11.2023 passed by the learned Civil Judge (Junior Division), Bargarh in Civil Suit No.17 of 2002 rejecting the prayer of the Petitioner-defendant, to allow cross-examination of the Civil Court Commissioner, who had filed the report, was examined and discharged as witness.

2. The brief facts of the case are that the present Petitioner is the defendant no.3 before the learned Civil Judge (Junior Division), Baragarh in Civil Suit No.17 of 2002, filed on 18.03.2002. Notices were issued in the Suit to the defendants - present Petitioner and they appeared on 11.12.2002 and filed their written statements on 10.03.2003. As per direction of the learned trial Court Civil

Court Commissioner was appointed. He prepared and furnished his report. The report was accepted. The Civil Court Commissioner was examined by the plaintiff on 22.06.2006 and was discharged as witness. The defendants were absent on 29.06.2006 and the plaintiff adduced evidence. On 30.06.2006 the defendants were set *ex parte,* judgment was passed.

3. For setting aside the *ex parte* judgment, the defendants filed CMA No.05 of 2012 before the learned Civil Judge (Junior Division), Bargarh which was dismissed on 15.02.2018. On 12.03.2018 FAO No.03 of 2018 was filed before the learned District Judge, Bargarh challenging the *ex parte* judgment and decree. By order dated 29.07.2019 the learned District Judge, Bargarh set aside the *ex parte* decree subject to payment of cost of Rs.2,000/- by the defendants. On 09.08.2019 cost as directed was paid and Civil Suit No.17 of 2002 was restored.

4. After restoration of the suit, on 26.08.2022 the present Petitioner-defendant no.3 filed a petition before the learned trial Court to recall and cross-examine the Civil Court Commissioner. On 19.09.2022 the plaintiff-Opposite Parties

herein filed their objection to the petition that was made to recall and cross-examine the Civil Court Commissioner. By impugned order dated 30.11.2023, the learned trial Court rejected the prayer of the defendant to recall and cross-examine the Civil Court Commissioner. The facts further relevant are that the report of the Civil Court Commissioner was submitted on 21.03.2005 and the defendant was set *ex parte* on 22.06.2006.

5. It was submitted by the learned counsel for the Petitioner that he shall rely on provisions of law as well as precedents to support the contention that the Court can allow cross examination of the Civil Court Commissioner though the defendant chose not to appear and not to cross examine when the Civil Court Commissioner was examined on 22.06.2006. Thereafter the plaintiff adduced evidence on 29.06.2006. The Opposite Parties herein-the plaintiff before the learned trial Court filed their objection before the learned trial Court.

6. It is contended by the learned counsel for the Opposite Parties-plaintiff that after the Suit was restored to file by setting aside the *ex parte* order and decree against the

defendants, they have a right to participate in the proceeding from the stage/date on which the proceeding of the suit was restored and not prior to that.

7. The Suit was for declaration of right, title and interest of the plaintiff over the suit schedule land, permanent injunction and for mandatory injunction against the defendants. When the application was filed to cross-examine the Civil Court Commissioner, the stage of the Suit, as it was restored, was that of hearing. The learned District Judge, Bargarh in FAO observed thus:

> *"the suit i.e.; T.S. No. 17/2002 is directed to be restored to file for disposal on merit subject however to payment of cost of Rs.2,000/- to the respondent No. l/plaintiff within 15 days from today. It is also made clear by the court that the defendant/appellant is to respond positively and to adduce evidence from his side that being the last opportunity provided and in case, a further default occasions, the learned Court below shall not hesitate but do well to dispose of the suit i.e. T.S. No. 17 of 2002 without any amount of delay. It is further held that the entire process of evidence from the side of the defendant/appellant and disposal of the suit i.e. T.S. No.l7 of 2002 by the learned court below is to be exercised and expedited preferably: within a period of two months hence from. It is lastly held that there shall be no further adjournment for the payment, of the imposed cost of Rs.2,000/- and if the cost is not paid, on the date of hearing of the suit i.e. T.S. No.17 of 2002 fixed by the Courts, to be made recoverable along with the cost of the decree, the purpose being is to prevent delay in its*

disposal. In the circumstances, however, the parties are directed to bear respective costs throughout."

