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HIGH COURT OF ORISSA: CUTTACK

CMP NO.812 OF 2022

(In the matter of an application under
Article 227 of the Constitution of India, 1950)

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Krutibas Das ... ***Petitioner***

-versus-

Shree Shree Gopaljee Mahaprabhu of Village Sonepur ... ***Opposite Party***

Advocate for the Parties

For the Petitioner : Mr. Soumya Mishra, Advocate
For Opp. Party : Mr. Amit Prasad Bose, Advocate

CORAM:
JUSTICE KRUSHNA RAM MOHAPATRA

Heard and disposed of on 13.02.2024

JUDGMENT

1. This matter is taken up through hybrid mode.

2. Judgment dated 30th June, 2022/5th July, 2022 (Annexure-8) passed by learned District Judge, Sonepur in Civil Revision No.02 of 2015 is under challenge in this CMP, whereby setting aside order dated 8th April, 2015 (Annexure-6) passed by learned Senior Civil Judge, Sonepur in CMA No.18 of 2011 allowed an application under Order IX Rule 13 CPC.

3. CS No.97 of 2006 was filed by the sole Opposite Party for permanent injunction. Before service of summon in the suit the sole Defendant died. Thus, notices were issued to the LRs of the

Defendant, but they failed to appear. Subsequently, substituted notice under Order V Rule 20 CPC was also taken by publication of notice in a widely circulated newspaper in the locality. Thus, notices on the legal heirs of the sole Defendant were treated to be sufficient. Subsequently, the LRs. of original Defendants were *ex-parte* and learned trial Court proceeded with the suit and decreed CS No.97 of 2006 *ex-parte* vide judgment dated 17th May, 2011. During pendency of the suit, the Defendants (legal heirs of the original Defendant) had alienated the property in favour of the Petitioner. Thus, being a *lis pendens* purchaser, the Petitioner filed an application under Order IX Rule 13 CPC in CMA No.18 of 2011 on 27th June, 2011 (Annexure-4) to set aside the *ex-parte* decree. There was delay in filing CMA No. 18 of 2011. Petitioner explained the delay at para-7 of the petition under Order IX Rule 13 CPC which reads as under:-

> *"7. That as the petitioner and his vendors were not aware of pendency of the present suit, they have not appeared earlier in the suit and the ex-parte order only gamete the knowledge of the petitioner only on 24.6.2011 when the plaintiff of the suit intended to take forcible possession and disclosed about the ex-parte judgment. Thus the limitation will run from 24.6.2011 or in the alternative condoning the delay if any for filing of this petition, the same needs to be admitted."*

3.1 Objection (Annexure-5) to the petition under order IX Rule 13 CPC was filed by the Plaintiff-Opposite Party. The petition under Order IX Rule 13 CPC was allowed vide order dated 8th April, 2015 (Annexure-6). Assailing the same, the Plaintiff-Opposite Party filed Civil Revision No.02 of 2015, which was allowed vide order under Annexure-8 setting aside the order under Annexure-6. Hence, this CMP has been filed.

4. In course of hearing of the CMP, an issue cropped up for consideration as to whether a *lis pendens* purchaser can maintain an application under Order IX Rule 13 CPC. Mr. Mishra, learned counsel for the Petitioner relied upon the case of ***Raj Kumar Vrs. Sardari Lal and others***, reported in (2004) 2 SCC 601, wherein it is held as under:

> *"13. The appellant cannot dispute that the decree though passed against Respondents 2 and 3 could be executed even against Respondent 4, he being a lis pendens transferee though not having been joined in the suit as a party. Such a person can prefer an appeal being a person aggrieved. Clearly, the person who is liable to be proceeded against in execution of the decree or can file an appeal against in decree, though not a party to the suit or decree, does have locus standi to move an application for setting aside an ex parte decree passed against the person in whose shoes he has stepped in. In the expression employed in Rule 13 of Order 9 CPC that "in any case in which a decree is passed ex parte against a defendant, he may apply... for an order to set it aside", the word "he" cannot be construed with such rigidity and so restrictively as to exclude the person, who has stepped into the shoes of the defendant, from moving an application for setting aside the ex parte decree especially in the presence of Section 146 CPC."*
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> *(emphasis supplied)*

5. In view of the case law in ***Raj Kumar (Supra),*** there cannot be any iota of doubt that a *lis pendens* purchaser can also maintain an application under Order IX Rule 13 CPC. Mr. Bose, learned counsel for the Opposite Party also does not dispute the same.

6. Mr. Mishra, learned counsel for the Petitioner further submits that learned revisional Court took exception to the fact that the petition under Order IX Rule 13 CPC was filed with a delay of ten days from the date of the judgment without filing a separate application under Section 5 of the Limitation Act, 1963 for condonation of such delay. Thus, it is held that learned trial Court

has not properly exercised the jurisdiction vested in it. As such, learned Revisional Court allowed the appeal thereby set aside the order under Annexure-6.

