

(2014) 10 GAU CK 0004

Gauhati High Court

Case No: Miscellaneous First Appeal No. 51 of 2014

Jain and Associates

APPELLANT

Vs

Nandita Acharjee

RESPONDENT

Date of Decision: Oct. 15, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 31, Order 43 Rule 1, Order 43 Rule 2, Order 5 Rule 20, Order 5 Rule 20(1A)

Citation: (2014) 5 GLT 373

Hon'ble Judges: Tinlianhang Vaiphei, J

Bench: Single Bench

Advocate: N. Saikia, L. Borgohain, P. Goswami and A. Saikia, Advocate for the Appellant; B. Benerjee, Sr. Advocate and R.C. Paul, Advocate for the Respondent

Judgement

Tinlianhang Vaiphei, J.

In this miscellaneous appeal, the appellant is questioning the validity of the ex-parte decree dated 31-5-2010 passed by the learned Civil Judge, Nagaon in Money Suit No. 6 of 1996.

2. The appellant is the second defendant in the suit as well as the power of attorney holder for all the defendants. The case of the appellant is that he filed an application under Order 9, Rule 13 of the Code of Civil Procedure (CPC) for vacating the impugned ex-parte judgement and decree passed against the defendants on the ground that they had not received the summons from the trial court. The original defendant No. 2 had engaged one T.R. Nanda, Advocate to conduct their case, but the said defendant died soon thereafter and further proceeding in suit was accordingly kept in abeyance on and after 11-9-2006 till the receipt of some original documents to be produced by the respondent. The said T.R. Nandi also died in the year 2007. The appellants were not aware of the death of their counsel and were always under impression that their counsel would take appropriate action to

prosecute their case and would inform them as and when the suit would be taken up for hearing. They came to know on or about 1-8-2013 about the ex-parte decree when they received the application for attachment of their movable properties filed by the respondent in Money Execution Case No. 12 of 2010 in the Court of the Civil Judge (Senior Division) at Alipore.

3. It is the further case of the appellant that they immediately engaged Mr. Promode Kothari, Advocate for obtaining a certified copy of the decree and for filing of an application under Order 9, Rule 13, CPC to set aside the same. On obtaining the certified copy of the ex-parte decree, they were surprised to learn that on re-opening of the case on 22-1-2008, notices were said to have been issued to them for their appearance, but they were, however, recorded to have been absent despite several attempts purportedly made by the respondent to secure their appearance. According to the appellants, no such intimations were ever received by them at any time. It is their further case that they also came to know from the order sheets that paper publication of the summons was made in the Sentinel newspaper, which is locally circulated in Assam, whereas they are residents of Kolkata. As they were not aware of the summons or of the paper publication of the summons addressed to them, they could not adduce evidence to substantiate their case or, for that matter, contest the suit in any manner. Moreover, the impugned judgment and decree is a nullity against the defendant No. 3 inasmuch as the decree was passed on 19-5-2010 his death which took place on 5-10-2007. The impugned decree was eventually passed on 19-5-2010 in their absence declaring that the respondent was entitled to recover Rs. 48,88,222/- with interest @ 6% per annum from the date of institution of the suit. The appellants, therefore, filed an application under Order 9, Rule 13 CPC for setting aside the ex-parte decree, but the application was dismissed on the ground that the provision of Order 5, Rule 20(2), CPC was complied with and summons were deemed to have been properly served upon them through paper publication in the Kolkata edition of "The Statesman" on 26-11-2009.

4. The main contention of Mrs. N. Saikia, the learned counsel for the appellants, is that the appellants have been prevented by sufficient cause from appearing in the trial court when the suit was called on for hearing and, as such, the ex-parte decree is liable to be set aside and a date be appointed by this Court for proceeding with the suit. She submits that the impugned judgment dismissing the application filed by the appellants is, therefore, arbitrary and cannot be sustained in law. To buttress her contentions, the learned counsel presses into services the following decisions:-
(a) Shantilal Gulabchand Mutha Vs. Tata Engineering and Locomotive Company Ltd. and Another,; (b) Rabindra Singh Vs. Financial Commissioner, Coopration, Punjab and Others, and (c) Great Punjab Agro Industries Ltd. v. Khushian and others, (2005) 13 SCC 503. On the other hand, Mr. B. Banerjee, the learned senior counsel for the respondent, supports the impugned ex-parte decree and contends that the publication of the summons upon the appellants through the widely circulated daily "The Statesman", which was simultaneously published from Kolkata, New Delhi,

Siliguri and Bhubaneshwar as per the order of the trial court under Order 5, Rule 20(1-A), CPC, is as effectual as if it had been made on the defendants/appellants by the operation of Order 5, Rule 20(1-A)(2), CPC. He, therefore, submits that the trial court has rightly dismissed the application for setting aside the ex-parte decree, and this appeal is, therefore, devoid of any merit and is liable to be dismissed.

