
(1974) 01 PAT CK 0004
In the Patna High Court
Case No : Civil Revision No. 59 of 1972

Abdul Hai	Vs	APPELLANT
Rahatullah Mian and Another		RESPONDENT

Date of Decision : 03-01-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5, Order 5 Rule 5

Citation : AIR 1974 Patna 244

Hon'ble Judges : Lalit Mohan Sharma, J

Bench : Single Bench

Advocate : S. Ali Ahmad, for the Appellant; Devendra Kumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Lalit Mohan Sharma, J.—The petitioner was a defendant in Title Suit No. 79 of 1965 filed by opposite Party No. 1. Opposite Party No. 2 was another defendant in the suit. The suit was heard ex parte and a preliminary decree was passed on 19th April, 1956. Thereafter, steps for preparation of final decree were taken and final decree was passed on 5-10-1966. The petitioner filed an application under Order IX, Rule 13 of the CPC (hereinafter referred to as "the Code") for setting aside the ex parte decree, preliminary as well as final, passed against him on the allegation that he learnt about the decision in the suit on the 4th April, 1967 for the first time. The application was filed four days later on the 8th April, 1967.

2. The case of the opposite party No. I plaintiff is that the petitioner had full knowledge of the suit and summons was duly served on him on 27th July, 1965. The date of knowledge mentioned by the petitioner was also denied.

3. Both the courts below have decided the points against the petitioner and rejected his application for setting aside the decree. He has thereafter moved this Court by the present civil revision application.

4. Mr. Ali Ahmad, learned Counsel appearing for the petitioner, has drawn my

attention to the nature of the summons, which is for settlement of issues, served on the petitioner on 27th July, 1967 and has contended that even assuming that the finding of the Court below about the service of summons be correct, the suit could not have been heard and disposed of without fresh summons for the final disposal of the suit being served on the petitioner. The summons issued and served on the petitioner on 27-7-1965 was for settlement of issues only and the argument is that the trial Court was not authorised to proceed to judgment in absence of the petitioner without serving fresh summons for the final disposal of the suit.

5. It will be necessary to take into account the scheme of the CPC and its various provisions for consideration of the point. Order V deals with the issue and service of summons and the provision regarding issue of summons to the defendant to appear and answer the claim made in the plaint is dealt with in Rule 1, Rule 5 lays down that at the time of issuing the summons, the Court shall determine whether it shall be for the settlement of issues only or for final disposal of the suit. Rule 1 does not distinguish between the two kinds of summonses contemplated in Rule 5 and the provision of Rule 1 applies to both kinds of summonses. The provision of Rule 2 is also similar and states that every summons shall be accompanied by a copy of the plaint for if so permitted, by a concise statement). There is no provision anywhere in the body of the Code saying that fresh summons for the final disposal of the suit shall be issued after summons for settlement of issues has been served. On the other hand, Rule 1 of Order XV of the Code says that where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment. By the expression "first hearing" of the suit, the day for the appearance of defendant fixed under Rule 5 of Order V of the Code is meant and in a case where summons has been issued for settlement of issues only, the date mentioned in the summons is the first date of hearing of the suit. Where in a case, the defendant does not appear in answer to the summons for settlement of issues served on him, it will be open to the Court under Order XV, Rule 1 of the Code to dispose of the suit on the date mentioned in the summons. The provision of Order IX, Rule 1 is also relevant in this regard, which says that on the date fixed in the summons the party shall be in attendance at the Court house in person or through lawyers and the suit shall then be heard unless the hearing is adjourned to a future date. No distinction in this rule is made between summons for settlement of issues and summons for disposal of the suit. Even if the parties are at issue on some question of law or of fact and issues have been framed by Court, power has been given to the Court under Order XV, Rule 3 of the Code to proceed on that very date with the trial "whether summons have been issued for settlement of issues only or for final disposal of the suit." If the aforesaid power under Rule 3 is not exercised or cannot be exercised, the suit should be adjourned in accordance with the other provisions of the Code. Nowhere in the Code either expressly or impliedly it is provided that fresh summons has to be issued to the defendant if he does not appear after service of

