

SUDHIR RANJAN PATRA (DEAD) THR. LRS. & ANR. A

v.

HIMANSU SEKHAR SRICHANDAN & ORS.

(Civil Appeal No. 3641 of 2022)

MAY 17, 2022 B

[M. R. SHAH AND B.V. NAGARATHNA, JJ.]

Code of Civil Procedure, 1908: Ord. IX r. 13 – Setting aside ex-part decree – On facts, application u/Ord. IX r. 13 by the appellants seeking condonation of delay, setting aside of an ex-part decree and also to allow them to file written statement and to take up the suit on merits – Trial court allowed the application by condoning the delay and set aside the ex-part decree – In appeal, the High Court though upheld the order passed by the trial court, it held that the appellants cannot be permitted to file their written statement – On appeal, held: Once the ex-part decree is set aside and the suit is restored to file, appellants cannot be relegated back to the position prior to the date of hearing of the suit – It should have been left to the trial court to consider the prayer of appellants whether to allow them to file written statement or not, which was also prayed in the application – There was no order passed by the trial court on the prayer made by the appellants to allow them to file written statement – Trial court condoned the delay and set aside the ex-part decree and the said order of condonation of delay and setting aside the ex-part decree was the subject matter before the High Court – Thus, the impugned judgment and order passed by the High Court that the appellants cannot be permitted to file their written statement is beyond the scope and ambit of the petition filed before the High Court, thus, unsustainable and is quashed and set aside – Issue whether appellants may be allowed to file their written statement or not, remanded to the trial court.

Allowing the appeals, the Court G

HELD: 1.1 It is true that as per the law laid down by this Court in *Sangram Singh's case* and *Arjun Singh's case* when an ex-part decree is set aside and the suit is restored to file, the defendants cannot be relegated to the position prior to the date

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- A of hearing of the suit when he was placed ex-parte. 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 and address arguments. In the instant case, by filing the CMA under Order IX Rule 13,
- B appellants-original defendant Nos. 2 and 3 not only prayed to set aside the ex-parte decree but also prayed to allow them to file written statement. There was no order and/or decision by the trial court on the second prayer, namely, to allow defendant Nos. 2 and 3 to file written statement or not. Therefore, once the ex-parte decree is set aside and the suit is restored to file, the
- C defendants cannot be relegated back to the position prior to the date of hearing of the suit in that case also, it should have been left to the trial court to consider the prayer of defendant Nos. 2 and 3 whether to allow them to file written statement or not, which was also prayed in the CMA. The trial court while passing order, condoned the delay and set aside the ex-parte decree and the said order of condonation of delay and setting aside the ex-parte decree was the subject matter before the High Court. Therefore, the further observations made by the High Court that defendant Nos. 2 and 3 cannot be permitted to file their written statement can be said to be beyond the scope and ambit of the CMP filed
- D before the High Court. Under the circumstances, the impugned judgment and order passed by the High Court is unsustainable and the issue/question whether defendant Nos. 2 and 3 may be allowed to file their written statement or not, would have to be remanded to the trial court. [Para 6][386-G-H; 387-A-F]
- F 1.2 The impugned judgment and order passed by the High Court to the extent of observing that though the ex-parte decree is set aside, defendant Nos. 2 and 3 cannot be permitted to file their written statement is quashed and set aside. The trial court to consider the prayer of defendant Nos. 2 and 3 whether to allow/ permit them to file their written statement or not, in accordance
- G with law and on its own merits. [Para 7][387-G-H]

Sangram Singh Vs. Election Tribunal, Kotah and another AIR 1955 SC 425 : [1955] SCR 1; Arjun Singh Vs. Mohindra Kumar and others AIR 1964 SC 993 : [1964] SCR 946 – held partly inapplicable.

<u>Case Law Reference</u>			A
[1955] SCR 1	held partly inapplicable	Para 6	
[1964] SCR 946	held partly inapplicable	Para 6	

CIVIL APPELLATE JURISDICTION : Civil Appeal No.3641
of 2022.

From the Judgment and Order dated 04.02.2022 of the High Court
of Orissa at Cuttack in CMP No.1423 of 2019.

With

Civil Appeal No.3642 of 2022.

Vijay K. Jain, Suresh Chandra Tripathy, Ms. Shailja Kulshreshtha,
Nitesh Bhandari, Prabhat Kumar Rai, Shourajeet Chakravarty, Ms.
Aprajita Bhardwaj, Naveen Kumar, Advs. for the appearing parties.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment
and order dated 04.02.2022 passed by the High Court of Orissa at Cuttak
in CMP No. 1423/2019, by which, though the High Court has confirmed
the order passed by the learned Trial Court setting aside the *ex-parte*
decree in exercise of powers under Order IX Rule 13 of Code of Civil
Procedure (CPC), the High Court has observed and held that appellants
herein – defendant Nos. 2 and 3 cannot be permitted to file their written
statement, the appellants herein – original defendant Nos. 1 to 3 have
preferred the present appeals.

