

SET ASIDE IN 2022 SCeJ 0591 , 2022 PLRonline 0205 , (2022-2)206 PLR 795 (SC) (SN)

HIGH COURT OF ORISSA AT CUTTACK

Before: Justice K.R. Mohapatra

HIMANSU SEKHAR SRICHANDAN - Petitioner,

Versus

SUDHIR RANJAN PATRA (since dead) - Respondent.

CMP No.1423 of 2019

(i) **CPC , O. 9, R. 13 - Limitation Act, Section 5, Article 123 - Lack of knowledge is also a sufficient cause for condonation of delay - Setting aside the decree passed *ex parte*- Defendant duly served and appeared through counsel and sought adjournment on several occasions to file written statement - Set *ex parte* and subsequently counsel filed petitions for adjournment but no prayer to set aside the *ex parte* order was made nor the written statement was filed - Ex *parte* judgment pronounced - Limitation for filing of petition under Order IX Rule 13 CPC commences from the date of passing of the *ex parte* decree under Article 123 of the Limitation Act provides when summons were duly served on the Defendants - Application under Order IX Rule 13 CPC filed along with a application under Section 5 of the Limitation Act - Delay explained on the ground that they came to know about the *ex parte* decree from their Advocate and thereafter from the Advocate's Clerk and immediately thereafter, steps were taken to obtain certified copy of the judgment and decree and petition for setting aside *ex parte* decree was filed - Record suggests laches on the part of counsel- Explanation of sufficient cause for non-appearance of Defendants on the date when the suit was called on for hearing is also because of lack of knowledge - Lack of knowledge having been established prepondering the probabilities - Defendants have shown sufficient cause for their non-appearance on the date when the suit was called for hearing - Civil Judge has exercised discretion judiciously - No interference is warranted with regard to setting aside the *ex parte* decree.**

(ii) **CPC , O. 9, R. 13 - As a consequence of setting aside of the *ex parte* decree , Defendants cannot be permitted to file their written statement - They can only take part in the hearing of the suit without propounding their own case - However, they can advance their argument on the basis of the materials available on record only. [Para 10]**

JUDGMENT

K.R.Mohapatra, J - (04.02.2022) - Order dated 5th December, 2019 (Annexure-11) passed by learned Senior Civil Judge, Bhubaneswar in CMA No.31 of 2018 filed under Order IX Rule 13 CPC is under challenge in this CMP.

2. This CMP finds its genesis from CS No.1783 of 2011 filed by the Petitioner for declaration of his right, title, interest and possession over the suit schedule land as well as for a decree to declare that Defendant No.1 has no authority to alienate the suit land and also to declare that the two registered sale deeds bearing Nos.3530 and 3533 of 2000 are not binding on the Plaintiff as well as proforma Defendant Nos. 4 and 5. A relief of permanent injunction against Defendant Nos. 1 to 3 was also sought for. The suit schedule land pertains to Plot No.133 to an extent of Ac.0.177 decimals and Plot No.134 to an extent of Ac.150 decimals under Khata No.291 situated in mouza Jharapada. The Opposite Party Nos.1 and 2 herein are Defendant Nos.2 and 3 in the suit. Defendant No.4 appeared on 4th December, 2015 and filed his written statement alone in the suit. Defendant No. 5(a) on appearance filed a memo and adopted the written statement of Defendant No.4. The contesting Opposite Parties, namely, Defendant Nos. 2 and 3 appeared on 20th March, 2012 and filed a petition for time to file their written statement. However, in spite of several adjournments they did not file written statement. Order dated 20th June, 2012 of the suit reveals that Defendant Nos. 2 and 3 on their appearance through Sri Gyanaranjan Mohapatra, Advocate filed a petition for adjournment to file written statement which was rejected. On 6th November, 2013 although Defendant Nos.2 and 3 filed hazira but they neither filed their written statement nor prayed for time for filing of the same. Subsequently on 24th November, 2016 issues were settled. On 27th March, 2017, the Plaintiff filed evidence in affidavit. On 4th July, 2017, when the suit was called on for hearing, Defendant Nos. 2 and 3 were absent on call and were set *ex parte*. Thus, PW-1 was examined and exhibits 1 to 9 were admitted into evidence. In due course, the case was posted to 15th July, 2017 for argument. On that date, Defendant Nos.1 to 3 also filed a petition for adjournment for which the suit was adjourned to 17th July, 2017, on which date, the argument was heard and the judgment was pronounced on 18th July, 2017. The decree was drawn up subsequently and was signed on 27th July, 2017.

