

(1992) 05 GAU CK 0017
In the Gauhati High Court
Case No : Civil Revision No. 6 of 1988

Angtha Khuman Co-Operative Collective Farming Society Ltd. APPELLANT
& Others

Vs

Konthoujam Parijat Singh & Others RESPONDENT

Date of Decision : 27-05-1992

Acts Referred:

Civil Procedure Code, 1908 — Order 3 Rule 4(2)
Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4(2)

Citation : (1993) GLR 285 Supp

Hon'ble Judges : N.G.Das, J

Bench : Single Bench

Advocate : N.Kumarjit Singh, Th.Ibobi Singh, Advocates appearing for Parties

Judgement

1. This is a plaintiff's application in revision against the Order of the Sub Judge No. 1, dated 22.6.1987 purporting to dismiss the suit under order 9 Rule 2 CPC for default in taking steps by the plaintiff.
2. The suit related to land measuring 40"65 acres partly situate in Angina village in patta No. 89/471/IE and partly in Lembakhul village under patta No. 90/236/IE which were allotted to the plaintiffs' Society in 1976 by the competent authority of the Government and the delivery of possession thereof was also given to them with effect from 14.2.1977.
3. The present suit was filed by the plaintiff petitioner on 13.6.1984 for a decree of perpetual injunction restraining the respondents from disturbing the peaceful enjoyment of suit property. The plaintiff petitioner also prayed for granting a temporary injunction.
4. The plaintiff petitioner obtained an ex parte order of temporary injunction on 14.6.1984 and the same was made absolute by the learned Sub Judge by his order dated 22.12.1984 passed in Judicial at Misc. Case No. 44/1984. The respondents preferred an appeal before the High court but the High Court

refused to interfere with the order of the trial court passed on 22.12.1984. The High Court, however directed the trial Court to dispose of the suit as expeditiously as possible preferably within 4 months. Pursuant to the order of the Hon"ble High Court dated 47 3985 in Misc. Appeal No. 2 of 1985 the case records came back to the trial Court.

5. On receipt of the case records the learned SubJudge fixed a number of dates for steps by plaintiff. On 22.6.1987 the learned counsel of both sides were present in the Court. But Mr. A. Rup chand Singh, learned Advocate who was appointed for the plaintiff filed an application for granting leave for determining his appointment as the counsel of the plaintiff petitioner on the ground that he could not contact his clients for many days. The learned SubJudge by his order dated 11.5.1987 granted the prayer under order 3 rule 4 (2) CPC and also passed the order to issue notice to the plaintiffs about the determination of their counsel and fixed the next date on 30.5.87. But he also gave a direction to the counsel to take steps on that day. On 30.5.87, the learned counsel for the respondents appeared but the summons to the plaintiffs were not returned after service. So, learned SubJudge passed the order to await till 6.6.87. But simultaneously gave a direction to the counsel to take steps on that day. On 6.6.87 learned Sub Judge recorded his order as follows :

"Plaintiffs are absent. Defendants with counsel present. Summons to plaintiffs not returned. Re issue summons to the plaintiffs, fixing 22.6.87. Plaintiff's counsel is to take steps immediately."

6. On 22.6.1987 the learned SubJudge passed the impugned order which reads

"The defendants by their counsel are present today. The plaintiffs are still absent without showing cause. Mr. A. Rupchand Singh, Advocate, in his application dt. 8.5.87 submits that the efforts so far made by the counsel to communicate with his clients namely the plaintiffs are without any success and prayed for determining his appointment as such counsel which was allowed vide my order dt. 11.5.87. The counsel was directed to take steps for summoning the plaintiffs, and for the 1st time he took step for doing so, but later on he has not taken any steps for issue of notices to the plaintiffs, whereas the defence counsel has all along been present. Under the circumstances, I am constrained to dismiss the suit and the suit is dismissed for default of appearance of the plaintiffs accordingly.

Announced in the open Court."

7. Learned SubJudge did not indicate under which provision he actually dismissed the suit. It however, appears that he dismissed the suit under order 9 Rule 2 of CPC.

8. The plaintiffs filed the present revision against the said order dated 22.6.1987 together with an affidavit that they entrusted their counsel Shri A. Rupchandra Singh, Advocate for conducting the case. But their appointed Advocate never

informed that he made an application to the trial Court for determining his appointment as pleader for the plaintiffs. It was also stated that no notice of the trial Court was ever served upon them. They came to know about the impugned order for the first time on or about 18.11.1987 as some of the defendants attempted to disturb their possession in the suit land by making attempt to harvest standing paddy crops grown by them. So, they at once rushed to the trial Court and on coming to know the above facts they obtained certified copy of the order dated 18.11.1987 and thereafter preferred the appeal.