summons on him for settlement of issues. Rule 10 of Order VIII of the Code says that where any party from whom written statement is required to be filed fails to present the same, the Court may pronounce judgment against him. This provision also suggests that on the first date of hearing itself, the Court is entitled to pass an ex parte decree. The contention of Mr. Ahmad is not supported by any provision in the Code. He has relied upon the decision in Binda Prasad Vs. United Bank of India Ltd. and Others, . But, I think, the said decision instead of helping him gives support to the view which I am taking. In paragraph 21 of the judgment, it has been held that the expression "first hearing" used in Rule 1, Order VIII of the Code, when summons issued as required by Rules 1 and 5 of Order V is for settlement of issues only, means the date of settlement of issues and in paragraph 15 of the judgment it has been laid down that if the defendant does not present a written statement of his defence, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit under Order VIII, Rule 10 of the Code. Mr. Ahmad has been fair enough to place before me another decision of this Court in the case of Firm of Har Chand Rai-Anand Ram and Others Vs. Raja Ram Bahadur Singh and Another, which he concedes, takes a view adverse to his argument. The Division Bench deciding this case held that:

"With regard to the contention that the date fixed for settlement of issues is not a date fixed for the hearing it is sufficient to read Order XIV, Rule 1, Clause 5. It is clear from the use of the word "hearing" in that clause that the date fixed for settlement of issues is as much a date fixed for the hearing of the suit as any other date fixed."

I, therefore, reject the argument of Mr. Ahmad and hold that the petitioner was not entitled to service of another summons for final disposal of the suit.

6. Mr. AH Ahmad has further contended that assuming that the provisions of the Code do not require a second summons to be issued on a defendant who does not appear in a suit after the service of summons for settlement of issues, it must be held that the Court should take such steps on the principles of natural justice. A defendant served with summons for settlement of issues cannot be deemed to have notice of the final hearing of the suit. I do not agree with this argument also. If a defendant is served with a summons for settlement of issues, he gets notice of the suit against him and he must be presumed to have sufficient warning that the suit will proceed in accordance with the provisions of the Code and he is put under a duty to appear in Court and take necessary steps in that case. Besides, the form of the summons for settlement of issues as included in Appendix B of the Code itself indicates that a proper notice is given to the defendant about final hearing of the suit itself. The second paragraph of the said form reads as follows :

"Take notice that in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence."

The records of the present case show that the summons served on the petitioner was in the prescribed form. I do not, therefore, agree that on the view which I am taking, there will be any violation of the principles of natural justice.

7. The next point taken on behalf of the petitioner is that after passing of the preliminary decree, ex parte steps were taken by the plaintiff for preparation of the final decree and having regard to the facts and circumstances of the case the petitioner was entitled to fresh notice in the matter of preparation of the final decree. There appears to be considerable force in this argument. Although the steps in regard to preparation of final decree are also steps in the suit itself, but all the parties to a suit who are not themselves desirous of getting final decree prepared cannot be expected to attend the Court regularly for finding out when a prayer is made by one of the parties for preparing a final decree and specially so in a suit for partition where every party is entitled to make such a prayer. A copy of an application in this regard is always served on the counsels for the other parties in the suit; and a pleader commissioner appointed for the purpose invariably serves notice on all the parties before proceeding further, and I am of the view that a notice should be sent to the non-appearing parties also before steps can be taken for the preparation of the final decree. This view gains support from the decision of the Calcutta High Court in *Suresh Chandra Banerjee and Another Vs. United Bank of India Ltd. and Another*, . It has not been contended on behalf of the opposite party that any attempt was made to inform the petitioner about the proceedings for preparation of the final decree in the suit and, therefore, I would have been inclined to set aside the final decree, but for another serious difficulty in the way of the petitioner. It has already been mentioned earlier that the final decree was passed on the 5th October, 1966 and the application under Order IX, Rule 13 of the Code out of which the present civil revision application arises had been filed on the 8th April, 1967. The petitioner explained the delay in filing the application by saying that he was informed about the existence of the suit and decree from one Mr. B. P. Sinha of Alamganj on 4-4-67 for the first time. Both the courts below have disbelieved this explanation of the petitioner. The petitioner did not examine the said Sri B. P. Sinha and said that he neither knew the father of the said Shri B. P. Sinha nor the mohalla where he resided. Both the courts below have rightly pointed out that in his very application, the petitioner had mentioned the parentage of the said Shri B. P. Sinha as also his address and the petitioner was certainly making a false statement in order to explain as to why he did not intend to examine the said Shri B. P. Sinha. Both the courts below, therefore, held that the applicant was not successful in proving his case of knowledge on the 4th April, 1967 and his application for setting aside the ex parte decree was barred by limitation. I do not find any reason for interfering with this finding arrived at by both the courts below. The result is that the petitioner's application is barred by limitation and has to be dismissed on that ground.

8. In the result, this civil revision application is dismissed. But there will be no order as to costs.