2. The facts leading to the present appeals in a nutshell are as F
under: -

2.1 That respondent No. 1 herein – original plaintiff instituted a
suit for declaration of his right, title, interest and possession over the suit
schedule land being Civil Suit No. 1783/2011. The original plaintiff also
prayed for a decree to declare that original defendant No. 2 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 original defendant Nos. 1 to 3 was also sought for.
The appellants herein – original defendant Nos. 2 and 3 appeared in the G

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- A suit on 20.03.2012 and filed a petition for time to file their written statement. However, in spite of several adjournments, they did not file written statement. That the appellants herein – original defendant Nos. 2 and 3 did not file their written statement. Thereafter, the issues were framed by the learned Trial Court. On 27.03.2017, the plaintiff filed their evidence in examination in chief by an affidavit. On 04.07.2017, when the suit was called on for hearing, appellants herein – original defendant Nos. 2 and 3 were absent and therefore, were set ex-parte. Thereafter, on behalf of the plaintiff, PW-1 came to be examined. The case was posted to 15.07.2017 for argument. On that date, original defendant Nos. 1 to 3 also filed an application for adjournment for which the suit was adjourned to 17.07.2017, on which date, the argument was heard and judgment was pronounced on 18.07.2017. The learned Trial Court passed an ex-parte decree.

Subsequently, the appellants herein – original defendant Nos. 2 and 3 filed CMA No. 31/2018 under Order IX Rule 13 of 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. The appellants herein – original defendant Nos. 2 and 3 also prayed to allow the filing of written statement and to take up the suit on merits. By order dated 05.12.2019, the learned Trial Court allowed the CMA by condoning the delay.

- E 2.2 Feeling aggrieved and dissatisfied with order dated 05.12.2019 passed by the learned Trial Court allowing CMA No. 31/2018, the original plaintiff – respondent No. 1 herein filed CMP No. 1423/2019 before the High Court. By the impugned judgment and order, though the High Court has confirmed the order passed by the learned Trial Court condoning the delay and setting aside the ex-parte decree, the High Court has also passed an order that on setting aside the ex-parte decree and consequently the suit being restored to file, defendant Nos. 2 and 3 cannot be permitted to file their written statement and that they can only take part in the hearing of the suit without propounding their own case. The High Court G has also observed that they can advance their argument on the basis of the materials available on record only.

2.3 Feeling aggrieved with the judgment and order passed by the High Court to the extent of observing that defendant Nos. 2 and 3 cannot be permitted to file their written statement and that they can only take part in the hearing of the suit without propounding their own case, original

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defendant Nos. 1 to 3 – appellants herein have preferred the present A appeals.

3. Learned counsel appearing on behalf of the appellants herein – original defendant Nos. 2 and 3 has vehemently submitted that in the facts and circumstances of the case the High Court has committed a grave error in passing the order that appellants herein - defendant Nos. 2 and 3 cannot be permitted to file their written statement. B

3.1 It is vehemently submitted that once the suit was restored to file by setting aside the ex-parte decree which has been upheld by the High Court, thereafter, it was not open for the High Court to pass a further order that on setting aside the ex-parte decree and restoring the suit to file, defendant Nos. 2 and 3 cannot be permitted to file their written statement. C

3.2 It is submitted that what was challenged before the High Court was the order passed by the learned Trial Court condoning the delay and setting aside the ex-parte decree. It is submitted that therefore, the impugned order passed by the High Court observing that defendant Nos. 2 and 3 cannot be permitted to file their written statement is beyond the scope and ambit of CMP filed before the High Court. D

3.3 It is submitted that once the suit was restored to file by setting aside the ex-parte decree and no order was passed by the learned Trial Court on whether the written statement be permitted to be taken on record or not, the High Court ought not to have observed anything on the same and ought to have left it to the learned Trial Court. E

3.4 It is submitted that in the present case no order was passed by the learned Trial Court on whether the written statement be taken on record or not, the decisions relied upon by the High Court in the case of **Sangram Singh Vs. Election Tribunal, Kotah and another**; AIR 1955 SC 425 and **Arjun Singh Vs. Mohindra Kumar and others**; AIR 1964 SC 993 shall not be applicable to the facts of the case on hand. F

4. Present appeals are vehemently opposed by Shri Nitesh Bhandari, learned counsel appearing on behalf of respondent No. 1 herein –original plaintiff. G

4.1 It is submitted that despite the fact that a number of opportunities were given to defendant Nos. 2 and 3 to file their written H

- A statement between 2012 to 2017 (till the ex-parte decree was passed). Hence, the High Court was justified in passing the impugned order by observing that defendant Nos. 2 and 3 cannot be permitted to file their written statement on setting aside the ex-parte decree.