2.1 Subsequently on 13th March, 2018, Defendant Nos.2 and 3 filed CMA No.31 of 2018 under Order IX Rule 13 CPC to set aside the *ex parte* decree along with an application under Section 5 of the Limitation Act to condone the delay in filing the CMA. In the CMA, the Defendant Nos. 2 and 3 took a stand that they along with Defendant No.1 entered appearance in the suit on 6th November, 2013 through their counsel and sought for

adjournment for filing written statement. When the suit was posted to 24th November, 2016 they could not take proper step as the Clerk in-charge had met with an accident and sustained a fracture of femur. He resumed his work only in the month of August, 2017. Their Advocate, namely, Sri Gyanaranjan Mohapatra was also suffering from ligament fracture for which the Defendant Nos. 2 and 3 were kept in dark about the progress of the suit and were set *ex parte*. Consequently, the *ex parte* judgment and decree was passed. It was specifically pleaded in the said CMA that on 4th January, 2018, the Defendant Nos. 2 and 3 learnt about the decree and requested the Advocate's Clerk to obtain the copy of the judgment. Accordingly an application for obtaining the certified copy of the judgment and decree was made on 8th January, 2018, which was made available to them on 17th February, 2018. Within thirty days thereafter, the petition under Order IX Rule 13 CPC (CMA No.31 of 2018) was filed. The Plaintiff/Petitioner who was the Opposite Party No.1 in the said CMA contested the case by filing objection stating that no sufficient cause was shown either for condonation of delay or for setting aside the *ex parte* judgment and decree. In support of their case, the Defendant No.3 was examined as PW-1, the Advocate's Clerk, namely, Sri Srikanta Kumar Das as PW-2 and Advocate Sri Gyanaranjan Mohapatra as PW-3. On the other hand, the Plaintiff/Petitioner examined himself as DW-1 and one Dr. Jayakrishna Mishra was examined as DW-

2. The documents relied upon by Defendant Nos.2 and 3 were marked as Exts.1 to 7 and that of the Plaintiff/Petitioner as Ext.A. Learned Senior Civil Judge took up hearing of the petition for condonation of delay along with the CMA filed under Order IX Rule 13 CPC and by order dated 5th December, 2019 allowed the CMA by condoning the delay, for which this CMP has been filed.

3. Mr. Bhuyan, learned counsel for the Petitioner submitted that the limitation for filing an application under Order IX Rule 13 CPC is governed under Article 123 of the Limitation Act, which provides two modes for determining the starting point of limitation, i.e., (i) thirty days from the date of the decree, when the applicants have appeared in the suit; and (ii) thirty days from the date of knowledge when summons were not duly served. In the instant case, Defendant Nos.2 and 3 had entered appearance in the suit through their Advocate and in spite of several adjournments did not file their written statement. Thus, clause (i) of Article 123 of the Limitation Act has application for determining the starting point of limitation in the case. The *ex parte* judgment was passed on 19th July, 2017 and the application under Order IX rule 13 CPC was filed on 13th March, 2018. The averments made in the petition for condonation of delay as well as the evidence of the witnesses of Defendant Nos.2 and 3 reveal that on 4th January, 2018, they came to know about the *ex parte* decree. In order to succeed in a Petition under Order IX Rule 13 CPC, the applicant has to show sufficient cause for his non-appearance on the date when the suit was called on for hearing. Explanation offered by Defendant Nos.2 and 3 does not disclose any cause of delay till 4th January, 2018 much less about sufficient cause for their non-appearance on the date when the suit was called on for hearing. The *ex parte* hearing commenced from 4th July, 2017 and the Defendant Nos.1 to 3 were set *ex parte* on that date. Subsequently, the judgment was pronounced on 19th July, 2017 followed by signing of the decree on 27th July, 2017. No explanation having been offered by Defendants No.2 and 3 for their non-

