

(2011) 07 AHC CK 0276

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 48795 of 2007

Hindalco Industries Limited.

APPELLANT

Vs

Brijesh Kumar Agarwal and
Another

RESPONDENT

Date of Decision: July 8, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Companies Act, 1956 - Section 5
- Constitution of India, 1950 - Article 226, 227

Citation: (2011) 8 ADJ 511

Hon'ble Judges: Ran Vijai Singh, J

Bench: Single Bench

Advocate: V.K. Upadhyaya and Ritvik Upadhyaya, for the Appellant; R.K. Paul, Bhavesh Pratap Singh and Udai Chandani and C.S.C., for the Respondent

Final Decision: Allowed

Judgement

Ran Vijai Singh, J.

The Petitioner who happens to be registered company incorporated under Companies Act, 1956 has filed this writ petition under Article 226/227 of the Constitution of India with the following prayers:

(i) A writ, order or direction in the nature of certiorari calling for the records of the case and to quash the judgment and order dated 23.5.2007 passed by the District Judge, Kanpur Nagar in Misc. Civil Appeal No. 92 of 2006 as contained in Annexure-12 to the writ petition.

(ii) A writ, order or direction in the nature of certiorari calling for the records of the case and to quash the plaint of O.S. No. 2108 of 1997 filed in the Court of Civil Judge (Junior Division) Kanpur Nagar and the entire proceedings of the aforesaid suit;

(iii) A writ, order or direction in the nature of certiorari calling for the records of the case and to quash the ex parte judgment and decree dated 16.3.1998 passed by Civil Judge, Junior Division, Kanpur Nagar in Original Suit No. 2108 of 1997 as contained in Annexure-5 to the writ petition. 66

2. It appears the Plaintiff has filed suit No. 2108 of 1997 in the Court of Civil Judge (Junior Division) Kanpur Nagar against the Petitioner/Defendant with the prayer not to transfer 100 shares (Folio No. H.E. 378256 Praman Patra Sankhya 457059 Se 60, D.No. 10721269-28506145-150, 6790945-6790961-961, 10041811-811, 13387162-162, 1117950-986, 20430694-703 and issue duplicate copy of the aforesaid shares with the further prayer to pay profit incurred there from. The said suit was decreed ex parte by the Court of Civil Judge (Junior Division) Kanpur Nagar on 16.3.1998.

3. Aggrieved by that order the Petitioner has filed an application under Order 9 Rule 13 of the CPC (hereinafter referred to as CPC) on 15.5.1998 alongwith an application for condonation of delay. The application of the Petitioner for condonation of delay was rejected by the Court below on 20.1.2003.

4. Aggrieved by that order a revision was preferred by the Petitioner which was allowed after condoning the delay on 25.11.2003 with the direction to the Civil Judge (Junior Division) Kanpur Nagar to decide the application on merit. Thereafter the Petitioner's application was heard and rejected by the Court below on 21.8.2006.

5. Being aggrieved by that order the Petitioner preferred Misc. Appeal No. 92 of 2006 which was dismissed by the District Judge vide order dated 23.5.2007. Against these orders present writ petition has been filed mainly on the ground that the jurisdiction of Civil Court was barred under the Companies Act 1956 which is a self contained Act having complete machanism for redressal of all kinds of the grievances including grievance raised in the suit. Further the Civil Court Kanpur had no jurisdiction to proceed with the matter as even a part of the cause of action did not arise in the territorial jurisdiction of Civil Court Kanpur. Further after receipt of the summons issued in the suit the Petitioner has informed the Court below through letter dated 1.1.1998 that the relief sought by the Petitioner cannot be granted as the shares have already been transferred through transfer deed on 15.3.1996 prior to the date of filing of the suit on 11.7.1997 and intimation in this regard was given to the Plaintiff but concealing these facts the Petitioner had filed suit and the Court below ignoring the Petitioner's letter decreed the suit ex parte.

6. A counter-affidavit has been filed by Plaintiff Respondent denying the allegations made in the writ petition about the plea raised by the Petitioner. It is stated in the counter-affidavit that inspite of the knowledge of filing of the suit the Petitioner/Defendant did not appear before the Court and filed written statement. It is further stated that mere sending of the letter was insufficient in the Court proceeding for not proceeding with suit. It is also stated that in fact Defendant had

deliberately avoided its participation in the proceeding of the suit and knowingly not filed written statement and in such situation there was no option before the Courts below except to decree the suit ex parte. It is stated that the Court below has very rightly decreed the suit and rejected the application of the Petitioner filed under Order 9 Rule 13 of the CPC and also dismissed the appeal.

