



IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 804 OF 2023

(An application under Articles 226 & 227 of the
Constitution of India)

Chinmaya Sahu and another

.....

Petitioners

-Versus-

Amit Kumar Sahu

.....

Opp. Party

Advocates appeared:

For Petitioners : Mr. Chitta Ranjan Nanda,
Advocate

For Opp. Party : Mr. Swarup Kumar Patnaik,
Advocate

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

Heard and disposed of on 14.11.2023

JUDGMENT

K.R. Mohapatra, J.

1. This matter is taken up through hybrid mode.
2. Judgment dated 11th May, 2023 (Annexure-4) passed by learned 1st Additional District & Sessions Judge, Baripada, Mayurbhanj in F.A.O. No.5 of 2023 is under challenge in this CMP, whereby dismissing the appeal, learned appellate Court confirmed the order dated 14th October, 2022 (Annexure-3) passed by learned Additional Senior Civil Judge, Baripada in



C.M.A. No.10 of 2022 (arising out of C.S. No.535 of 2015) dismissing an application under Order IX Rule 13 CPC.

3. Mr. Nanda, learned counsel for the Petitioners submits that the Plaintiff-Opposite Party filed the suit for eviction, mandatory and prohibitory injunction. The Defendants-Petitioners though appeared in the suit through their learned Advocate, but did not file the written statement and contest the suit. Accordingly, they were set *ex parte* and subsequently, *ex parte* judgment was passed on 24th February, 2022. The Defendants-Petitioners could not know about the *ex parte* judgment passed against them, as learned Advocate appearing on their behalf did not intimate the same. When the Defendants-Petitioners came to know about the *ex parte* judgment passed in the suit, they filed an application in C.M.A. No.10 of 2022 on 26th April, 2022. Although there was a delay in filing the petition under Order IX Rule 13 CPC, but learned Advocate appearing for the Petitioners on a *bona fide* impression that the period of limitation will reckon from the date of knowledge of the *ex parte* judgment by the Defendants-Petitioners, did not file any application under Section 5 of the Limitation Act for condonation of delay. Objections were filed stating that petition for condonation of delay was not filed. Taking note of the objection, learned trial Court dismissed the petition under Order IX Rule 13 CPC vide judgment dated 14th October, 2022 under Annexure-3. The sole ground of rejection of the petition under Order IX Rule 13 CPC was that the petition under Order IX Rule 13 CPC was not accompanied with an application for



condonation of delay. Learned appellate Court also dismissed the appeal vide judgment under Annexure-4 on the same ground. Hence, this CMP has been filed.

4. It is his submission that for the laches of the Advocate, the party should not suffer. He further submits that there was a meager delay in filing the petition under Order IX Rule 13 CPC. As such, learned Courts below should not have adopted hyper technicality in rejecting the petition under Order IX Rule 13 CPC. The Defendants-Petitioners should have been given an opportunity to file an application under Section 5 of the Limitation Act for condonation of delay in filing the petition under Order IX Rule 13 CPC. This aspect was not taken into consideration by either of the Courts. He, therefore, prays for setting aside the impugned orders under Annexures-3 and 4 and to set aside the *ex parte* decree permitting the Petitioners to contest the suit.

5. Mr. Patnaik, learned counsel for the Opposite Party by filing a date chart submits that summons were issued to the Defendants on 14th October, 2015. They entered appearance on 18th February, 2016. Although they sought for adjournment to file written statement, but for the reasons best known, no written statement was filed by the Defendants. As such, vide order dated 22nd June, 2016, the Defendants were precluded from filing the written statement. The Defendants were set *ex parte* vide order dated 3rd April, 2019 and *ex parte* evidence was recorded. Argument of the suit was closed on 22nd February, 2022 and on 24th February, 2022, *ex parte* judgment was pronounced in the



suit. Decree was drawn up on 10th March, 2022. In their application under Order IX Rule 13 CPC, which was filed on 26th April, 2022, the Defendants asserted that they came to know about the *ex parte* judgment and decree on 5th April, 2022. Thus, the application under Order IX Rule 13 CPC was filed without an application for condonation of delay.

