

(2010) 12 CAL CK 0072

Calcutta High Court

Case No: C.O. No. 3322 of 2008

Sulekha Nag

APPELLANT

Vs

Pranati Banerjee and Others

RESPONDENT

Date of Decision: Dec. 10, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 20, Order 9 Rule 13

Hon'ble Judges: Prasenjit Mandal, J

Bench: Single Bench

Advocate: S.T. Mina, for the Appellant; Basudeb Gayen and Nakul Chandra Maiti, for the Respondent

Final Decision: Dismissed

Judgement

Prasenjit Mandal, J.

Challenge is to the order dated August 27, 2008 passed by the learned Judge, S.C.C. Court at Sealdah in the Misc. Appeal No. 62 of 2007 thereby setting aside the order No. 35 dated July 19, 2007 passed by the learned Civil Judge (Junior Division), First Court, Sealdah in the Misc. Case No. 31 of 2006, arising out of the Title Suit No. 222 of 2003 of the First Court of learned Civil Judge (Junior Division) at Sealdah.

2. The decree holder has filed this application for setting aside the order dated July 19, 2007 passed in the Misc. Case No. 31 of 2006. He obtained an ex parte decree for recovery of possession. Thereafter, the judgment debtors filed an application under Order 9 Rule 13 of the CPC which was registered as Misc. Case No. 31 of 2006. That misc. case was rejected by the learned Civil Judge by the order dated July 19, 2007. Being aggrieved by that order, the judgment debtors preferred a misc. appeal being Misc. Appeal No. 62 of 2007 which was allowed by the impugned order thereby setting aside the order dated July 19, 2007 passed in the Misc. Case No. 31 of 2006 and also the ex parte decree passed in the Title Suit No. 222 of 2003 with costs. Being aggrieved by that order, the decree holder has preferred this revisional

application.

3. Now, the point for consideration is whether the impugned order should be sustained.

4. Upon hearing the learned Counsel for the parties and on going through the written argument filed by the learned Advocate for the Petitioner and also the materials on record, I find that admittedly, the Title Suit No. 222 of 2003 was decreed ex parte on May 11, 2005. Thereafter, the judgment debtors preferred a Misc. Case No. 31 of 2006 which was rejected by the learned Trial Judge. Thereafter, the judgment debtors preferred the Misc. Appeal No. 62 of 2007 which was allowed by the impugned order. The contention of the decree holder is that the learned Trial Judge has rightly observed that there was no irregularity in the matter of service of summons upon the judgment debtors. It is the stand of the judgment debtors that they did not receive summons at all. The findings of the learned appellate court in this regard cannot be accepted. The learned appellate Court has also failed to consider that the judgment debtors could not show sufficient cause for non-appearance at the time of call.

5. In fact, upon perusal of the materials on record, I find that it is an admitted position that the judgment debtors do not reside at the premises in suit; but elsewhere. It is within the knowledge of the decree holder. However, the whereabouts of the judgment debtors could not be collected by the decree holder. Under the circumstances, when the normal procedure for issuance of service of summons failed to be effective, the decree holder had no other alternative but to apply substituted service Order 5 Rule 20 of the CPC by way of paper publication. It was published in the daily newspaper accordingly. When nobody appeared, the suit was decreed ex parte. Though the paper publication was made, it may not come to the notice of the judgment debtors. The judgment debtors have adduced evidence that they were not aware at all of the publication of the notice under Order 5 Rule 20 of the CPC. In fact, on getting some sort of information they took the particulars of the proceedings upon obtaining the information report from the Court and thereafter they took steps for setting aside the ex parte decree by filing an application under Order 9 Rule 13 of the Code of Civil Procedure.

6. This being the position, I am of the view that the paper publication may not come to the knowledge of the judgment debtors when it was published. When such a plea was taken, it should be considered whether such plea can be accepted. Having considered the nature of the relief sought for in the suit, it could well be decided that had the judgment debtors knowledge of the institution of the suit, they would have taken appropriate steps in the suit. Therefore, the contention of the judgment debtors that they had no knowledge about the institution of the suit, should be accepted. The learned lower appellate court in exercising discretionary power has taken a pragmatic approach and held that negligence, if any, on the part of the judgment debtors could have been compensated by way of imposing costs on him.

and that the doors of justice should not be shut on mere technicalities. I am of the view that such reasonings by the learned lower appellate court amount to correct approach in dealing with such matters. Therefore, the learned lower appellate court has rightly held that the learned court below was not justified in dismissing the application under Order 9 Rule 13 of the CPC. Now service of summons or no knowledge of the institution of the suit is the sufficient cause for non-appearance on the date of hearing of the suit. The learned appellate court has awarded an amount of costs of Rs. 3,000/- which, in my opinion, is an adequate compensation for setting aside the ex parte decree.

7. In that view of the matter, I hold that the order of the learned lower appellate court should not be disturbed. The judgment debtors should be given an opportunity to ventilate his stand with regard to the suit. The impugned order should, therefore, be sustained.

8. Accordingly, this application is dismissed.

9. Considering the circumstances, there will be no order as to costs.

10. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.