7. I have heard Sri V.K. Upadhaya learned senior counsel assisted by Sri Ritvik Upadhaya for the Petitioner and Sri B.P. Singh learned Counsel for the Plaintiff Respondent.

8. In brief, the facts of this case are that Plaintiff Respondent has purchased 100 shares of the Petitioner company from Defendant/Respondent No. 2 on 18.2.1996 after full payment. After purchase while he was in the way to his home the shares purchased by him were somewhere misplaced. When the Plaintiff came to know about the same he lodged an F.I.R. on the same day in the concerned police station and also informed this event to the Petitioner Defendant on 20.2.1996 requesting him not to transfer these shares in favour of any other person and also issue duplicate share certificate. When noting was done by the Petitioner, Plaintiff, the Plaintiff/Respondent has also given a legal notice but that was also of no avail and consequently Petitioner filed suit No. 2108 of 1997 on 11.7.1997 with the prayer as detailed in the preceding paragraphs, i.e., not to transfer the share in favour of anybody else except the Plaintiff and to issue duplicate certificate and also provide profit incurred thereon.

9. The summons were issued to the Defendant and the same were served on the Defendant on 18.12.1997. In spite of service of the summons the Petitioner/Defendant did not appear and ultimately on 9.2.1998 an order was passed by the Court below to proceed ex parte, even thereafter nobody appeared and the suit was ultimately decreed ex parte on 16.3.1998. As mentioned in the preceding paragraphs thereafter an application was filed by the Defendant/Petitioner under Order 9 Rule 13 CPC alongwith an application for condonation of delay for setting aside the ex parte decree but the application for condonation of delay was rejected by the Court below.

10. Being aggrieved by the order of rejection of Section 5 application, the Petitioner/Defendant preferred a Revision which was allowed and the delay in filing the application under Order 9 Rule 13 of the CPC for setting aside the ex. parte decree was condoned. It is thereafter the application was heard on merit and the same was rejected vide order dated 21.8.2006 by the Civil Judge (Junior Division) Kanpur Nagar, on the ground that the ex parte decree can be set aside only on two grounds: (a) There was no sufficient service of the summons on the Defendant (b) that even after service of the summon Defendant could not appear on the date of hearing for the sufficient cause/reason.

11. The Court below observed that the Defendant has admitted the service of summons but no cause, for non appearance before the Court, except taking shelter of his letter to the Court intimating that the shares have already been transferred, has been shown. On this, the Court has opined that the ingredients for setting aside the ex parte decree were not satisfied therefore rejected the application filed under Order 9 Rule 13 of the Code of Civil Procedure.

12. The Petitioner's appeal against this order was also dismissed by learned District Judge Kanpur Nagar on 23.5.2007 on the ground that the grounds taken in the appeal may be good ground for setting aside the ex parte decree in the Appellate forum against original decree i.e., the ground of territorial jurisdiction of Civil Court Kanpur and barring of Civil Court's jurisdiction under Companies Act 1956 but that cannot be a ground for allowing the application filed under Order 9 Rule 13 CPC for setting aside an ex parte decree. In the opinion of learned District Judge the trial Court i.e., Civil Judge (Junior Division) has very rightly rejected the application filed by the Petitioner for setting aside the ex parte decree as the ingredients to set aside the ex parte decree were not satisfied.

13. Sri V.K. Upadhaya learned senior counsel has very vehemently argued that the companies Act is a self contained Act and there is remedy for redressal of every kind of grievance particularly which has been raised by the Plaintiff Respondent with the suit, therefore, the jurisdiction of Civil Court was barred. He has also submitted that the Civil Court Kanpur had no jurisdiction to proceed with the matter as no cause of action arose under the territorial jurisdiction of Civil Court Kanpur. He further submitted that for the sake of argument even if it is assumed that the Civil Court had jurisdiction to proceed with the matter, even then both the Courts below have erred in law in rejecting the application of the Petitioner for setting aside the ex parte decree particularly in the circumstance when the Civil Court was informed through letter dated 1.1.1998 that the relief sought by the Petitioner cannot be granted as shares have already been transferred and the Plaintiff/Respondent and his counsel were aware of it and concealing this fact suit was filed which was decreed ex parte. In his submissions the Petitioner was under the bona fide belief that the Court will take note of letter sent by the Petitioner/Defendant and drop the proceeding of the suit but instead of doing so the Court had decided to proceed with the matter and decreed the suit ex parte which is unsustainable.

