
(2009) 05 GAU CK 0056
In the Gauhati High Court

Bimal Rabi Das @ Joy Ram Rabi Das and Another	APPELLANT
Vs	
Janaki Rabi Das and Others	RESPONDENT

Date of Decision : 11-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 6, Order 9 Rule 7, Order 9 Rule 9, 115

Citation : (2009) 5 GLR 854 : (2009) 3 GLT 326

Hon'ble Judges : C.R. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

C.R. Sarma, J.—This revision petition is directed against the order dated 15.12.2008 passed by the learned Civil Judge (Jr. Division) No. 2 in T.S. No. 120 of 2006 rejecting the petition filed by the defendants-petitioners under Order IX, Rule 7 of the Code of the Civil Procedure ("CPC") for setting aside the order dated 16.4.2008 passed against the petitioners fixing the suit for ex parte hearing.

2. Heard Mr. A.L. Saha, learned Counsel for the defendants-petitioners. Also heard Mr. P.K. Dhar, learned Counsel for the plaintiffs-respondents.

3. The petitioners' case in brief, is as follows:

The plaintiff-respondents filed a suit against the defendant-petitioners for declaration of right, title, confirmation of possession, perpetual injunction and recovery of possession. On receipt of the summons, the defendant-petitioners entrusted one Sri Jiban Debnath for engaging an advocate, but the said Jiban Debnath neither engaged any advocate nor returned the papers to the petitioners. He informed that the case was disposed of. Subsequently, the suit was transferred from the court of the Civil Judge (Jr. Division) No. 1, and on receipt of the transfer petition the petitioners came to know that the suit was not disposed of. Due to non-appearance of the defendants, on 16.4.2008, the

learned trial Judge passed an order fixing the suit for ex parte hearing against the defendants. On 21.6.2008 the defendant-petitioners entered appearance by engaging his advocate and submitted an application praying for adjournment to file written statement, but the prayer was rejected. On 4.8.2008, the petitioners filed the written statement with an application under Order IX, Rule 7 of CPC for setting aside the ex parte order dated 16.4.2008 and submitted the written statement on 5.12.2008. On 15.12.2008, the learned trial Civil Judge, Jr. Division by the impugned order aforesaid, rejected the prayer made under Order IX, Rule 7, CPC. Being aggrieved by the said order dated 15.12.2008, the petitioners have come up with this revision petition.

4. Mr. A.L. Saha, learned Counsel for the petitioners has submitted that the learned trial Judge, by refusing to allow the petition under Order IX Rule 7 CPC committed gross irregularity and failed to exercise its jurisdiction vested in it. It is further submitted that if the petitioners are not allowed to participate in the suit, the petitioners will be evicted from their possession without giving an opportunity to defend. Refuting the said argument, advanced by he learned Counsel for the petitioners, Mr. Dhar, learned Counsel, appearing for the plaintiffs-respondents contended that the defendants-petitioners by failing to appear before the court even after receipt of the summons as far back as on 2.9.2006 forfeited the right to contest the suit that the grounds cited for nonappearance were not reasonable grounds and that, in view of the ex parte hearing of the suit being concluded, the petition under Order IX, Rule 7, CPC was not maintainable at that stage. The learned Counsel further argued that, in the facts and circumstances of the case, there is no scope for entertaining the revision petition u/s 115 of CPC. In support of his contention the learned Counsel has placed reliance on the decisions held in the following cases:

1. Sunil Kumar and Others Vs. Praveen Chand Chowardia and Another,
2. Rakhal Mandal v. Topa Baruah and Ors. (2004) 1 GLT 175 and
3. State of Tripura and Ors. v. Dr. Nilratan Majumder 1997 (1) GLT 641.

5. I have also perused the record of trial court. From the order sheets of the record it appears that on 4.9.2006 some report regarding service of summons upon the defendants was received. Due to non-appearance¹ of the defendants, in spite of receiving the summons on 2 9.2006, vide order dated 16.4.2008, the suit was fixed for ex parte hearing, against the defendants. On 21.6.2008 the plaintiffs' witness was examined. On the said date the defendants' counsel submitted that defendants had entrusted a person to take steps in the suit and that the said person without taking any steps had informed the defendants that the suit was dismissed. It was also submitted that the defendants had no knowledge about the transfer of the suit from the court of learned Civil Judge Jr. Division No. 1. As the defendants-petitioners failed to appear even after receipt of the summons and to file petition for setting aside the ex parte order, the learned trial Judge rejected the prayer with the observation that the petition was

not maintainable at that stage. On the said date the plaintiffs examined one witness and exhibited some documents and the learned trial Judge fixed the suit on 4.8.2008 for hearing/argument. On the same date the defendants-petitioners also filed a petition under Order IX, Rule 9, CPC with a prayer for setting aside the order dated 16.4.2008 aforesaid. By his order dated 15.12.2008, the learned Civil Judge (Jr. Division) No. 2, after hearing the learned Counsels for both sides dismissed the petition filed under Order IX, Rule 7, CPC, holding therein that the grounds cited by the defendants were not acceptable and that the suit had reached the concluding stage. He has also observed that as the suit was received on 5.3.2008 on transfer there was no reason which prevented the defendants from appearing before the court. Admittedly, the petitioners came to know about the pendency of the suit on receipt of the transfer petition. Hence, they got opportunity to appear immediately after 5.3.2008.

6. From the records, it appears that as the defendants did not appear, in spite of receipt of summons, the learned trial Judge by passing the order dated 16.4.2008 followed the procedure prescribed by Order IX, Rule 6, CPC fixed the suit for ex parte hearing on 21.6.2008 and on the said date the plaintiffs' evidence was recorded. On 4.8.2008 the petition under Order IX, Rule 7 was filed and the same was rejected holding that the grounds cited herein were not acceptable and that the suit was at the stage of conclusion. Therefore, the learned Civil Judge, Jr. Division by rejecting the prayer made under Order IX, Rule 7, CPC by the impugned order dated 15.12.2008 committed no procedural or jurisdictional irregularity or error.

Section 115, CPC reads as follows:

The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears-

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other recordings.

7. After the amendment of the CPC the scope to review an order by exercising the power of revision has been made very limited. In the proviso to Section 115, CPC, which has been inserted by the amendment Act, 46 of 1999, it has been made very clear that the High Court, in revision, shall not, vary or reverse any

order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

8. Therefore, the test to ascertain as to whether a revision will lie against a particular order or not is, whether in the event of deciding the order, against which revision is preferred, in favour of the party preferring the revision, the suit or proceeding itself would have stood finally disposed of. If the answer is found in negative then no revision will lie.

9. This being the position, even if the petition filed under Order IX, Rule 7, CPC was allowed by the learned civil Judge (Jr. Division) No. 2 the suit would not have been finally disposed of, rather the same would have continued. Therefore, in view of the said provision of Section 115, CPC a revision does not lie against the impugned order dated 15.12.2008.

10. In the cases aforesaid, as relied on by the learned Counsel for the plaintiffs-respondents, the law regarding the revisional jurisdiction has been well settled and it has been made clear that the revisional court should not exercise the power unless the impugned order suffers from infirmities mentioned in Section 115, CPC.

11. In the light of the above, considering the facts and circumstances of the case, I do not find that the learned Civil Judge, Jr. Division committed any illegality, by passing the impugned order, requiring interference by this Court in exercise of the revisional jurisdiction.

12. Accordingly, this revision petition stands dismissed for want of merit. The stay order dated 6.2.2009 shall stand vacated. No cost. Return the lower court records.