
(2007) 03 OHC CK 0026
In the Orissa High Court

Nishamani Bewa and Others

APPELLANT

Vs

Narayan Sethi and Another

RESPONDENT

Date of Decision : 14-03-2007

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2007) 104 CLT 217 : (2007) 1 OLR 658

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.M. Das, J.—This appeal under Order 43 Rule 1-(d) CPC has been preferred against the order refusing to set aside the decree passed in T.S. No. 520 of 1987 by the learned 2nd Additional Civil Judge, (Senior Division), Cuttack.

2. T.S. No. 520 of 1987 was filed by the predecessor-in-interest of the respondents for partition of the suit property. The said plaintiff having expired during the pendency of the suit, the present respondents were substituted as plaintiffs. The said suit was filed against the predecessor-in-interest of the appellants 1 to 4 and the predecessor-in-interest of the appellants 5 and 6 who have also been substituted during the pendency of the suit.

3. The appellants as defendants filed a joint written statement stating, inter alia, that all the co-sharers of each of the branch are possessing properties in respect of their shares which was already partitioned by metes and bounds and in view of such previous partition, the suit filed by the plaintiff was not maintainable. It is the further case of the appellants that the original defendant, namely, Bhagaban Sethi was looking after the said suit on behalf of the defendants. On 18.6.1992 the said Bhagaban Sethi expired and the appellants 1 to 4 were substituted on 10.8.1992. The written statement was filed during the lifetime of said Bhagaban Sethi after whose death the suit was being looked after by the defendant No. 2, Ghana Sethi who is the predecessor-in-interest of the

appellants 5 and 6. During the course of proceeding on 6.7.2001, the respondents filed a petition under Order 18 Rule-1 CPC praying therein that the defendants should first begin the evidence as they have pleaded a previous partition and the said petition was fixed to 30.7.2001 for filing of objection and hearing. Due to serious illness of late Ghana Sethi, he could not file objection on behalf of the defendants and on 8.8.2001 in the absence of the defendants as well as their advocate, the petition filed under Order 18 Rule-1 CPC was allowed by the learned trial Court and the defendants were directed to begin the case by adducing evidence fixing the case to 16.8.2001 for recording of evidence from the side of the defendants. The defendants remained absent from 16.8.2002 to 20.11.2001 and no steps were taken on their behalf. It is pertinent to mention that by orders dated 28.7.1998 and 27.6.2000, all the other defendants were set ex parte, except the appellants-defendants. Though the present appellants were not present even on 30.7.2001 to which date, the case was fixed for filing of objection to the petition under Order 18 Rule-1 CPC filed by the plaintiff, the order sheet discloses that the appellants were not set ex parte at any point of time. The further case of the appellants is that as the said late Ghana Sethi, the original defendant No. 2 was looking after the case and he fell seriously ill from first week of July, 2001 till the second week of February, 2002, he was unable to attend the Court nor give instruction to the other defendants to appear before the Court. Ultimately said Ghana Sethi expired on 15.2.2002. A preliminary decree in the suit was passed on 3.12.2001 pursuant to the judgment dated 20.11.2001. In the judgment, however, it has been stated that the suit is decreed preliminarily on contest against the defendant Nos. 1(a), 2, 23, 24 and 25 and ex parte against the other defendants. As the said judgment as well as the decree was not within the knowledge of the appellants, on receiving notice of the final decree proceeding initiated by the plaintiffs, they could come to know about the passing of the preliminary decree. On 2.1.2003, the appellants filed an application under Order 9 Rule-13 CPC for setting aside the preliminary decree, which according to the appellants, was an ex parte decree. An objection was filed to the said Misc. Case and after hearing the same, the learned trial Court rejected the said application as well as the petition filed u/s 5 of the Limitation Act for condoning the delay in filing the said application. Being aggrieved by the said order the appellants have preferred the present appeal.

4. It was contended in the objection filed by the respondents, to the application under Order 9 Rule 13 CPC and the application u/s 5 of the Limitation Act that the appellants had knowledge about the proceeding of the suit inasmuch as they having entered appearance and filed their written statement, the suit should be held to have been decreed on contest and, therefore, the application under Order 9 Rule-13 CPC is not maintainable. It was further contended that the delay in filing the restoration petition has not been explained by the appellants.

5. The learned trial Court relying on the decision in the case of B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and Others, in the facts of this case, came to the conclusion that even though it is mentioned in the judgment and the decree that

it was passed on contest against the present appellants, but the same should be taken to be an ex parte decree and the application under Order 9 Rule 13, CPC at the behest of the appellants, is maintainable.