14. In the further submissions of Sri Upadhaya the Court below should have endeavour to impart substantial justice to the parties instead of closing the door of justice treating the reason to be insufficient to set aside the ex parte decree.

He has further submitted that this Court while exercising its jurisdiction under Article 227 of Constitution of India can set aside the impugned judgment and decree as grave injustice has been done to the Petitioner's/Defendant as it will fall under the category of gross failure of justice. In support of his submissions he has placed reliance upon the judgment of Apex Court in *Surya Dev Rai v. Ram Chancier Rai* and

Ors. AIR 2003 SC 2044.

15. Sri B.P. Singh learned Counsel appearing for the Plaintiff Respondent has reiterated the stand taken in the counter-affidavit by submitting that summon was duly served on the Respondent and being aware of the proceeding pending before the Court, the Petitioner Defendant has chosen not to appear before the Court and merely sent a letter which is unknown to the procedure prescribed for deciding a suit. He has also submitted that the Petitioner/Defendant is a company and its case cannot be put at par with the case of a rustic villager and this kind of absence will amount deliberate absence and that cannot be a ground for setting aside the ex parte decree.

16. After hearing counsel for the parties and considering their stand I feel necessary to go through the provisions contained under Order 9 Rule 13 CPC which reads as under:

13. Setting aside decree ex parte against Defendants.--In any case in which a decree is passed ex parte against a Defendant, he may apply to the Court by which the decree was passed for an order to set it aside and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

Provided that where the decree is of such a nature that it cannot be set aside as against such Defendant only it may be set aside as against all or any of the other Defendants also;

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the Defendant had notice of the date of hearing and had sufficient time to appear and answer the Plaintiffs claim.]

17. From the bare perusal of Rule 13 it transpires that an ex parte decree can be set aside only when the summons was not duly served, or that the Defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. Taking all these ingredients into account the Courts below have found that the summon was duly served and the Petitioner Defendant knowing it well has not chosen to appear before the Court, therefore, the case set up by the Petitioner in the application filed under Order 9 Rule 13 CPC that he has informed the Court about transfer of share and thought that the Court will drop the proceeding of suit cannot be treated to be sufficient cause for non appearance before the Court.

18. The expression "sufficient cause" used in the aforesaid Rule "Sufficient Cause" has to be construed as elastic expression for which no hard and fast guidelines can

be prescribed. In fact it is Court's discretion which to my mind is quite wide either to treat a "reason" for non appearance as "sufficient cause" or not.

19. In [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others](#), the Apex Court while dealing with the expression "sufficient cause" has observed as under:

The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts.

It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

20. Further in the case of [State of Bihar and Others Vs. Kameshwar Prasad Singh and Another](#), the Apex Court while dealing with the word "sufficient cause" although in the delay condonation matter has observed as under:

Para 12. ...The expression "sufficient cause" should, therefore, be considered with pragmatism injustice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause.

21. Further in the case of Ramji Dass and Ors. v. Mohan Singh 1978 ARC 496, the Apex Court has held that "we are inclined to the view that, as far as possible, Courts discretion should be exercised in favour of hearing and not to shutout hearing."

22. A Division Bench of this Court in First Appeal From Order No. 2023 of 2010 Ram Garib and Anr. v. Ram Prasad Mishra decided on 11.2.2011 while dealing with the appeal filed against an order of rejection of application under Order 9 Rule 13 CPC has also taken the same view and set aside the ex parte decree.

23. In that case although the ex parte decree was obtained by playing fraud but the above noted decision has been cited only with a view to lay emphasis on the object of the establishment of the Courts and its functioning.

24. So far as the present case is concerned I have gone through the impugned order of the Courts below. The (Civil Judge) Junior Division, Kanpur Nagar has rejected the Petitioner/Defendant application for setting aside the ex parte decree on the ground that the ingredients as provided under Order 9 Rule 13 of the CPC for setting aside an ex parte decree were not satisfied, as the summon was duly served on the