5. Before proceeding further, it may be apposite to refer to the relevant part of the impugned judgment, which was made with reference to the provision of Order 5, Rule 20(1-A), CPC:

"One perusal of the record, it appeared that after 21-1-08, summons issued against the petitioner and all the summons returned with endorsement always O/C. Hence Left. Thereafter, paper publication was made through "The North East Times" and "Sentinel" but the same not accepted and finally paper publication summons was made in "The Statesman" paper and paper publication of summon was published on 26-11-09 circulated on "The Statesman". Thus, (sic) shows that service of summons to the present petitioner is done in accordance with the provision of law and paper publication of service of summon was made in a local daily paper where defendant is resided. The Statesman newspaper is publishing from Kolkata and 26-11-09 edition of The Statesman shows that it simultaneously published from Kolkata, New Delhi, Bhubaneswar. Petitioner/defendant are resident of Kolkata and paper publication in The Statesman paper shon due publication of the summon as per sub-rule 2 of Rule 20 of Order 5. The record further revealed that the present petitioner made their appearance after substitution. Thereafter, when the suit was restarted, defendant/petitioner were duly noticed about it and the postal remark on the registered summons issued return with report office closed, left the address and therefore, provision of Order 5, Rule 20 of Sub-rule 2 applied which is duly complied and therefore I do not find any merit in the present petition."

6. The parameters for deciding an appeal under Order 43, Rule 1, CPC have been restated by the Apex Court in Parimal Vs. Veena @ Bharti, in the following manner:

"24. The appellate court has to decide the appeal preferred under Section 104 CPC following the procedure prescribed under Order 43 Rule 2 CPC, which provides that for that purpose, procedure prescribed under Order 41 shall apply, so far as may be, to appeals from orders. In view of the fact that no amendment by the Delhi High Court in exercise of its power under Section 122 CPC has been brought to our notice, the procedure prescribed under Order 41 Rule 31 CPC had to be applied in this case.

25. Order 41 Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance with the said provisions. The first appellate court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right

and the parties have a right to be heard both on question of law and on facts. (Vide [Moran Mar Basselios Catholicos and Another Vs. The Most Rev. Mar Poulose Athanasius and Others, , Thakur Sukhpal Singh Vs. Thakur Kalyan Singh, , Santosh Hazari Vs. Purushottam Tiwai \(Dead\) by Lrs., , Madhukar and Others Vs. Sangram and Others, , G. Amalorpavam and Others Vs. R.C. Diocese of Madurai and Others, , Shiv Kumar Sharma Vs. Santosh Kumari, and Gannmani Anasuya and Others Vs. Parvatini Amarendra Chowdhary and Others,](#),

26. The first appellate court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial court's judgment without opening the whole case for rehearing both on question of facts and law. More so, the appellate court should not modify the decree of the trial court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate court would fall short of considerations expected from the first appellate court in view of the provisions of Order 41 Rule 31 CPC and such judgment and order would be liable to be set aside. (Vide [B.V. Nagesh and Another Vs. H.V. Sreenivasa Murthy, .](#))

27. In view of the aforesaid statutory requirements, the High Court was duty-bound to set aside at least the material findings on the issues, in spite of the fact that approach of the Court while dealing with such an application under Order 9 Rule 13 CPC would be liberal and elastic rather than narrow and pedantic. However, in case the matter does not fall within the four corners of Order 9 Rule 13 CPC, the Court has no jurisdiction to set aside an ex parte decree. The manner in which the language of the second proviso to Order 9 Rule 13 CPC has been couched by the legislature makes it obligatory on the appellate court not to interfere with an ex parte decree unless it meets the statutory requirement."

7. Thus, the rule is that an ex-partie decree cannot be lightly interfered with by an appellate court unless it meets the statutory requirement. In my opinion, the decision of the trial court in proceeding against the appellants ex-partie is in conformity with the provisions of Order 5, Rule 20(1-A) of CPC. Sub-rule (2) of Order 5, Rule 20 says that service substituted by order of the Court shall be as effectual as if it had been on the defendant personally. The daily "The Statesman" is undoubtedly a widely circulated newspaper in the Eastern India, and the publication of the summons in this daily based in Kolkata where the appellants are carrying on their business or are residing in Kolkata in compliance with the direction of the trial court amounts to substantial compliance with the provision of Order 5, Rule 20(1-A), CPC. In this view of the matter, the decision of the trial court does not suffer from any statutory infirmity or otherwise. There is absolutely no evidence to show that the appellants were prevented by sufficient cause from appearing in court when the suit was called on for hearing. In my judgment, the trial court was hardly left with any alternative but to proceed against them ex-partie. Therefore, the decision of the trial court refusing to set aside the ex-partie decree passed by it cannot be faulted

with in any manner. In any case, it is difficult to believe that the appellants were really ignorant about the progress of the suit from 2006 to 2013: this is a civil suit and not a writ petition where the personal appearance of the parties was hardly required.

8. The result of the foregoing discussion is that this appeal is bereft of merit and is, therefore, dismissed, but by directing the parties to bear their respective costs.