The above quoted portion is quoted from the order dated 30.11.203 of the learned District Judge, Bargarh.

8. The order of the learned District Judge, Bargarh passed in FAO No.03 of 2018 has attained finality having not been challenged, and in considered opinion of this Court, at this stage, the issues decided by the learned District Judge, Bargarh particularly the stage of restoration of the suit cannot be reopened.

9. Perusal of the order as quoted above indicates that the learned District Judge did not direct/grant liberty to defendant to cross-examine any witness those were examined by the plaintiff rather the learned District Judge directed the defendant-appellant to adduce evidence from his side 'being the last opportunity provided'.

10. It is contended by the learned counsel for the Petitioner that since the Petitioner was set *ex parte,* he did not get opportunity to cross-examine, therefore, he has sought for the opportunity before the learned trial Court after the suit was restored.

However, when the facts of the case are looked at, it is apparent that the plea raised before this Court regarding lack of opportunity is misconceived or at the most is an afterthought. The present Petitioner-defendant (appellant before the learned District Judge) had never sought for any opportunity in the FAO to cross examine the Civil Court Commissioner. The Petitioner-defendant had enough opportunity from the date of submission of the Civil Court Commissioner's report on 21.03.2005 till the defendant was set *ex parte* 15 months after, on 22.06.2006. The defendant chose not to participate/not to remain present before the learned trial Court. Such indifference of the defendant cannot be countenanced when the defendant sought for restoration of the suit which was granted by setting aside the *ex parte* decree by the learned District Judge in FAO. The suit has to be and has been restored to the stage when the defendant was set *ex parte* i.e. on 22.06.2006. The appellate order in FAO makes it abundantly clear as would be evident from reading of the operative portion, quoted above.

11. Perusal of the learned trial Court's order reveals that the Civil Court Commissioner's report was placed on record 08.04.2005. Thereafter the matter was adjourned on 29.04.2005,09.05.2005,27.06.2005,18.07.2005,23.07.2005, 25.08.2005,2.09.2005,13.09.2005, 20.09.2005, 27.09.2005, 25.10.2005,11.11.2005,24.11.2005,30.11.2005,09.12.2005, 09.01.200609.02.2006, 18.02.2006. All the dates evidently are for objection and hearing on Civil Court Commissioner's report. On 28.02.2006 and 20.03.2006 the following orders were passed:

> *"28.02.2006: Adv. for the both parties files hazira. C.C.C. report with objection are put up. Heard on the objection of the defendant. The defendant is willing to cross examine the C.C.C. Hence the defendant is directed to file PCR. Showing deposit of Rs.500/- as witness cost and taken steps. Put upon 08.03.06 for the PCR & steps.*
>
> *20.03.2006: Adv. for the Plaintiff files hazira. Adv. for the defendant files a memo showing deposit of Rs.500/- file PCR Rs.500/- to witness cost to the C.C.C. vide PCR no.148 on dt.20.3.06 and files summon to witness issue the same. Put up on 24.3.06 for SR & hearing on C.C.C."*

In order dated 17.04.2006 the following has been recorded:

> *17.4.06: Adv. for the defendant files hazira. Adv. Sri S.C. Samantaray and others files V. nama along with a time petition to adjourned the hearing on behalf of the defendant. Head Time petition is*

rejcted. Adv. Civil Court Commissioner present and files hazira. He is cross-examine in Full. The document marked as exhibit I.II,III,IV,V,VI,VII,VIII,IX,X,XI and XII. Adv. for the plaintiff files petition U/s 151 C.P.C. Copy served. Put up on 20.04.06 for objection on the pet. Dt.17.4.06 witness cost paid."

