

AFR

HIGH COURT OF ORISSA: CUTTACK

C.M.P No.64 of 2023

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

Mamata Samantaray

...

Petitioner

Mr. Bibekananda Bhuyan, Advocate

-versus-

Saraswati Patra

...

Opposite Party

Mr. Banshidhar Baug, Advocate

Date of Judgment: 03.05.2023

CORAM:

JUSTICE KRUSHNA RAM MOHAPATRA

JUDGMENT

KRUSHNA RAM MOHAPATRA, J.

1. This matter is taken up by virtual/physical mode.
2. Order dated 20th December, 2022 (Annexure-4) passed in FAO No.162 of 2022 is under challenge in this CMP, whereby learned District Judge, Khurda at Bhubaneswar dismissing the appeal, confirmed order dated 12th October, 2022 (Annexure-2) passed by 1st Additional Senior Civil Judge, Bhubaneswar in CMA No.69 of 2021 (arising out of CS No.310 of 2017) rejecting an application filed by the Petitioner under Order IX Rule 13 CPC.

3. Facts of the case are not much disputed. CS No.310 of 2017 was filed by the Plaintiff-Opposite Party for eviction, recovery of outstanding monthly rent along with arrear electricity and water charges as well as for recovery of damages from the Defendant-Petitioner. On 6th April, 2018, Plaintiff filed her evidence in affidavit serving copy thereof on the Defendant. On 11th April, 2018, the Plaintiff was examined as PW-1 and exhibited documents as Ext.1 to Ext.15. She was also partially cross-examined by the Defendant. On 8th May, 2018, evidence from the side of the Plaintiff was closed and the suit was posted to 10th May, 2018 for adducing evidence on behalf of the Defendant. After taking several adjournments, the Defendant filed an application on 25th January, 2020 to recall PW-1 for further cross-examination, which was allowed. On recall, the PW-1 was cross-examined on 15th February, 2020 and was discharged.
 - 3.1 Thereafter, the suit was posted to 17th February, 2020 for evidence on behalf of the Defendant. As the Defendant took several adjournments and did not co-operate for conclusion of the trial of the suit by adducing evidence, the Plaintiff moved this Court in CMP No.112 of 2020, which was disposed of on 6th February, 2020 with a direction to hear the suit on day-to-day basis. Accordingly, the suit was posted to 7th March, 2020 for evidence of the Defendant, on which date an application for adjournment was filed by

the Defendant. The said application was allowed subject to payment of cost of Rs.100/-.

3.2 Thereafter, the suit was adjourned to different dates from 7th March, 2020 to 4th October, 2021. On 4th October, 2021, the Defendant being personally present filed an application for adjournment, which was allowed adjourning the suit to 5th October, 2021 as a last chance for adducing evidence on behalf of Defendant. Again on 5th October, 2021, learned Advocate for the Defendant filed a petition for adjournment on the ground of illness of the Defendant. The said application was rejected and evidence from the side of the Defendant-Petitioner was closed. The suit was thus posted to 7th October, 2021 for argument. On 7th October, 2021, the Plaintiff argued the matter in part, as the Defendant remained absent. The suit was then posted to next day, i.e., 8th October, 2021 for further argument. On the said date, the Defendant filed an application under Order VI Rule 17 CPC for amendment of the written statement, which was rejected on the very same day and the argument was taken up. As such, judgment of the suit was pronounced on contest on 11th October, 2021. The decree was also signed on 27th October, 2021.

3.3 On 3rd November, 2021, the Defendant filed an application under Order IX Rule 13 CPC (CMA No.69 of 2021) to set aside the judgment and decree passed in CS No.310 of 2017 stating that the suit was decreed *ex-parte*. The Plaintiff filed objection on 22nd June, 2022 stating that the

petition under Order IX Rule 13 CPC was not maintainable, as the suit was decreed on contest. Learned 1st Additional Civil Judge (Senior Division), Bhubaneswar after hearing the parties, vide order dated 12th October, 2022 (Annexure-2) held the petition under Order IX Rule 13 CPC to be not maintainable since the suit was decreed on contest. The Defendant-Petitioner being aggrieved by the said order preferred FAO No.162 of 2022. Learned District Judge, Khurdha at Bhubaneswar also holding that the suit was decreed on contest, dismissed the appeal vide order dated 20th December, 2022 (Annexure-4). Assailing the said orders under Annexures-2 and 4, this CMP has been filed.