7. Mr. Mishra, learned counsel for the Petitioner relied upon the decision in ***Sesh Nath Singh and another vrs. Baidyabati Sheoraphuli Co-operative Bank Limited and another***, reported in (2021) 7 SCC 313, wherein the Hon'ble Supreme Court held as under:

> *"61. Section 5 of the Limitation Act, 1963 does not speak of any application. The section enables the court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the court or tribunal to weigh the sufficiency of the cause for the inability of the appellant applicant to approach the court/tribunal within the time prescribed by limitation, there is no bar to exercise by the court/tribunal of its discretion to condone delay, in the absence of a formal application.*
> *62. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, a Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the court is satisfied that the appellant applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay*

> *under Section 5 of the Limitation Act as of right, without making an application."*
>
> *(emphasis supplied)*

7.1 Learned counsel for the Petitioner also relied upon the case of ***The Executive Engineer (Electrical), NESCO Utility, Rairangpur Electrical Division, Rairangpur, Mayurbhanj vrs. M/s. Maa Kirandevi Agro Foods Private Limited and another***, reported in (2021) III ILR-CUT-590, in which this Court held as under:

> *"10……..Further, Section 5 does not contemplate any application. In absence of a formal application, the provision can also be invoked, if the applicant has explained the delay providing sufficient cause. As discussed above, the writ petition in W.P.(C) No.22281 of 2015 was filed on 11th December, 20215 against final assessment order dated 12th November, 2015 and disposed of on 22nd December, 2015. The appeal was filed on 6th January, 2016. Thus, the reason for not filing the appeal within the statutory period has been well-explained in the memorandum of appeal. As such, this Court finds that the Appellate Authority has committed no error in deciding the appeal on merit."*

8. He, therefore, submits that a separate application for condonation of delay is not necessary when sufficient cause for not filing the application under Order IX Rule 13 CPC has been shown in the petition itself. The same is sufficient consideration for condonation of delay in filing the petition.

9. It is his submission that at para 7 of the petition under Order IX Rule 13 CPC, delay in filing such petition has been explained. Thus, learned Revisional Court should not have taken any exception to the same. He, therefore, submits that the impugned order is not sustainable and is liable to be set aside.

10. It is further submitted that when the Petitioner, being a *lis pendens* purchaser has stepped into the shoes of his vendors, he has a

right to defend his title in the suit. When learned trial Court on consideration of the materials available granted the opportunity by setting aside the *ex-parte* decree, learned revisional Court should not have interfered with the same by sitting over it as an appellate authority. He, therefore, prays for setting aside the impugned order under Annexure-8. In support of his submission, learned counsel for the Petitioner also relied upon the case of ***Frost International Limited vrs. Milan Developers and Builders Private Limited and another***, reported in (2022) 8 SCC 633, wherein it is held as under:-

> *"29.1. Gajendragadkar, CJ., in a judgment passed by the five-Judge Bench of this Court in Pandurang Dhondi Chougule v. Maruti Hari Jadhav dealt with a the question of jurisdiction under Section 115 CPC, as follows: (AIR p. 155, para 10)*
> *"10. The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Section 115."*
> *29.2. Nariman, J. while discussing Section 115 CPC and proviso thereto held that revision petitions filed under*

> *Section 115 CPC are not maintainable against interlocutory orders in Tek Singh v. Shashi Verma. The following observations were made in the said case: (SCC p. 681, para 6)*
> *"6. Even otherwise, it is well settled that the revisional jurisdiction under Section 115 CPC is to be exercised to correct jurisdictional errors only. This is well settled. In D.L.F. Housing & Construction Co. (P) Ltd. v. Sarup Sing/r this Court held: (SCC pp. 811-12, para 5)*
> *5. The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision. and not to errors either of fact or of law, after the prescribed formalities have been complied with."*

11. Mr. Bose, learned counsel for the Plaintiff-Opposite Party submits that there cannot be any doubt with regard to position of law as raised by learned counsel for the Petitioner. But learned revisional Court on a detailed discussion of the materials on record, has stated that learned trial Court has exercised the power under Order IX Rule 13 CPC erroneously. When there is an erroneous exercise of jurisdiction vested in the trial Court, there cannot be any doubt that revisional Court may interfere with the same taking into consideration the facts and circumstances involved therein. This

CMP being in the guise of a second revision is not maintainable in the eye of law. Hence, he prays for dismissal of the CMP.

12. Considering the submissions made by learned counsel for the parties and on perusal of the record, it appears that learned revisional Court exercised the power under Section 115 CPC on the ground that no separate application was filed along with the petition under Order IX Rule 13 CPC. Thus, it opined that when learned trial Court has exercised its jurisdiction erroneously a revision would be maintainable.

13. In view of the case law in ***Sesh Nath Singh (supra)*** and ***M/s. The Executive Engineer (Electrical), NESCO Utility, Rairangpur Electrical Division, Rairangpur, Mayurbhanj (supra),*** there cannot be any iota of doubt that in each case, a separate application for condonation of delay is not necessary to be filed providing explanation for not filing the proceeding in time for which condonation of delay is sought for. Law is well-settled in the aforesaid case laws that even if sufficient cause for condonation of delay has been stated in the petition for which the condonation of delay is sought for, the Court has the discretion to consider the same, while entertaining a prayer for condonation of delay. In the instant case, the Petitioner has explained the delay at para 7 of the petition under Order IX Rule 13 CPC. Learned revisional Court has not stated that the explanation at para 7 is not sufficient to condone the delay of only ten days in filing the petition under Order IX Rule 13 CPC. Limitation may bar a remedy, but does not take away the right or title accrued to a party.

14. True it is that, a discretionary power under Section 115 CPC should be exercised in exceptional cases when it satisfies the requirements of Section 115 CPC itself. Learned revisional Court should always keep in mind that it is not deciding an appeal and start to re-appreciate the factual aspects of the matter.

15. On perusal of the order under Annexure-6 passed by learned trial Court, it appears that the same is well-discussed one and in exercise of its jurisdiction properly, the application under Order IX Rule 13 CPC was allowed. When an opportunity has been given to the Petitioner to contest the suit, it should not have been taken away so lightly by the learned revisional Court.

16. In view of the discussions made above, this Court has no hesitation to hold that the impugned order under Annexure-8 is not sustainable.

16.1 Accordingly, the same is set aside. But in the facts and circumstances, there shall be no order as to costs.

Issue urgent certified copy of this judgment on proper application.

(K.R. Mohapatra)
Judge

High Court of Orissa, Cuttack
Dated 13th February, 2024/ Rojalin