Thereafter the matter was listed on 20.04.2006, 25.04.2006, 27.04.2006, 01.05.2006, 05.05.2006 and the defendant was set *ex parte* on 22.06.2006

12. The evidence from the side of the plaintiff was closed on 28.06.2006 and the matter was put up on 29.06.2006 for hearing of the defendant and argument of the suit. On 29.06.2006 since the defendant did not take steps to adduce evidence, evidence from the side of the defendant was closed. Therefore, the learned District Judge while restoring the suit had directed that the defendant shall adduce his evidence without fail. The defendant did not try before the learned trial Court or the learned 1st Appellate Court to make any such prayer by showing good/adequate reasons to explain his absence earlier. At least the defendant got a reprieve.

13. Mr. Rath, learned counsel for the Petitioner relies on the decision rendered by the Hon'ble Supreme Court in

Nanda Dulal Pradhan and others vrs. Dibakar Pradhan and others[1] (Manupatra Print) and the judgment of Coordinate Bench of this Court in ***State of Orissa and others vrs. Sitanjjali Jena***[2] (Manupatra Print).

In considered opinion of this Court reliance on the said decisions is of no avail to the Petitioner herein as the facts in both the cases are miles apart from the case at hand. Both the judgments do not lay down that upon restoration of a suit by setting aside the judgment and decree as per the appellate order, the party who was set *ex parte* can take advantage of the situation to get the matter restored to a date and stage which is fifteen months prior to the date/stage of restoration sought for.

14. Paragraph-4 of the decision of the Apex Court in **Nanda Dulal** (*supra*) is reproduced herein:

> *"4. In view of the above and for the reasons stated above the impugned judgment and order passed by the High Court is hereby set aside. The order passed by the First Appellate Court setting aside the ex parte judgment and decree and restoring the suit is hereby restored. However, it is observed that on restoration of the suit, the defendant nos.2 & 3 shall not be permitted to file the written statement, as though number of opportunities were given earlier, they did*

[1] ***2002 INSC 681: (2024) 12 SCC 155***
[2] ***2016 (I) ILR CUT 106***

not file the written statement. However, at the same time they may be permitted to participate in the suit and cross examine the witnesses and make submissions on merits. Present appeal is partly allowed to the aforesaid extent. However, in the fact and circumstances of the case there shall be no order as to costs."

[Underlines to supply emphasis]

15. The observations of the Hon'ble Supreme Court in **Nanda Dulal** (*supra*) goes to show that when the defendant did not avail the opportunity of filing written statement despite getting several opportunities, the Hon'ble Supreme Court refused to grant the opportunity to the defendant to file the written statement. Drawing an analogy, in the present case the defendant did not avail the opportunity of cross examining the Civil Court Commissioner when the suit was posted on several dates over fifteen months; he cannot succeed in his plea to cross examine the Civil Court Commissioner at the stage of adducing evidence by the defendant which was the direction of the 1st Appellate Court.

16. In such view of the matter the case law relied upon by the learned counsel for the Petitioner do no come to his

help. In ***Quinn v. Leathem***[3], *Lord Halsbury, more than a century ago, observed thus:*

> *"Before discussing the case of Allen v. Flood(1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before-that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of Allen v. Flood."*

17. In view of the discussion made above, the Petition fails and is dismissed. Upon restoration of the suit, it goes back to the stage when the defendant no.3 was set *ex parte*. The order dated 30.11.2023 passed by the learned Civil Judge (Junior Division), Bargarh in C.S. No.17 of 2002 cannot be faulted with and is accordingly confirmed.

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[3] *[(1901) UKHL 2: 3(1901) AC465: [1900-3] AII E.R. Rep.1 (Page-7 plactium H & 1 of AII E.R.)]*

The interim order dated 13.02.2024 stands vacated upon dismissal of the present petition.

No costs.

18. Certified copy of the orders of the learned trial Court passed in C.S. No.17 of 2002 starting with 02.01.2003 upto 22.08.2006 shall be returned to the learned counsel for the Petitioner after retaining attested photocopy of the same by the Registry.

(Mruganka Sekhar Sahoo)
Judge

Orissa High Court, Cuttack
The 30th October, 2026/Amit-Rajesh

Signature Not Verified
Digitally Signed
Signed by: RAJESH KUMAR BADHEI
Reason: Authentication
Location: HIGH COURT OF ORISSA, CUTTACK
Date: 31-Oct-2026 16:38:01