4. Mr. Bhuyan, learned counsel for the Defendant-Petitioner strenuously argued that the suit was decreed in terms of Order XVII Rule 2 read with Rule 3(b) CPC. Thus, the suit although stated to have been disposed of on contest, but in law the same is an *ex-parte* decree.

4.1 It is his submission that when the Defendant did not adduce any evidence in the suit and was not present physically on the date to which the suit was posted for hearing, it cannot be said that the suit was decreed on contest. In support of his submission, he relied upon the ratio decided in the case of ***Prakash Chander Manchanda and another Vs. Smt. Janki Manchanda***, reported in AIR 1987 SC 42, wherein Hon'ble Supreme Court discussing

the scope of Order XVII Rules 2 and 3 CPC, held as under:-

“6. It is clear that in cases where a party is absent only course is as mentioned in Order 17 rule 3(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2, Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fail to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined upto that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30th October 1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiffs evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that upto the date i.e. 30th October, 1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under Order 9.

7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not' be disputed that the Court when

proceeded to dispose of the suit on merits had committed an error.....”

He also relied upon a decision of this Court in the case of ***M/s Radhika Engineering Industries Vs. M/s Hindustan Aeronautics Limited, Koraput Division***, reported in 1993

(II) OLR 37, held as under:-

“4. Rules 2 and 3 of Order 17 provide for distinct and different sets of circumstances. Rule 2 applies where an adjournment has been generally granted and not for any special purpose, whereas Rule 3 applies where the adjournment has been given for one of the purposes mentioned in said Rule 3. Whereas Rule 3 empowers the Court to decide the suit forthwith, Rule 2 speaks disposal of the suit in one of the modes specified. Rule 2 does not apply unless the party has failed to appear at the hearing, whereas Rule 3 will apply where the party appears, but has committed default referred to in Rule 3. But it has been held in several cases that even where a party is physically present in Court but refuses to take part in the proceedings after his application for adjournment is rejected, he cannot be said to have appeared at the hearing so as to bring the matter within Rule 3 of Order 17, Code of Civil Procedure. Even where a party to whom time' had been granted at his instance for doing one of the acts mentioned in Rule 3 of Order 17, but he fails to do the same, and also does not appear at the hearing of the suit,. then the Court should proceed only under Rule 2. This is the view expressed by this Court as well as several others High Courts in several cases. (See AIR 1967 Orissa, 14 (Parikshit Sai and Anr. v. Indra Bhoi and Ors.) : 41 (1975) CLT 1117, (Adhikari Devanidhi Das v. Krupanidhi Nanda) : 43 (1977) CLT. 63 (Dr. Lakhiram Gupta v. S. Paikrai); AIR 1977 Madhya Pradesh, 282 (FB) (Rama Rao and Ors. v. Shantibai and Ors.); AIR 1964 Kerala, 99 (P. Govinda Menon, son of Lakshmi Amma and Anr. v. Visalakshi Amma and Ors.) : AIR 1961 Andhra Pradesh, 201 (FB) (W. Agaish v. Mohd. Abdul Koreem) and AIR 1977 Madras, 108 (Chidambaram v. Kalidas and Ors.). Admittedly when the suit was adjourned on 10-10-1986, it was an adjournment generally and not for any special purpose or for any of the purposes mentioned in Rule 3 of Order 17. On 19-11-1986, no evidence had been led by either

party and the defendant's application for adjournment having been rejected, the lawyer appearing for the defendant also did not further participate in the proceeding and finally the Court on the evidence of the plaintiff concluded the matter. Though the Court has disposed of the matter on merits purporting to be one under Rule 3, but it must be held to be one under Rule 2 of Order 17, since the defendant had failed to appear at the hearing on 19-11-1986. This conclusion of mine is supported by the Full Bench decision of the Allahabad High Court reported in AIR 1976 Allahabad, 290 (FB) (M. S. Khalsa v. Chiranji Lal and Ors.) as well as the decision of this Court reported in 1985 (I) OLR 81 (Orissa State Financial Corporation v. Gopal Chandra Ghosh). The decision of the Andhra Pradesh High Court reported in AIR 1975 Andhra Pradesh, 90 (Thummala Suryamma v. The Andhra Pradesh State Electricity Board and Ors.) also supports the aforesaid conclusion and such a decision, therefore, can be set aside under the provisions of Order 9, Code of Civil Procedure. I am, therefore of the considered opinion that the Subordinate Judge committed gross error of law in holding that Order 9, Code of Civil Procedure, has no application.”

