

S.K.MISHRA, J.

W.P.(C) NO.4799 OF 2010 (Decided on 24.9.2010)

MANORAMA MOHANTA Petitioner.

. Vrs.

**ORISSA STATE FINANCIAL
CORPORATION & ORS.** Opp.Parties.

(A) LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – SEC.5.

(B) CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 14, RULE 1.

For Petitioner - M/s. P.K.Nanda, B.R.Pati, G.N.Rana &
Lala B.M.Chand.

For Opp.Parties - M/s. P.K.Routray, N.K.Deo, B.G.Mishra &
A.Routray (for Opp.Parties 1 and 2).

S.K.MISHRA, J. The petitioner assails the order passed by the Additional District Judge, Baripada in F.A.O. No. 54/20 of 2009 confirming the order of dismissal passed by the learned Civil Judge (Senior Division), Baripada in C.M.A. No.7 of 2007.

2. The undisputed facts leading to file this writ petition are as follows:

The present petitioner has filed a Civil Suit bearing No. 73 of 2004 in the court of the Civil Judge (Senior Division), Baripada with a prayer of perpetual injunction. The suit was posted to 24.10.2006 for filing of draft issues. On that day owing to the absence of the plaintiff due to his illness, the suit was dismissed for non-prosecution. The plaintiff-petitioner submits that on 18.01.2007 he filed an application for restoration of the suit. The opposite party no.3 appeared but did not file any written counter to the petition. The petitioner examined himself as P.W. 1. None was examined on behalf of the opposite party. However, the learned Civil Judge (Senior Division) dismissed his application for restoration of the suit under Order IX, Rule 9 of the Code of Civil Procedure, 1908, hereinafter called as “the Code”, for brevity, mainly on the ground of non-examination of the Doctor, who treated the petitioner for the ailment.

3. Thereafter, the petitioner filed an appeal under Order XLIII, Rule 1 of the Code before the learned District Judge, which was transferred to the court of Addl. District Judge, Baripada. While considering the appeal, the learned Addl. District Judge has dismissed the appeal mainly on the ground that the petition for restoration was filed after a considerable delay and no petition for condonation of delay was filed. Such orders passed by the learned Civil Judge (Senior Division) and the learned Addl. District Judge are called in question in this writ application.

4. In course of hearing, learned counsel for the petitioner submits that unless the petitioner's suit is restored to file, he will suffer irreparable loss. It is further contended that his absence in the court on the date of posting was unintentional and he was prevented by sufficient cause i.e. the illness, as has been proved by him. It is further contended that the case was not posted for hearing on that date. Hence, the learned Civil Judge (Senior Division) should not have dismissed the suit. Learned counsel for the opposite parties, on the other hand, contended that the orders passed by the learned trial and appellate court are correct, which require no interference.

5. At this stage, it is undisputed that the suit was posted for filing of draft issues on 24.10.2006. A suit should not be posted for filing of draft issues, rather a suit, after the pleadings are complete, should be posted for hearing under Order X, Rule 1 of the Code for ascertaining whether the allegations made in the pleadings are admitted or denied and for settlement of issues. There is no provision in the Code for posting of case for filing of the draft issues. Such a practice is not proper. Nevertheless, if the suit is posted for filing of draft issues, it cannot be held to be posted for hearing. Rule 8 of Order IX of the Code provides that when the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit would be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against such defendant upon such admission, and, where part of the claim has been admitted, in such case, the court shall dismiss the suit as far as it relates to the reminder. A plain reading of this provision makes it abundantly clear that a suit should be dismissed under Rule 8 of Order IX of the Code, only when the suit is posted for hearing and not for other purpose. The court can dismiss the suit for other purpose like, non-taking of steps against the defendants or failure to pay cost or where neither party appears as provided in Rule 2 and Rule 3 of Order IX of the Code. This case also does not come under Rule 2 or 3 of Order IX of the Code and hence, the learned Civil Judge (Senior Division) should not have dismissed the suit on the date it was posted for filing of draft issues.

6. The residual question which remains to be determined is whether, in this case, there is delay and, if so, what should be the consequence of the petitioner not filing of application under Section 5 of the Limitation Act, 1963. This Court feels it apposite to quote the provision which reads as follows :

“5. Extension of prescribed period of certain cases.- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.”

A reading of the provision shows that the statute does not require that a separate petition under Section 5 of the Limitation Act should be filed. It is necessary for satisfaction of the court that the applicant was prevented by sufficient cause in preferring the application in the time prescribed. In a case of this nature, where the petition under Order IX, Rule 9 of the Code itself reveals the ground on which the petitioner was prevented from filing the application in time, the Court can take cognizance of the said fact and condone the delay. It must be remembered that the provisions like Order IX,

Rule 9 of the Code and Section 5 of the Limitation Act are benevolent provisions aimed at for providing appropriate relieves to the litigant, who are prevented by sufficient cause in coming to the court in time. Procedure is the handmaid of the substantial justice. The courts exist for doing substantive justice and not to hide behind technicalities. So, the learned Addl. District Judge should have taken a boarder conspectus of the view and should have allowed the appeal.

7. It is pertinent to note that the opposite party has not taken the plea that the petition for restoration has been filed after the period of limitation. The learned Civil Judge (Senior Division) has also not considered this aspect. There is no material to show that this aspect was pointed out in the office check conducted by the Chief Ministerial office. Hence, this Court comes to the conclusion that in this case even in the absence of a separate application for condonation of delay, the same had to be condoned. The delay in filing the restoration application, is therefore, condoned.

8. It is not disputed by the opposite parties that the petitioner was ill during the period from 20.10.2006 to 17.1.2007 as he was suffering from Rheumatic Arthritics. The averment made by the petitioner goes uncontroversial. The petitioner has examined himself as a witness and has proved the medical certificate issued by the doctor. In such view of the matter, it is not necessary to examine the doctor especially when the medical certificate has been marked as exhibit without any objection. The opposite parties have also not raised any objection at the time of proving of the said Medical Certificate.

9. In view of the aforesaid facts, this Court is inclined to quash the order passed by the learned Civil Judge (Senior Division) on 04.04.2009 in C.M.A. No.7 of 2007 (Annexure-1) and the order passed by the learned Addl. District Judge in F.A.O. No.54/20 of 2003 on 11.01.2010. It is further ordered that the application under Order IX, Rule 9 of the Code filed by the petitioner is allowed, subject to payment of cost of Rs.200/- (Rupees two hundred) to be paid on or before 30.11.2010 to the opposite parties-Corporation in the trial court. The writ petition is accordingly disposed of.

10. Civil Suit No. 73 of 2004 of the court of Civil Judge, (Senior Division), Baripada be restored to file. The parties are directed to appear before the learned Civil Judge (Senior Division), Baripada on 30.11.2010.

Writ petition disposed of.