6. Mr. Patnaik, learned counsel further submits that since the petition under Order IX Rule 13 CPC was filed beyond the statutory period of thirty days, as provided under Article 123 of the Limitation Act, the petition should have accompanied with the petition for condonation of delay. In absence of any application for condonation of delay, learned Courts have committed no error in rejecting the petition under Order IX Rule 13 CPC, as it could not have been entertained beyond the statutory period without condoning the delay. In support of his case, Mr. Patnaik, learned counsel for the Opposite Party relied upon the decision in the case of ***Himansu Sekhar Srichandan – v- Sudhir Ranjan Patra (since dead) Jully Patra and others***, reported in 2022 SCC OnLine Ori 576, wherein at Paragraph-8, it is stated as under:

“8. Before delving into the rival contentions of the parties, it is to be kept in mind that Order IX CPC deals with appearance of parties and consequences of their non-appearance in the suit. Rule 13 of Order IX CPC deals with setting aside the decree passed ex parte. It provides that if the Court is satisfied that either the summons was not duly served on the Defendant or that the Defendant was prevented by sufficient cause from appearing in the Court when the suit was called on for hearing, the Court shall make an order for setting aside the decree as against him on such terms as to cost as it thinks fit. Thus, it essentially



provides two contingencies under which an ex parte decree can be set aside. The first contingency is when the summons is not duly served on the Defendant. The second one is, if summon is duly served, then the Defendant has to show sufficient cause to the satisfaction of the Court for his nonappearance on the date when the suit was called on for hearing. In the instant case, the situation falls under second category. Admittedly, the Defendant Nos.2 and 3 were duly served with the summons; they appeared through learned counsel and sought for adjournment on several occasions to file written statement. They were admittedly set ex parte on 4th July, 2017 on which date the suit was called on for hearing. Although learned counsel for Defendant Nos.2 and 3 subsequently filed petitions for adjournment dated 7th July, 2017 and 15th July, 2017, but no prayer to set aside the ex parte order was made nor the written statement was filed on their behalf. Admittedly, the ex parte judgment was pronounced on 19th July, 2017 and the decree was drawn up on 24th July, 2017 and was sealed and signed on 27th July, 2017. Article 123 of the Limitation Act provides that when summons were duly served on the Defendants, the limitation for filing of petition under Order IX Rule 13 CPC commences from the date of passing of the ex parte decree. The period of limitation for filing of such application, as provided under Article 123 of the Limitation Act, is thirty days. Admittedly, the petition under Order IX Rule 13 CPC was filed on 13th March, 2018 along with a petition under Section 5 of the Limitation Act. Materials available on record reveal that Defendant Nos.2 and 3 have made an endeavour to explain the delay in filing the petition under Order IX Rule 13 CPC stating that on 4th January, 2018 they came to know about the ex parte decree from their learned Advocate and thereafter from the Advocate's Clerk. Immediately thereafter, steps were taken to obtain certified copy of the judgment and decree, and after obtaining the same on 17th February, 2018, the petition for setting aside ex parte decree was filed, within thirty days, i.e., 13th March, 2018.”



It is his submission that no prayer was also made at any point of time for condonation of delay. Hence, the CMP does not merit consideration and should be dismissed.

7. Considering the submissions made by learned counsel for the parties and on perusal of the record, it is apparent that the *ex parte* judgment was passed on 24th February, 2022 and the decree was drawn up on 10th March, 2022. The application for setting aside the *ex parte* decree was filed on 26th April, 2022. As such, the petition under Order IX Rule 13 CPC in C.M.A. No.10 of 2022 was filed beyond the statutory period. Thus, it should have accompanied with an application for condonation of delay.

8. It is submitted by Mr. Nanda, learned counsel for the Petitioners that learned Advocate was under a *bona fide* impression that the period of limitation would commence from the date of knowledge. Since the *ex parte* judgment and decree came to the knowledge of the Defendants-Petitioners on 5th April, 2022, the application under Order IX Rule 13 CPC was filed without accompanying an application for condonation of delay. He also relied upon the decision in the case of ***Albert Morris –v- J.B. Simons***, reported in 2017 (I) CLR (SC) 1047.

9. The contention raised by Mr. Nanda, learned counsel for the Petitioners cannot be accepted, as learned Advocate appearing for the Defendants had ample opportunity either to file an application for condonation of delay or to make an oral prayer in that regard. Although specific objection was raised with regard to the limitation, the Defendants did not take care to make



a prayer for condonation of delay. Admittedly, the summons were duly served on the Defendants and they had entered appearance.

10. Vide order dated 22nd June, 2016, they were precluded from filing the written statement. But, they were allowed to participate in the proceeding of the suit. Accepting the same, the Defendants participated in the suit. But, for the reasons best known they did not appear subsequently when the matter was called for hearing. Hence, they were set *ex parte* on 3rd April, 2019 and hearing of the suit proceeded. From the conduct of the Defendants, it appears that they were thoroughly negligent in asserting their right, if any, in the suit. Only by alleging that they should not suffer for the laches of the Advocate is not sufficient to take away the valuable right accrued in the favour of the Plaintiff by the judgment and decree. In the instant case, the Defendants-Petitioners have not made out any ground to interfere with the impugned orders under Annexures-3 and 4.

11. Accordingly, the CMP being devoid of any merit stands dismissed.

Urgent certified copy of this judgment be granted on proper application.

(K.R. Mohapatra)
Judge

Orissa High Court, Cuttack,
Dated 14th November, 2023/Madhu