He, thus, submitted that appearance of the Defendant-Petitioner means his physical appearance in Court and not through his learned counsel. In the instant case, admittedly, the Defendant was not present physically when her evidence was closed and till then no evidence was adduced by the Defendant. Then the suit was posted for argument. As such, the suit should have been disposed of in terms of Order XVII Rule 2 CPC read with Rule 3(b) of the said Order.

- 4.2** He accordingly prays for setting aside the impugned order and to remit the matter back to learned 1st Additional Senior Civil Judge, Bhubaneswar to adjudicate the petition under Order IX Rule 13 CPC on merit.

5. Mr. Baug, learned counsel for the Opposite Party countenancing the submission made above, contended that learned trial Court as well as the appellate Court has committed no error in holding the petition made under Order IX Rule 13 CPC to be not maintainable as the suit was decreed on contest. It was his submission that neither the ratio of *Prakash Chander Manchanda (supra)* nor *M/s Radhika Engineering Industries (supra)* is applicable to the case at hand. On 4th October, 2021, the Defendant was personally present in Court and filed an application for adjournment, which was allowed posting the suit to 5th October, 2021 for adducing evidence on behalf of the Defendant, as last chance. On the said date also, learned counsel for the Defendant-Petitioner filed an application for time on the ground of illness, which was rejected and the evidence from the side of the Defendant was closed. It is his submission that the Defendant also participated in the suit thereafter by filing the application under Order VI Rule 17 CPC on 8th October, 2021 to which date the suit was posted for further argument. From the recitals of the judgment and decree, it is apparent that learned counsel for the Defendant had participated in the hearing as well as argument of the suit, but without adducing any evidence on her behalf. Only because the Defendant did not adduce any evidence on her behalf, it cannot be said that she was set *ex-parte*. Admittedly, the Defendant had initially filed written statement in the suit, but did not cooperate for disposal of the suit for which this Court in CMP No.112 of

2020 directed for day-to-day hearing of the suit. Thereafter, either Defendant herself or her learned counsel being present in Court prayed for adjournment. The Defendant was never set *ex-parte* in the suit. Thus, learned trial Court as well as the appellate Court has committed no error in holding that the petition under Order IX Rule 13 CPC is not maintainable.

5.1 In support of his submission Mr. Baug, learned counsel for the Opposite Party relied upon the case of ***Haramani Mohapatra and others Vs. Smt. Annapurna Sahoo***, reported in 1995 (I) OLR 89, this Court held as under:-

“5. Provisions of Order 9 by themselves do not apply to a case in which the plaintiff or defendant has already appeared but has failed to appear at an adjourned hearing of the suit. In such a case provisions laid down in Order 17 which deal with adjournments are applicable. If the defendant fails to appear not at an adjourned hearing but at the first hearing Order 17, Rule 2 of the Code does not apply and decree is ex parte under Order 9, Rule 6 of the Code if the defendant does not appear at an adjourned hearing, irrespective of whether or not he appeared at the first hearing, Order 17, Rule 2 applies and the Court is given the widest possible discretion either to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit (See, Sangram Singh v Election Tribunal). The effect of Rule 2 of Order 17 is to assimilate the procedure in cases where there is default of appearance at an adjourned hearing. The result is that though a party may have appeared in the first hearing but fails to appear at an adjourned hearing, the procedure laid down in Order 9 will apply. If the plaintiff fails to appear at an adjourned hearing, the Court may make an order dismissing the suit under this Rule and Order-9, Rule 8 and the plaintiff may, if so advised, then apply under this Rule and Order 9, Rule 9 for an order setting the dismissal aside and no appeal lies in such a case. If the defendant fails to appear at an adjourned hearing, the