appearance on the date when the suit was called on for hearing, learned Senior Civil Judge has committed gross error in allowing the petition under Order IX Rule 13 CPC. The evidence of PW-3, namely, Sri Gyanaranjan Mohapatra, learned counsel appearing for Defendant Nos.2 and 3 deposed that he suffered from ligament fracture from 29th July, 2017 and recovered on 11th April, 2018. He also stated in his evidence that he was under treatment and was bedridden during that period. In his evidence, he also deposed that he informed his clients, namely, Defendant Nos.2 and 3 about the judgment and decree after he came to know about the same on 3rd January, 2018. It is his evidence that he had instructed Defendant Nos.2 and 3 to remain present in the Court for filing written statement. Although the Defendant Nos. 1 to 3 were set *ex parte* on 4th July, 2017, but no prayer for setting aside the *ex parte* order was made by Defendant Nos.2 and 3 although their counsel appeared and filed petitions for adjournment on 4th July, 2017, 7th July, 2017 and 15th July, 2017. As such, the inordinate delay caused in filing the petition under Order IX Rule 13 CPC should not have been condoned and the petition under Order IX Rule 13 CPC ought not have been allowed.

3.1 It is his submission that while exercising power under Order IX Rule 13 CPC, the trial Court is expected to exercise its discretion judiciously. The Court while exercising its discretion cannot brush aside the mandatory requirements of Order IX Rule 13 CPC. In the instant case, learned Senior Civil Judge neither considered the demeanor of the party seeking such relief nor discussed about the requirements of law while passing the impugned order. Relying upon the ratio in the case of ***State of Orissa and another V. Smt. Sitanjali Jena***, reported in **(2016) 121 CLT 492**, he submitted that on setting aside an *ex parte* decree though the suit is restored to file, but the Defendants cannot be relegated back to the position prior to the date of hearing of the suit. He would be debarred from filing written statement. At the same time he can participate in the hearing of the suit by cross-examining the witnesses of the Plaintiff, adducing evidence without propounding his own case in the suit and advancing argument. He, therefore, submitted that even if this Court comes to a conclusion that the discretion exercised by learned Senior Civil Judge is legal and justified, still then the Defendant Nos.2 and 3 cannot be permitted to file written statement and propound their own case in the suit. In view of the above, he prayed for setting aside the impugned order.

4. Mr. Tripathy, learned counsel for Opposite Party Nos.1 and 2 (Defendant Nos.2 and 3 in the suit) vehemently countenancing such submission made lengthy argument defending the impugned order. It is his submission that sufficient cause has to be construed on the touchstone of pragmatic parameters as set out in ***Nakul Swain V. Jogendra Das***, reported in **1996 (I) OLR 534**. The expression '*sufficient cause*' must receive '*liberal construction*' so as to advance substantial justice, as laid down in the case of ***GMG Engineering Industries and Others V. ISSA Green Power Solution and Others***, reported in **(2015) 15 SCC 659**. The law of limitation is founded on public policy. Rules of limitation are not meant to destroy the rights of the parties available under law (See ***N.Balakrishnan V. M. Krishnamuthy***, reported in **(1998) 7 SCC 123**). There may be some lapses on the part of the litigant concerned. That alone is not enough to turn down his plea and shut the door against him. When learned Senior Civil Judge has discussed the evidence available on record and found sufficient cause for condoning the delay in filing

