

[2022 LiveLaw \(SC\) 579](#)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
M.R. SHAH; J., B.V. NAGARATHNA, J.
CIVIL APPEAL NO. 4151 of 2022; July 11 , 2022
Nanda Dulal Pradhan & Anr. Versus Dibakar Pradhan & Anr.

Code of Civil Procedure, 1908; Order IX Rule 13 - On setting aside the ex-parte judgment and decree, though the defendants who had not filed the written statement, can be permitted to participate in the suit and cross-examine the witnesses. *Sangram Singh vs Election Tribunal, AIR 1955 SC 425. (Para 3.1)*

For Appellant(s) Mr. Sibor Sankar Mishra, AOR

For Respondent(s) Mr. Gautam Das, AOR Mr. Manoj Kumar, Adv. Mr. Dharendra Kumar Jha, Adv. Mr. Abani Kanta Sahu, Adv. Mr. C.M. Gopal, Adv. Ms. Vandana Miglani Bebartha, Adv. Mr. Sudhansu Palo, Adv. Mr. Tarun Kanti Samantaray, Adv. Mr. Sunil Kumar Sethi, Adv.

J U D G M E N T

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 16.05.2018 passed by the High Court of Orissa at Cuttack in C.M.P. No.324 of 2018 by which the High Court has observed and held that mere setting aside the ex-parte judgment and decree would serve no purpose as the defendants cannot lead evidence in the absence of written statement filed by them and consequently setting aside the order passed by the First Appellate Court who allowed the appellants herein – original defendant nos. 2 and 3 to adduce the evidence apart from setting aside ex-parte judgment and decree, the original defendant nos. 2 & 3 have preferred the present appeal.

2. That the respondent no.1 herein – original plaintiff instituted the suit in the Court of learned Civil Judge (Junior Division), Jaleswar being TS No.317 of 2003, for declaration and title. The appellants – original defendant nos. 2 & 3 moved an impleadment application in the suit which was allowed. That thereafter the application under Order I Rule 10 of the CPC was allowed on 20.02.2004. The learned Trial Court fixed the next date as 27.02.2004 for filing the written statement. The appellants herein – original defendant nos. 2 & 3 (hereinafter referred to as “original defendant nos. 2 & 3”) sought time to file the written statement on various dates. However, they failed to file the written statement even after availing several opportunities. The original defendant nos. 2 & 3 also remained absent on number of dates. Therefore, neither did they file the written statement in the suit nor did they appear before the learned Trial Court. Thereafter the learned Trial Court passed an ex-parte judgment and decree dated 31.08.2004. In the above circumstances, defendant nos. 2 & 3 filed the application under Order IX Rule 13 of the CPC to set aside the ex-parte judgment and decree. The learned Trial Court dismissed the said application and refused to set aside the ex-parte judgment and decree. Hence defendant nos. 2 & 3 preferred the appeal before the First Appellate Court. The First Appellate Court allowed the said appeal by setting aside the order passed by the learned Trial Court dismissing the application to set aside the ex-parte

judgment and decree. The First Appellate Court also passed an order to restore the suit to file and thereafter to dispose of the suit after affording sufficient opportunity to the parties to adduce their respective evidence and rebuttal evidence. Feeling aggrieved and dissatisfied with the order passed by the First Appellate Court in allowing the appeal and setting aside the ex-parte judgment and decree and the order directing that the matter be disposed of afresh in accordance with law after affording adequate opportunity to the parties to adduce their respective evidence and rebuttal evidence, the original plaintiff filed the present petition under Articles 226 and 227 of the Constitution of India before the High Court. By the impugned judgment and order and without considering and/or observing anything on the findings recorded by the First Appellate Court on whether there was a sufficient cause made out to set aside the ex-parte judgment and decree, the High Court has set aside the order passed by the First Appellate Court setting aside the ex-parte judgment and decree solely on the ground that as no written statement was filed on behalf of the defendant nos. 2 & 3 the reopening of the suit would become futile. Thereby the High Court has set aside the order passed by the First Appellate Court setting aside the ex-parte judgment and decree.

2.1 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the original defendant nos. 2 & 3 have preferred the present appeal.

3. Having heard learned counsel for the respective parties and considering the order passed by the First Appellate Court setting aside the ex-parte judgment and decree and observing that on restoration of the suit the same be disposed of after affording opportunities to the parties to adduce their respective evidence and rebuttal evidence, the same was absolutely in consonance with the law laid down by this Court in the case of **Sangram Singh versus Election Tribunal, AIR 1955 SC 425** and **Arjun Singh versus Mohindra Kumar, AIR 1964 SC 993**.

3.1 At this stage it is required to be noted that as such the First Appellate Court gave specific findings while setting aside the ex-parte judgment and decree that the defendant nos. 2 & 3 have made out a sufficient cause for setting aside the ex-parte judgment and decree. But while passing the impugned judgment and order the High Court has not at all dealt with and considered the findings recorded by the First Appellate Court, recorded while setting aside ex-parte judgment and decree. The High Court has set aside the order passed by the First Appellate Court solely on the ground that as the defendant nos. 2 & 3 did not file the written statement and contested the suit, the reopening of the suit would become futile. However, as observed and held by this Court in the case of **Sangram Singh (supra)** on setting aside the ex-parte decree and on restoration of the suit the parties to the suit shall be put to the same position as they were at the time when the ex-parte judgment and decree was passed and the defendants may not be permitted to file the written statement as no written statement was filed. However, at the same time they can be permitted to participate in the suit proceedings and cross-examine the witnesses. In that view of the matter the impugned judgment and order passed by the High Court is unsustainable. Still, on setting aside the ex-parte judgment and decree, though the defendants who had not filed the written statement, can be permitted to participate in the suit and cross-examine the witnesses. Therefore, the High Court is not right in observing that as no written statement was filed by the defendants, the reopening

of the suit by setting aside ex-parte judgment and decree will become futile. As observed hereinabove the High Court has not at all observed anything on the correctness of the order passed by the First Appellate Court setting aside the ex-parte judgment and decree on merits.

4. In view of the above and for the reason stated above the impugned judgment and order passed by the High Court is hereby set aside. The order passed by the First Appellate Court setting aside the ex-parte judgment and decree and restoring the suit is hereby restored. However, it is observed that on restoration of the suit, the defendant nos. 2 & 3 shall not be permitted to file the written statement, as though number of opportunities were given earlier, they did not file the written statement. However, at the same time they may be permitted to participate in the suit and cross-examine the witnesses and make submissions on merits. Present appeal is partly allowed to the aforesaid extent. However, in the facts and circumstances of the case there shall be no order as to costs.

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