4.2 It is submitted that as held by this Court in the case of **Sangram**

- B **Singh** (*supra*) and **Arjun Singh** (*supra*) 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 and he would be debarred from filing any written statement in the suit. It is submitted that therefore, the impugned order passed by the High Court is absolutely in consonance with the law laid down by this Court in the case of **Sangram Singh** (*supra*) and **Arjun Singh** (*supra*).

5. We have heard learned counsel appearing on behalf of the respective parties at length.

6. At the outset it is required to be noted that when the appellants

- D – original defendant Nos. 2 and 3 filed CMA No. 31/2018 under Order IX Rule 13 of CPC they prayed to condone the delay as well as to set aside the ex-parte decree and also to allow filing of the written statement and to take up the suit on merits. By order dated 05.12.2019, the learned Trial Court allowed CMA No. 31/2018 and condoned the delay and set aside the ex-parte decree subject to cost of Rs. 25,000/- each to be paid to the plaintiff. From order dated 05.12.2019, it does not appear that any further order was passed by the learned Trial Court on whether by setting aside the ex-parte decree, defendant Nos. 2 and 3 may be permitted to file written statement or not. The order passed by the learned Trial Court condoning the delay and setting aside the ex-parte decree has been confirmed by the High Court by passing the impugned judgment and order. However, the High Court has observed that on setting aside the ex-parte decree and restoring the suit to file, defendant Nos. 2 and 3 cannot be permitted to file the written statement. Reliance is placed upon the decisions of this Court in the case of **Sangram Singh** (*supra*) and **Arjun Singh** (*supra*). However, it is true that as per the law laid down by this Court in the case of **Sangram Singh** (*supra*) and **Arjun Singh** (*supra*) when an ex-parte decree is set aside and the suit is restored to file, the defendants cannot be relegated to the position prior to the date of hearing of the suit when he was placed ex-parte. 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 and address arguments. However, in our view, in the facts and circumstances of the case, the decisions of this Court in the case of **Sangram Singh** (supra) and **Arjun Singh** (supra) shall not be fully applicable. In the present case by filing the CMA under Order IX Rule 13, appellants herein – original defendant Nos. 2 and 3 not only prayed to set aside the ex-parte decree but also prayed to allow them to file written statement. As observed above, there was no order and/or decision by the learned Trial Court on the second prayer, namely, to allow defendant Nos. 2 and 3 to file written statement or not. Therefore, once the ex-parte decree is set aside and the suit is restored to file and even as per the decisions of this Court in the case of **Sangram Singh** (supra) and **Arjun Singh** (supra) the defendants cannot be relegated back to the position prior to the date of hearing of the suit in that case also, it should have been left to the learned Trial Court to consider the prayer of defendant Nos. 2 and 3 whether to allow them to file written statement or not, which was also prayed in CMA No. 31/2018.

As observed hereinabove, there was no order passed by the learned Trial Court on the specific prayer made by defendant Nos. 2 and 3 to allow them to file written statement. The learned Trial Court while passing order dated 05.12.2019 condoned the delay and set aside the ex-parte decree and the said order of condonation of delay and setting aside the ex-parte decree was the subject matter before the High Court. Therefore, the further observations made by the High Court that defendant Nos. 2 and 3 cannot be permitted to file their written statement can be said to be beyond the scope and ambit of the CMP filed before the High Court. Under the circumstances, the impugned judgment and order passed by the High Court to the extent of observing that defendant Nos. 2 and 3 cannot be permitted to file their written statement is unsustainable and the issue/question whether defendant Nos. 2 and 3 may be allowed to file their written statement or not, shall have to be remanded to the learned Trial Court.

7. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court to the extent of observing that though the ex-parte decree is set aside, defendant Nos. 2 and 3 cannot be permitted to file their written statement is hereby quashed and set aside. The learned Trial Court to consider the prayer of defendant Nos. 2 and 3 whether to allow/permit them to file their written statement or not and as and when such question/issue is considered by the learned

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- A Trial Court, it will be open for respondent No. 1 – original plaintiff to resist the same and the learned Trial Court to consider the question/issue whether on setting aside the ex-parte decree, defendant Nos. 2 and 3 may be allowed/permited to file their written statement, in accordance with law and on its own merits for which we have not expressed anything in favour of either party. The learned Trial Court to consider the issue/question with respect to the prayer of defendant Nos. 2 and 3 to allow them to file their written statement within a period of three months from the first date of hearing of the suit, which shall be within a period of one month from today. The present appeals are allowed to the aforesaid extent. In the facts of the case, there shall be no order
- B as to costs.

Nidhi Jain

Appeals allowed.