Bhola Nath Das Vs Basanti Rani Neogi

Civil Order No. 1897 of 2000

Court: Calcutta High Court

Date of Decision: March 30, 2001

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 5 Rule 2#Limitation Act, 1963 â€" Section 5

Citation: (2001) 1 ILR (Cal) 530

Hon'ble Judges: Bhaskar Bhattacharya, J

Bench: Single Bench

Advocate: S.P. Roy Chowdhury and M.N. Roy, for the Appellant;A.C. Bagchi and Asit Kumar Bhattacharya (3) for Opposite Party No. 1, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.
This revisional application is at the instance of a Plaintiff in a suit for declaration, recovery of possession and

injunction and is directed against order dated May 18, 2000, passed by the learned Additional District Judge, 9th Court, Alipore in Misc. Appeal

No. 1 of 1996 thereby setting aside order No. 132 dated December 12, 1995, passed by the learned Assistant District Judge, 9th Court, Alipore

in Misc. Case No. 20 of 1985.

2. The present Petitioner brought against the opposite parties in the 9th Court of Assistant District judge. Alipore a suit being Title Suit No. 22 of

1982 for declaration of title, recovery of possession and permanent injunction. The said suit was decreed ex parte against the opposite parties on

April 23, 1985. Subsequently, on July 22, 1985, the opposite party No. 1 came up with an application under Order 9 Rule 13 of the CPC and

Section 5 of the limitation Act for setting aside the said ex parte decree. The said application gave rise to Misc. Case No. 20 of 1985.

3. In the said miscellaneous case, the specific case of the opposite party No. 1 was that no summons of the aforesaid suit was served upon her and

that from one Subodh Mridha of Kakdeep she came to know on July 18, 1985, that the aforesaid suit was decreed ex parte. According to the

opposite party No. 1 the said Subodh Mridha went to the seresta of Amal Kumar Ghosal, Advocate, where the said Shri Mridha came to know

from Sudhir Bhattacharya, the Clerk of Mr. Amal Kumar Gosal that such suit has been decreed ex parte.

4. In the application u/s 5 of the Limitation Act, the opposite party specifically asserted that she came to know about the ex parte decree on July

18, 1985. However, it was prayed that if it appeared to the court that there was delay in filing the miscellaneous case, the said delay might be

condoned.

5. The aforesaid miscellaneous case was contested by the present Petitioner by filing written objection thereby denying the allegation made in the

application. It was the definite case of the Petitioner that the summons of the suit was sent through registered post but the opposite party No. 1

deliberately refused to accept the same. The further contention of the Petitioner was that he was examined as D.W. 1 in Title Suit No. 584 of 1970

in the 3rd Court of Munsif. Diamond Harbour and on May 10, 1982, in answer to the question put in cross-examination on behalf of the Plaintiffs

wherein the opposite party No. 1 was Plaintiff No. 4, he specifically stated that he filed the instant suit being Title Suit No. 22 of 1982 and as such

the opposite party No. 1 was well aware of the pendency of the Title Suit No. 22 of 1982 at least from May 10, 1982.

6. The learned trial Judge on consideration of the entire materials on record including oral evidence adduced by the parties disbelieved the case of

the opposite party No. 1 and dismissed the miscellaneous case thereby holding that the summons was tendered to her but she deliberately refused

to accept the same and that she had knowledge to the proceeding even from May, 1982. The learned trial Judge held that the date of acquiring

knowledge of the ex parte decree as pleaded in the application under Order 9 Rule 13 of the Code was a false one.

7. Being dissatisfied, the opposite party No. 1 preferred a miscellaneous appeal being Mise. Appeal No. 1 of 1986 and by the order impugned

herein the learned first appellate court below has set aside the order passed by the learned trial judge and has allowed the application under Order

9 Rule 13 of the Code.

8. Being dissatisfied, the Petitioner has come up with the instant revisional application u/s 115 of the Code of Civil Procedure.

9. Mr. Roychowdhury, the learned Counsel appearing on behalf of the Petitioner has firstly contended that the learned first appellate court below

acted in the exercise of its jurisdiction illegally and with material irregularity in setting aside the order passed by the learned trial Judge by not at all

considering or discarding the reason assigned by the learned trial Judge in dismissing the miscellaneous case. Mr. Roychowdhury contends that the

learned first appellate court below perversely set aside the finding of the learned trial Judge on the question of acquiring the alleged knowledge of

the ex parte decree through Subodh Mridha P.W. 2. According to Mr. Roychowdhury, the learned court of appeal below although found that

there were discrepancies in the evidence of P.W. 2 but did not consider the evidence of O.P.W. 2 viz. Sudhir Bhattacharya upon which the

learned trial Judge placed strong reliance.

10. Mr. Roychowdhury further contends that although the learned first appellate court below has not disbelieved the evidence of O.P.W. 3 viz.