Court may pass an ex parte decree under this Rule ' and Order 9, Rule 8, and in order event defendant may apply under Rule and Order 9. Rule 13 for an order to set it aside. This is because Rule 2 of Order 17 makes Order 9 applicable and Court disposes of the suit according to the provisions of that Order. It follows that the party against whom such an order is made, has at its disposal the remedies available under Order 9. if both parties fail to appear at an adjourned hearing, the Court may make an order dismissing the suit under Rule 2 of Order 17 and Order 9, Rule 3. In such an event, the plaintiff, if so advised, may bring a fresh suit or apply for an order to set aside the dismissal under Order 9, Rule 4. Rule 2 of Order 17 deals with a situation when on a day to which hearing of the suit is adjourned, there is failure in appearance by the parties or any one of them. In such a situation, the Court is given two alternative discretions, i. e. either (i) to dispose of the suit in one of the modes prescribed by Order 9, or (ii) to make such other order as it thinks fit. in the instant case, there was no default on the part of the plaintiff-opposite party who was present along with her witnesses. Therefore, the Explanation to Rule 2 of Order 17 has no application to the case of the plaintiff, and consequentially to that of the facts of the case. The Explanation operates only where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned.

6. Rule 3 of Order 7 had application when a party to whom time has been granted to produce his witness, or to cause attendance of his witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, has failed to do the concerned act. Plaintiff is not covered by this situation in the case at hand. Further, time was not granted to defendant-petitioners to produce evidence or to cause the attendance of their witnesses, or to perform any other act necessary to the further progress of the suit. Therefore, Rule 3 had no application. In order to make Rule 3 applicable the party must have made default in one of the modes specified in the Rule. Rule 2 applies whenever there is a default of appearance by the party. In order to attract Rule 3, two conditions must be satisfied, i.e.(1) the suit must have been adjourned at

the instance of the party to carry out any of the things set out in the Rule, and (ii) there must be default by that party in carrying it out. Rule 2 applies where a party or his pleader is not present in Court whereas Rule 3 applies even if the party or his pleader is present in the Court but there is a failure to do any of the three acts enumerated in the Rule.”

5.2 He also relied upon the case law in the case of ***Sakuntala Subudhi and another Vs. Subash Chandra Panda and others***, reported in 115 (2013) CLT 864, wherein discussing several case laws including those relied upon by the Petitioner, it is held as under:-

“19. On the adjourned dates, D.W.1 did not appear for further cross-examination & took adjournments. Lastly, such time petition was rejected & the evidence from the side of the Defendants 1 & 2 was closed & the suit was posted for argument. The Defendants remained absent. In the facts of the present case, therefore, it is seen that the Defendants 1 & 2, to whom time was granted, failed to produce D.W.1 for further cross-examination. Hence, it can be said that they failed to perform an act necessary to the further progress of the suit, for which time was allowed. In such event, in Rule 3(b), since the Defendants were absent, the Court was to proceed under Rule-2.....”

It is his submission that in view of ratio in ***Sakuntala Subudhi (supra)*** Rule-2 will be made applicable only when the Defendant remained absent on the date of hearing, which is also the ratio in ***Prakash Chander Manchanda (supra)*** and ***M/s Radhika Engineering Industries (supra)***. In the instant case, the Defendant being present in Court either physically or through her learned counsel on different adjourned dates of hearing of the suit did not adduce evidence and sought for adjournment. Only because she has not adduced any evidence it cannot be said that she was

absent on the date of hearing of the suit. Thus, Order XVII Rule 3(a) CPC squarely applies to the case at hand. The amendment of Order XVII Rule 3(a) was introduced to deal with such type of situations when the Defendant being present in Court either in person or through Advocate does not lead any evidence or perform any other act necessary for the progress of the suit. In the instant case, the suit was posted for adducing evidence on behalf of the Defendant. She being present failed to produce her witness in the suit. Thus, the Petitioner cannot take shelter either under Order XVII Rule 2 or 3(b). He, therefore, submits that the CMP merits no consideration and liable to be dismissed.

6. In view of the rival contentions of learned counsel for the parties, the issue that arises for consideration in this case is whether in the facts and circumstances of the case, the Court should have disposed of the suit *ex parte* instead of holding it to be decreed on contest.
7. Order XVII of the CPC deals with adjournments. The relevant Rules of the said order that requires interpretation in this case are Rules-2 and 3. Rule 2 of Order XVII provides that if on the day to which hearing of the suit was adjourned, the parties or any of them failed to appear, the Court may proceed to dispose of the suit in one of the modes as available under Order IX or may make such order/such other order as it thinks fit. However, explanation to Rule 2 provides that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on

any date to which hearing of the suit was adjourned, the Court, may, in its discretion, proceed with the case, as if such parties were present. Thus, Rule 2 deals with absence of a party on the adjourned date of hearing of the suit. It speaks of general adjournments of the suit.