6. While dealing with the question of delay in filing the said application by the appellants, the learned trial Court came to the conclusion that the first part of Articles 123 of the Limitation Act would be applicable and the petition for setting aside the ex parte decree was required to be filed within 30 days from the date of the decree, i.e., 20.12.2001. The same having been filed on 2.1.2003, along with an application for condonation of delay, it was incumbent on the part of the appellants to explain the delay from 20.12.2001 which was the last date for filing the application, till 2.1.2003 on which day, the said application was filed. The learned trial Court concluded that the said delay has not been explained by the appellants, much less, sufficiently in the petition u/s 5 of the Limitation Act nor in the evidence of P.W. 1. The learned trial Court has further held that if at all Ghana Sethi was looking after the case on behalf of the defendants, he having expired two months after expiry of the period of limitation the said defendant could have filed the petition in time and the present appellants having knowledge about the proceeding of the suit, should have filed the petition for restoration immediately after the death of Ghana Sethi. Ultimately the learned Court below holding that the delay has not been explained by the appellants, came to the conclusion that the petition under Order 9 Rule 13 CPC is barred by limitation and hence, it is not maintainable in law. As the learned Court below, has already come to the conclusion that the preliminary decree which is sought to be set aside was in the nature of an ex parte decree and the petition under Order 9 Rule 13 CPC was maintainable at the instance of the appellants for restoration of the suit, this Court is not inclined to enter into the said question as to Whether the preliminary decree passed was an ex parte decree or a contested one.

7. The only point to be examined in the present appeal is as to whether the learned Court below has acted erroneously in rejecting the plea of the appellants as made out in the petition u/s 5 of the Limitation Act and as explained in the evidence of P.W. 1.

8. By the interim order dated 28.6.2004, this Court directed tha the final decree shall not be sealed and signed until further orders.

I have perused the application u/s 5 of the Limitation Act and the evidence adduced by P.W. 1 on behalf of the appellants in support of the application under Order 9 Rule 13, CPC and the application u/s 5 of the Limitation Act. In the said petition for condonation of delay, it was specifically stated that the original defendant No. 2, Ghana Sethi, was looking after the case who died in the year 2003 for which it was not within the knowledge of the appellants that a preliminary decree has been passed by the Court. In the evidence of the P.W. 1, who is the appellant No. 6 in this appeal, has stated that his father Ghana Sethi was seriously ill for about 6 to 7 months before his death in February, 2002 and the said Ghana Sethi was looking after the suit on behalf of all the defendants.

He has further stated that during the illness of his father, he was unable to walk and was bed-ridden. The death certificate has been exhibited as Ext.1. From the cross-examination, it appears that the said witness even did not have knowledge regarding details of the suit and that he was residing in Bhubaneswar. He has also denied the suggestion put to him that his father late Ghana Sethi knew about the passing of the preliminary decree, it appears that the conclusion of the learned Court below that after death of Ghana Sethi the appellants had knowledge about the proceeding is based on no material. It is a fact that no medical evidence has been adduced by the appellants in support of the illness of late Ghana Sethi but that cannot be construed to be fatal to the case of the appellants as there is no other material to show that the statement made by the witness on behalf of the appellants regarding illness of late Ghana Sethi has been rebutted.

9. It is well settled in law that in an application u/s 5 of the Limitation Act, each day, each hour and each minute of the period of delay is not required to be explained. The learned Court below should have appreciated the case of the appellants basing on the theory of pre-ponderance of probability and not in a technical manner as has been done by him and, that too, in an application for setting aside a preliminary decree passed in a suit for partition, which has far reaching consequences.

10. This Court is of the view that considering all aspects of the matter and, more particularly, that the suit was for partition of joint family properties, the learned Court below should have allowed the application under Order 9 Rule 13 CPC by setting aside the preliminary decree passed in the suit. The impugned order dated 16.9.2003 passed in CM. Appeal No. 2 of 2003 by the Second Additional Civil Judge (Senior Division), Cuttack, arising out of T.S. No. 520 of 1987 is set aside and consequently, the ex parte judgment and the preliminary decree dated 20.11.2001 and 3.12.2001 respectively are set aside restoring the suit to the position as on 20.11.2001. The appellants are directed to appear before the learned Court below on the date to be fixed by the said Court and adduce their evidence. The learned Court below after closure of the evidence adduced on behalf of the appellants shall proceed to record the evidence to be adduced by the respondents-plaintiffs and after hearing, pass the judgment in the suit afresh. The evidence already recorded on behalf of the plaintiffs-respondents stands expunged.

11. The appeal is accordingly allowed but in the circumstances without costs.