Postal Peon on the question of tender but erred in law in holding that the said tender was invalid simply because the summons was not

accompanied by a copy of the plaint. Mr. Roychowdhury thus prays for dismissal of the miscellaneous case.

11. Mr. Bagchi, the learned Counsel appearing on behalf of the opposite party No. 1 has on the other hand supported the order passed by the

learned first appellate court below and has contended that the learned first appellate court below being the final court of fact and having accepted

the case of his client that she acquired knowledge of the ex parte decree on July 18, 1985, through P.W. 2, such finding based on appreciation of

oral evidence should not be upset by this Court sitting in a jurisdiction u/s 115 of the Code of Civil Procedure.

12. Mr. Bagchi further contends that the learned first appellate court below rightly held that the summons being not accompanied by a copy of the

plaint, the refusal thereof cannot be said to be a valid service but amounts to non service of summons and thus the learned court of appeal below

rightly set aside the order passed by the learned trial Judge. Mr. Bagchi in this connection relies upon two decisions, one of this Court in the case

of Suresh Chandra Sarkar Vs. Gosaidas Pal, and the other in the case of Smt. Chhutbai and Another Vs. Madanlal and Another,

13. In reply to the aforesaid contention of Mr. Bagchi, Mr. Roychowdhury has placed reliance upon a decision of the Punjab and Haryana High

Court in the case of Risaldar Pakhar Singh and Others Vs. Bhajan Singh and Others, .

14. After bearing the learned Counsel for the parties and after going through the materials on record I find substance in both the contentions of Mr.

Roychowdhury.

15. It is the specific case of the opposite party No. 1 in her application under Order 9 Rule 13 of the Code as well as in evidence that she came to

know about the ex parte decree on July 18 and the miscellaneous case was filed on July 22, 1985. Therefore, if the acquiring of knowledge of the

ex parte decree as pleaded by the opposite party No. 1 is accepted, the said miscellaneous case is definitely within the period of limitation. But if

the said allegation is disbelieved, in that event the said miscellaneous case is surely barred by limitation unless the opposite party No. 1 can show

that she acquired knowledge of the ex parte decree within 30 days prior to July 22, 1985.

16. In this case the opposite party No. 1 has examined the said Subodh Mridha as P.W. 2. He has stated in his examination-in-chief that in Ashar,

1392 he went to his lawyer Amal Kumar Ghosal at Alipore Court and met his registered clerk Sudhir Bhattacharya who told him that the Petitioner

got ex parte decree against opposite party No. 1. In cross examination he admitted that he had no case for which he had occasion to go to the said

lawyer Sri Amal Kumar Ghosal. He has further stated that Amar Kumar Ghosal practices in High Court and in Judges Court but he could not say

if the said lawyer had any seresta in Alipore Court. The present Petitioner examined Sudhir Kumar Mukherjee, the registered clerk of Amal

Kumar Ghosal as O.P.W. 2 who has stated that Mr. Ghosal has neither any seresta nor any registered clerk named Sudhir bhattacharya in Alipore

Court and he did not work for him in the Alipore Court. His further evidence is that he did not know anything about Title Suit No. 22 of 1982 of

Alipore Court and he even did not know any person named Subodh Mridha of Kakdeep.

17. The learned trial Judge in view of such evidence disbelieved the case of the opposite party No. 1 that Subodh Mridha ever told her about the

ex parte decree. The learned first appellate court while setting aside such finding and in accepting the case of the opposite party No. 1 that Subodh

Mridha really told such fact has not at all taken into consideration the evidence of O.P.W. 2 although the learned first appellate court below has

stated that there are certain discrepancies in the evidence of P.W. 2. The learned first appellate court below also did not take into consideration the

fact that the present Petitioner as D.W. 1 stated in Title Suit No. 584 of 1970 that he filed the present title suit against the opposite party No. 1 in

answer to the question put in cross examination on behalf of the Plaintiffs therein where the present opposite party No. 1 was Plaintiff No. 4,

Therefore, at least from May 10, 1982, the date of deposited of the Petitioner in the said proceeding, the opposite party no: 1 had knowledge of

the pendency of the suit. The learned trial Judge took into consideration these facts whereas the learned first appellate court below although set

aside those findings did not take into consideration those vital facts. Therefore, such finding recorded by the learned first appellate court below

should be set aside in exercise of power u/s 115 of the Code of Civil Procedure. (See Vinod Kumar Arora Vs. Surjit Kaur, , Mihirlal Vs.

Panchkari Santra and Others, .

18. I am therefore of the opinion that the opposite party No. 1 failed to prove that she filed the application under Order 9 r. 13 of the Code within

30 days from date of knowledge of ex parte decree. On the other hand it is clear that she had all along knowledge of the suit and as such the

miscellaneous case should be held to be barred by limitation.