8. But Rule 3 of Order XVII deals with a situation of specific adjournment. It provides that where any party to the suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness or to perform to any other act necessarily to the further progress of the suit, for which time has been allowed, the Court may notwithstanding such default ,-

*(a) the parties are present to proceed to
decide the suit forthwith; or*

*(b) if the parties or any of them, is absent,
proceeded under Rule 2;*

9. Thus, on a conspectus of both the rules, it is made clear that when a party is absent on the date to which the suit is posted for hearing, the Court may proceed in any of the modes as provided under Order IX. To the contrary, where a party to the suit to whom time has been granted to produce evidence, or cause the attendance of the witness, fails to do so or fails to perform any act for which time has been allowed, the Court in its discretion, notwithstanding such default, may proceed to decide the suit forthwith, provided the parties are present. If such party is absent, the only option left with the Court is to proceed with the suit in any of the modes provided under Order IX. It has also been held so in the case of ***Prakash***

Chander Manchanda and another (supra) and M/s. Radhika Engineering Industries (supra).

10. In the instant case, after closure of the evidence of the Plaintiff, the suit was posted to different dates for adducing evidence on behalf of the Defendant. Since she did not cooperate with learned trial Court, the Plaintiff-Opposite Party moved this Court in CMP No.112 of 2020, which was disposed of on 6th February, 2020 with a direction to hear the suit on day-to-day basis in terms of the provision under proviso to Sub-Rule (2) of Rule 1 of Order XVII. Even after the direction of this Court, the Defendant-Petitioner did not adduce evidence and went on seeking adjournments either being present in person or through her learned counsel. It appears from the record that on 7th March, 2020 hearing of the suit was adjourned on the prayer of the Defendant subject to payment of cost of Rs.100/-. Neither did she pay the cost nor adduce evidence in the suit for which the suit was being adjourned. On the other hand, after taking adjournments, on 4th October, 2021, the Defendant herself appeared in Court in person and filed an application for adjournment, which was allowed as a last chance and the suit was posted to 5th October, 2021 for adducing evidence on her behalf. On the said date, learned counsel for the Defendant filed a petition for adjournment on the ground of illness of the Defendant, which was dismissed by the Court on that date and the Court closed the evidence of the Defendant. Thus, it appears that the Defendant and her Advocate were remained present on the dates to which hearing of the suit was being adjourned. There

is no doubt that no evidence has been led by the Defendant. Thus, explanation to Rule 2 has no application to the instant case. Further, the case also does not fall within the scope of Rule 2 or Rule 3 (b) of Order XVII C.P.C., as either the Defendant herself or her learned counsel was being present on the dates to which hearing of the suit was being adjourned. Neither Rule 2 nor Rule 3 refers to physical appearance of the party. As such, *Prakash Chander Manchanda and another (supra)* and *M/s. Radhika Engineering Industries (supra)* are of no assistance to the Petitioner.

- 11.** It further reveals from the materials on record that the Defendant had prayed for recall of P.W.1, which was allowed. In the midst of argument of the suit, the Defendant had also filed an application under Order VI Rule 17 CPC, which was dismissed. The Defendant also participated in the argument of the suit. Thus, the case of the Petitioner squarely falls under Rule 3(a) of Order XVII C.P.C., as the Defendant failed to perform the act for which hearing of the suit was adjourned being present in Court through her Advocate.
- 12.** A party cannot be allowed to take advantage of his own fault at the cost of prejudice to the adversary. Neither Rule 2 nor Rule 3 provides that if the party chooses not to adduce any evidence, the Court has to proceed in any of the modes provided under Order IX. In the instant case, the conduct of Defendant clearly illustrates that she chose not to adduce any evidence on her behalf being present in Court. In that event, it cannot be said that the suit was decided *ex parte*.

- 13.** There is also no explicit order passed by learned trial Court setting the Defendant *ex parte*.
- 14.** Thus, in the facts and circumstances of the case, as stated above, this Court is of the considered opinion that learned Courts have committed no error in holding that a petition under Order IX Rule 13 C.P.C. would not be maintainable, as the suit was decreed on contest.
- 15.** Accordingly, the CMP being devoid of any merit stands dismissed, but, in the circumstances, without any cost.

Issue urgent certified copy of the judgment on proper application.

(KRUSHNA RAM MOHAPATRA)
JUDGE