9. It may be mentioned here that the plaintiff petitioners initially filed an appeal under section 96 of the C. P. C. against the order of dismissal of their suit. But subsequently, on 5.2.1988 Mr. A. Nilamani Singh, the learned senior counsel appearing for the petitioners made a prayer before the court for converting the appeal into a revision case. After hearing learned counsel of both the parties this Court by its order dated 5.2.1988 converted the appeal into a revision following the principles laid down in the decisions reported in AIR 1971 SC 2083 and AIR 1970 SC (I).

10. Mr. N. Kumarjit Singh, learned counsel appearing for the petitioner has submitted that the learned trial Court was wholly unjustified in dismissing the suit on the last mentioned date as a perusal of the order sheet will show that no notice was served upon the plaintiff petitioners before determination of the appointment of their counsel Mr. A. Rupchand Singh. Mr. Kumarjit Singh, the learned counsel next argued quite empathically that the order sheet will show that last mentioned date was not the date for hearing and as such the impugned order not only suffers from procedural error but it is also beyond the jurisdiction. Although the above facts were not controverted, Mr. Th. Ibobi Singh, the learned counsel appearing for the respondents has quite strenuously argued that the impugned order must be regarded to have been passed under the provision of order 9 rule 8 of CPC and as such the remedy that was open for the plaintiff petitioners was for filing an application under order 9 rule 9 of CPC. In support of his contention learned counsel for the respondents has referred to the case of MIS. Choukhanybag Tea Company Private Ltd. and others. Petitioners vs. Prabhu Dayal Lohia and others, opposite parties, reported in AIR 1979 Gau 37. But the facts of this case are quite distinguishable from the present one and as such I do not think that it will be applicable to the present case. In the case referred to above it will appear from para 3 of the judgment that the suit was posted for hearing on 4.6.1975 and on that date the plaintiffs being absent without any steps the suit was dismissed. Similarly, the other case referred to by the learned counsel for the respondent is the case of Bainshingh, appellant vs. Koonwarjee and others, respondents reported in AIR 1970 SC 997. The facts of this case are also quite distinguishable. This case came to the Apex Court only for disposal of the question as to the application of section 151 of CPC. The question that required for consideration before the High Court was in respect of abolition of Jagirs. The lower court decreed the suit and the appellate Court also affirmed the decree. But in view of abolition of jagirs under the Jagirs Abolition Act it was held

that the plaintiff could not get a decree for possession of the suit property. The High Court opined that the Court had inherent power to consider correctness of that order and accordingly, it allowed the appeal and dismissed the suit.

11. It will therefore, be apparent from the above that both the rulings cited by the learned counsel for the respondents are not applicable in, the present case. It will be abundantly clear from the summary of facts given above which were also not controverted that the date on which the impugned order of dismissal was passed was no", a date for taking steps. It will further appear from the order sheet that although learned Sub Judge allowed the petition of the petitioners" counsel for determination of his appointment under Order 3 Rule 4(2) CPC he simultaneously directed the counsel to take steps on that day. The order thus, appear to be self contradictory. The order dated 6.6.1987 clearly indicates that learned Sub Judge passed the order for re issuing the summons upon the plaintiffs. It is, therefore quite clear from the order sheet of the trial court that no notice or summons were actually served upon the plaintiff petitioners. It is, therefore, not at all clear to me how the learned Sub Judge passed the order dismissing the suit on 22.6.1987.

12. The order of the trial court appears to be wholly unjustified in dismissing the suit on the last mentioned date as this order of dismissal appears to have been passed beyond procedure.

13. In this context, it is necessary to mention here the Rule 12 of the Advocate Act which reads :

"An advocate shall not ordinarily withdraw from engagement once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Upon his withdrawal from a case, he shall refund 1st part of the fees as has not been earned."

14. In the instant case, it is abundantly clear from my discussion above that no step whatsoever was taken by the learned counsel, Mr. A. Rupchand Singh for service of notice to his clients. I, therefore, find that learned trial court acted beyond its jurisdiction by passing the impugned order and hence, this court is competent to exercise its revisional jurisdiction under section 115 of CPC.

15. I, therefore, accept the petition for revision, reverse the order of the lower court and direct that the case be restored to its original number and tried in accordance with law. The case is a pretty old one. Hence, learned trial court is directed to dispose of the case as expeditiously as possible preferably within a period of 3 months. Having regard to all the circumstances of the case, I leave the parties to bear their own costs.