application under Order IX Rule 13 CPC and set aside the *ex parte* decree, this Court in exercise of supervisory jurisdiction under Article 227 should not re-assess the same and substitute the finding of learned Senior Civil Judge by its own. It is his submission that Defendant No.3, who was examined as PW-1, deposed that he came to know about the *ex parte* decree in the month of January, 2018. He (P.W.-1) had not engaged any other advocate except Sri Gyanaranjan Mohapatra to defend his case. On 4th January, 2018, he for the first time came to know about the *ex parte* decree from his Advocate, then from the Advocate's Clerk. Similarly, Sri Gyanaranjan Mohapatra, who was examined as PW-3, in his evidence, stated that Defendant Nos.2 and 3 had entrusted him to conduct CS No. 1783 of 2011 in the Court of learned Senior Civil Judge, Bhubaneswar. On the first day of their appearance, he and the Advocate's Clerk, namely, Sri Srikanta Das had assured Defendant Nos. 2 and 3 to take all possible steps for them in the suit. They also assured them to inform the position of the suit from time to time and they (Defendant Nos. 2 and 3) need not come to Court on each date of posting. It was also deposed by PW-3 that Defendant Nos.2 and 3 were instructed to come to Court when they would be informed. The Advocate's Clerk, namely, Srikanta Das was taking all the steps required in the suit. Written statement on behalf of Defendant Nos.2 and 3 could not be filed as they were waiting for filing of the written statement of Defendant Nos.4 and 5, who were the venders of Defendant Nos.2 and 3. Unfortunately, during pendency of the suit, Sri Gyanaranjan Mohapatra, learned counsel appearing for Defendant Nos.2 and 3 suffered from ligament fracture and waist cramp. He was under physiotherapy from 29th June, 2017 to 11th April, 2018. Since he was under treatment and was bedridden and the Advocate's Clerk did not inform him about the status of the suit, he could not inform the Defendant Nos.2 and 3 about the same.

5. Mr. Tripathy also relied upon evidence of PW-2, who in his evidence reiterated the statement of P.W.-3 and deposed that on the date of appearance he along with Mr. Mohapatra, learned counsel assured Defendant Nos.2 and 3 to take all possible steps in the suit and informed that their presence is not required on each and every date of posting of the suit. They will be informed when their presence would be required. He met with an accident and after recovery he did not inform either the Defendant Nos.2 and 3 or Sri Gyanaranjan Mohapatra about the status of the suit. Only on 4th January, 2018 he informed Defendant No.3 that the suit has been decreed *ex parte*. The certified copy of the *ex parte* judgment and decree was applied on 8th January, 2018, the same was notified on 5th February, 2018 and after submission of requisites, the certified copy was made available to him on 17th February, 2018. On receiving the same, PW-2 handed it over to Defendant No.3. Thereafter, CMA was filed. Thus, it is clearly proved that the Defendant Nos.2 and 3 had no knowledge about the *ex parte* judgment and decree till it was informed by PWs-2 and 3. Thereafter, CMA was filed without any further delay. Thus, no fault can be attributed to Defendant Nos.2 and 3 for the delay in filing the petition under Order IX Rule 13 CPC. It is his submission that the Hon'ble Supreme Court made it clear that legislature has conferred power to condone delay by incorporating Section 5 to the Limitation Act. Ordinarily, a litigant does not stand to benefit by delayed lodging of an application or appeal. Refusing to condone delay can result in a meritorious matter being thrown out at very threshold. When delay is condoned the highest that can happen is that, a cause would be decided on merits after hearing the parties. Every day delay must be explained does not mean that, a

pedantic approach should be made. He also drew attention of this Court to the findings of learned Senior Civil Judge to arrive at the impugned conclusion. Hence, Mr. Tripathy, learned counsel for Opposite Parties submitted that learned Senior Civil Judge has committed no error in exercising the discretion by setting aside the *ex parte* judgment and decree. The Defendant Nos. 2 and 3 have also paid the cost of Rs.50,000/- as condition precedent for setting aside the *ex parte* judgment and decree. It is his submission that the subject matter of dispute is a valuable piece of land, which is situated at prime locality of the Bhubaneswar town, which is the State's capital. Loss, if any, caused to the Plaintiff has already been compensated on payment of a hefty cost. He therefore prayed for dismissal of the CMP.

6. 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 non- appearance 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.

7. Mr. Tripathy, learned counsel for the Opposite Party Nos.1 and 2 (Defendant Nos.2 and 3) made an endeavour to justify the delay in filing the petition under Order IX Rule 13

CPC stating that Defendant Nos. 2 and 3 had no knowledge about the *ex parte* decree and they should not suffer for the laches, if any, on the part of their Counsel. Learned Senior Civil Judge on assessment of the materials available on record observed that P.W.-2 sustained fracture of femur in an accident and P.W.3 suffered from ligament fracture. In support of his case, he relied upon the ratio decided in **Rafiq V. Munshilal**, reported in **(1988) 2 SCC 388**, wherein, it is held as follows:-

“.....What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K.Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanor of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted.”