19. In the application u/s 5 of the Limitation Act the opposite party No. 1 specifically mentioned July 18, 1985, as the date of knowledge of the ex

parte decree and merely prayed for condonation of delay if there was any. Thus, on the basis of such allegation, the delay in filing the miscellaneous

case cannot be condoned.

20. Even on merit, in my view, the opposite party No. 1 should not succeed. The learned trial Judge accepted the case of the postal peon who

specifically stated that he tendered the registered cover containing the summons to the opposite party No. 1 who refused it. The learned first

appellate court below did not disbelieve the evidence of O.P.W. 3 but notwithstanding such fact held that there was no proper of summons to the

opposite party No. 1 as the summons was not accompanied by plaint. It may not be out of place to mention here that at the time hearing before the

trial court, on the request of the learned advocate for the opposite party No. 1 the said registered envelop was torn and it was found that inside the

envelop there was only copy of the summons but not any copy of plaint.

21. The decisions relied upon by Mr. Bagchi appearing on behalf of the opposite party No. 1 viz., the decision in the case of Sureshchandra

Sarkar v. Gosaidas (supra) and the other in the case of Chhutbai (Smt.) and Anr. v. Madanlal and Anr. (supra) were all passed in connection with

cases where the court had no occasion to consider the effect of incorporation of the proviso to the provisions contained in Order 9 Rule 13 of the

Code. There is no dispute with proposition that along with summons copy of the plaint should be sent; but in view of the proviso added to Order 9

Rule 13 of the Code by the amendment of 1976, if only summons is served, that being mere irregularity in the service of summons, cannot be a

ground for setting aside ex parte decree if it is shown that the Defendant had time to appear in the proceeding and contest the suit. Once it is

established that summons is validly served, it should be presumed that Defendant came to know about the number of suit, the court in which such

suit is pending and the date of appearance. Therefore, in such a situation the Defendant could appear in the said suit and collect the copy of the

plaint; but in spite of knowledge of suit, if the Defendant decides not to appear, that cannot be a ground for setting aside ex parte decree

subsequently passed on the ground that the summons was not accompanied by the copy of the plaint.

22. Mr. Bagchi vehemently contended that summons not accompanied by plaint should be deemed to be "no summons" and as such this is not a

case of irregularity of service. Therefore proviso to Order 9 r. 13 of the Code does not come into play. I am unable to accept such contention. I

fully rely upon the decision of the Punjab and Haryana High Court-in the case of Risaldar Pakhar Singh v. Bhajan Singh (supra) and hold that if

only summons is served not accompanied by copy of plaint it cannot be said to be a case of non service of summons but is really an instance of

irregular service of summons. Therefore, for such irregular service of summons an ex parte decree cannot be set aside when the Petitioner had full

knowledge of the pendency of the suit sometime in the year 1982.

23. If I accept the aforesaid contention of Mr. Bagchi then in a case where the summons is accompanied by illegible copy of the plaint or a copy of

the plaint without all the annexures or with one or two pages of the plaint left out, the Defendant may successfully contend that the service should

be deemed to be ''no service''. In my view, those are the instances of the irregularity in service of summons. The provision contained in Order 5

Rule 2 of the Code is, in my opinion, not a mandatory provision. Such provision can be waived by a Defendant. If the Defendant proves non-

service of copy of the plaint, the court will direct the Plaintiff to supply such copy and will give further time to the Defendant to file written

statements and may award costs in favour of the Defendants, In Osborn''s Concise Law Dictionary, Seventh Edition the word ''irregularity'' has

been defined as follows:

The departure from, or neglect of, the proper formalities in a legal proceeding. They may be waived, or consented to by the other party or rectified

by the court on payment of costs occasioned.

24. Thus, service of summons without copy of plaint is an instance of irregularity in the service of summons but that cannot be branded as ''non-

service of summons.''

25. The learned court of appeal below thus acted illegally and with material irregularity in holding that the Petitioner is not entitled to get benefit of

the proviso to Order 9 Rule 13 of the Code. Therefore, in this case it is established that although there was irregular service of summons but the

opposite party No. 1 had full knowledge of the suit and he had sufficient time to contest the proceeding and the learned trial Judge rightly held that

the opposite party No. 1 was not entitled to get benefit of Order 9 Rule 13 even on merit.

26. Thus, the application under Order 9 Rule 13 of the Code filed by the opposite party No. 1 was not only barred by limitation but the said

opposite party was not entitled to get benefit of Order 9 Rule 13 as he had sufficient time to contest the suit after due tender of the summons by

registered post. The order passed by the learned first appellate court below is thus set aside and the one passed by the learned trial judge is

restored. The application under Order 9 Rule 13 of the Code filed by the opposite party No. 1 is thus dismissed.

27. In the facts and circumstances there will be, however, no order as to costs.