Defendant and knowing it well the Defendant did not appear before the Court. The Appellate Court has also arrived at the same conclusion as of the Court of civil judge junior division and found that the grounds taken by the Petitioner/Defendant in the application for setting aside the ex parte decree were not disclosing sufficient cause to set aside the ex parte decree and the other grounds on which appeal was preferred before the Appellate Court, the learned District Judge observed that those grounds may be relevant for the purpose of setting aside the ex parte decree in appeal but the Petitioner/Defendant instead of filing the appeal has filed an application for setting aside an ex parte decree under Order 9 Rule 13 CPC and there the ex parte decree can only be set aside on the ground mentioned therein i.e., summons was not duly served or for sufficient cause the Defendant could not appear on the date fixed for hearing. The only ground taken by the Petitioner/Defendant in the application for setting aside the ex parte decree was that Petitioner company has already informed the Court after receipt of summons through letter dated 1.1.1998 that transfer of the shares has already been made in March 1996 prior to the date of filing of the suit, therefore, the Petitioner/Defendant was under impression that after the receipt of aforesaid letter the Court will drop the proceeding of the suit that is why no body could appear on behalf of company.

25. Here, I also share my views with the view taken by the Court's below to the extent that this was not the sufficient ground for setting aside the ex parte decree for the reasons that the Petitioner/Defendant is not an ordinary illiterate citizen and it is a company incorporated under Companies Act 1956 having high repute in the country, well equipped with the battery of legal experts. In my view the duty of the officer of the company who was entrusted to look into the Court's proceeding was to obtain legal advice in this regard from the legal experts with regard to the further steps to be taken after receipt of the summons issued by the Court's below in the aforesaid suit, but instead of doing so a simple letter was sent to the Court which is (sic) a recognized method under the CPC to drop the proceeding of a suit or to dismiss the suit. The CPC is self contained Code having complete mechanism/procedure for deciding a suit and once the suit was entertained and summons were issued such kind of application was not entertainable unless it is filed in consonance with the procedure provided under the Code of Civil Procedure. Such kind of ground if it would have been taken by a rustic villager who happens to be ignorant of the Court's proceeding, the matter would have been different and it could have fallen under the category of "sufficient cause" for setting aside an ex parte decree, but the Petitioner/Defendant stands on high pedestal and that kind of discretion has rightly not been exercised in favour of the Petitioner in that very circumstance, but the Court's below should not have limit their discretion only on the ground taken in the application for setting aside its ex parte decree but it must have gone a step further and would have decided the application looking into the object of establishment of Court which are respected and known for imparting substantial justice to the parties, on the approach of a party for setting aside an ex

parte decree, instead, closing the door of justice particularly in the circumstance when the Defendant was not going to gain anything by not filing the written statement and contesting suit proceeding. Further there was no allegation of mala fides against Defendant/Petitioner for not filing the written statement. It was also necessary to look into the matter with an angle that it was not a case of default on particular date of hearing but it was a case where the Defendant not at all participated in the proceeding of the suit. There happens to be difference in between the absence on a particular date and not all participation in the suit proceeding, therefore it could have been interpreted taking note of justice oriented process of Court. The reason taken by the Petitioner in its recall application should have been looked into taking note of the very purpose of establishment of the Court, in view of the decisions of the Apex Court in the case of Collector Land Acquisition Anantnag and Anr. v. Ms. Katiji and Ors. State of Bihar and Ors. v. Kameshwar Singh and Ors. and Ramji Dass and Ors. v. Mohan Singh (supra). The Court below taking note of that very object should have set aside the ex parte decree and the inconvenience caused to the other side could have been compensated by imposing some costs.

26. In view of the foregoing discussions I am of the view that judgments of the Courts below may be technically sound but it has lead to failure of justice. Thus in view of the law laid down by the Apex Court in the case of Surya Dev Rai v. Ram Chander Rai and Ors. (supra) the writ petition succeeds and is partly allowed in following terms:

27. So far as relief No. (i) and (iii) are concerned, the writ petition succeeds and is allowed the impugned orders dated 23.5.2007 passed by the learned District Judge, Kanpur Nagar in Misc. Civil Appeal No. 92 of 2006 and the judgment and decree dated 16.3.1998 passed by Civil Judge (Junior Division) Kanpur Nagar in original suit No. 2108 of 1997 are hereby quashed on payment of Rs. 10,000/- costs which is to be paid through an account payee bank draft issued either in the name of Plaintiff/Respondent or in the name of counsel within four weeks. After payment of such costs, if the Petitioner/Defendant files its written statement alongwith certified copy of judgment of this Court annexing the receipt of payment of costs, the Court competent shall proceed with the matter in accordance with law and make its endeavour to decide the suit expeditiously.

28. So far as prayer No. (ii) is concerned it is refused for that the Petitioner/Defendant is free to take all those grounds in its written statement or through separate application as may be advised before the Court below.