He also relied upon the ratio in **Bank of India V. Mehta Brothers and others**, reported in **AIR 1991 Delhi 194**, in which it is held that the real test for adjudication of a petition under Order IX Rule 13 CPC is whether the litigant upon learning about the *ex parte* decree takes immediate steps in filing the application seeking setting aside of *ex parte* decree. He also relied upon the case law in **Nakula Swain (supra)**, in which this Court held that the Courts have to judge the application under Order IX Rule 13 CPC on the touchstone of pragmatic parameters. Also relying upon the ratio in the case of **N. Balakrishnan (supra)**, Mr. Tripathy submitted that the Law of limitation is founded on public policy. Rules of limitation are not meant to destroy the right of parties. Primary function of the Court is to adjudicate the dispute and to advance substantial justice. Further, in the said case, it is held that be it an appeal or any other case, if it is proved that there are some lapses on the part of the litigant concerned, but that alone is not enough to turn down his plea and to shut the door against him.

8. Suffering of P.Ws.-2 and 3 is of little significance, when on assessment of evidence learned Senior Civil Judge came to a categorical finding that the Defendant Nos. 2 and 3 had no knowledge about passing of the *ex parte* decree till 4th January, 2018. On scrutiny of materials available on record vis-à-vis applying the avowed principle of law as discussed above, it brings out a clear picture that Defendant Nos.2 and 3 on getting information of the *ex parte* decree immediately took step for setting aside the same. The material available on record of course suggests that there are certain laches on the part of learned counsel to whom Defendant Nos.2 and 3 entrusted the case and relied upon. Another aspect is clear from scrutiny of materials on record that Defendant Nos.2 and 3 had no knowledge of the *ex parte* decree till 4th January, 2018 when they were informed by Mr. Mohapatra, learned counsel engaged by them. Lack of knowledge is also a sufficient cause for condonation of delay. Due to lack of knowledge of the *ex parte* decree, the Defendant Nos. 2 and 3 could not take steps to set aside the same within the statutory period. Explanation of sufficient cause for non-appearance of Defendant Nos.2 and 3 on the date when the suit was called

on for hearing is also because of lack of knowledge. In my view lack of knowledge having been established prepondering the probabilities, this Court is of the considered opinion that Defendant Nos. 2 and 3 have shown sufficient cause for their non-appearance on the date when the suit was called for hearing. On a close reading of the impugned order, it appears that learned Senior Civil Judge has made his best endeavour and discussed the matter in detail with reference to materials available on record to set aside the *ex parte* decree. When this Court is satisfied that the discretion has been exercised judiciously by the learned Senior Civil Judge, no interference is warranted with regard to setting aside the *ex parte* decree.

9. The next issue that arises for consideration is that as a consequence of setting aside of the *ex parte* decree whether Defendant Nos.2 and 3 can be permitted to file their written statement and contest the case. Law is no more *res integra* on this issue. As held in the case of **Sitanjali Jena (supra)**, this Court relying upon the ratio decided in the case of **Sangram Singh V. Election Tribunal, Kotah and another**, reported in **AIR 1955 SC 425** and **Arjun Singh V. Mohindra Kumar and others**, reported in **AIR 1964 SC 993**, has held as under;-

“8. Thus the logical sequitur of the analysis made in the preceding paragraph is that when an ex parte decree is set aside and the suit is restored to file, the defendants cannot be relegated back to the position prior to the date of hearing of the suit. He would be debarred from filing any written statement in the suit, but then he can participate in the hearing of the suit inasmuch cross-examine the witness of the plaintiff, adduce evidence and address argument.”

10. In view of the above, I have no hesitation to hold that though the *ex parte* decree is set aside, the Defendant Nos.2 and 3 cannot be permitted to file their written statement. They can only take part in the hearing of the suit without propounding their own case. However, they can advance their argument on the basis of the materials available on record only.

11. With the aforesaid observation, the CMP is disposed of.

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