

(2002) 01 CAL CK 0031
In the Calcutta High Court
Case No : C.O. No. 1810 of 2001

Dr. Abhijit Ghosh and Another

APPELLANT

Vs

Mukunda Lal Ganguly and Another

RESPONDENT

Date of Decision : 17-01-2002

Acts Referred:

Arbitration Act, 1940 — Section 17
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 115
Constitution of India, 1950 — Article 227

Citation : 106 CWN 931

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : S.N. Mukherjee, Harish Tandon and Gautam Das, for the Appellant; Ranjit Ray and S.S. Samanta, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This revisional application is at the instance of defendants and is directed against Order No. 84 dated July 3, 2001 passed by the learned Judge, 11th Bench, City Civil Court at Calcutta in Misc. Case No. 6050 of 1999 thereby allowing an application under Order 9 Rule 13 of the CPC filed by the petitioners on condition that the petitioners will deposit the costs of decree and will further furnish security to the extent of Rs. 2 lakh each within a particular date and will also file written statement by that day. The opposite party filed a suit being Title Suit No. 3513 of 1995 for damages and compensation claiming Rs. 10 lakh on the allegation that due to negligence on the part of the petitioners, two Doctors, he lost his vision. The said suit was decreed ex parte.

2. Subsequently, on receiving notice of the proceedings for execution of the said decree, the petitioners filed an application under Order 9 Rule 13 of the Code contending that no summons of the original suit was ever served upon them and as such they could not contest the suit and it was only from the service of notice of execution case that they came to know about the passing of ex parte decree. The aforesaid application gave rise to Misc. Case No. 6050 of 1999.

3. The aforesaid application was contested by the opposite parties alleging that summonses were duly served upon the petitioners at their medical college address and they had full knowledge of the decree.

4. Ultimately, the learned trial Judge after taking evidence, from the parties allowed the application as mentioned earlier.

5. It appears from the order impugned that after recording the respective contentions of the learned counsel for the parties, the learned trial Judge ultimately came to the following findings :

Considering the fact and circumstances of the case, considering the decision reported in Hon"ble Orissa High Court about the necessity of examining the postal authority, yet considering the reputation of two doctors is at stake as well as the blindness of the plaintiff/opposite party is a fact that cannot be overlooked, I am inclined to direct the petitioners to deposit the cost of the decree and to furnish a security to the extent of Rs. 2,00,000/- each by 13th July, 2001 as well to file written statement in the original suit by that time, their application under Order 9 Rule 13 C.P.C. will be allowed, in default, this petition will stand dismissed on contest with costs.

6. Being dissatisfied, the defendants have filed the instant revisional application.

7. At the time of entertaining this application this court suo motu issued a rule under Article 227 of the Constitution of India calling upon the petitioners to show cause why the entire order should not be set aside and the matter should not be remanded back to the learned trial Judge for fresh decision on merit. The learned advocate for the petitioners having waived service of notice of the Rule, the said suo motu rule has been heard along with the instant revisional application.

8. Mr. Mukherjee, the learned counsel appearing on behalf of the petitioners submitted before this court that the application under Order 9 Rule 13 of the Code having been filed on the ground of non-service of summons and the court having allowed such application, it acted without jurisdiction in imposing conditions of giving security and depositing decretal costs as condition precedent. Mr. Mukherjee contends that if an application under Order 9 Rule 13 of the Code filed by a defendant on the ground of non-service of summons succeeds, the court cannot impose any condition for payment of decretal costs or giving security for any amount claimed in the suit.

9. Mr. Ray. the learned" counsel appearing on behalf of the opposite parties has on the other hand supported the order impugned and has contended that in view of specific language used in Order 9 Rule 13 of the Code, a court is empowered to impose condition for depositing of costs or of giving security of the part of the claim as condition of allowing an application under Order 9 Rule 13 even if such application has been filed on the ground of non-service of summons.

10. In support of such contention Mr. Ray has placed strong reliance upon a decision of the Allahabad High Court in the case of Jayshree Distribution Piplani

Katra and Others Vs. Jayshree Tyres and Rubber Products, Allahabad and Another, .

11. Mr. Roy further submits that a revisional application u/s 115 of the Code is not maintainable against an order allowing an application under Order 9 Rule 13 of the Code inasmuch as in such a case the court after considering the materials on record exercises discretion in favour of one of the parties. Even if such discretion is erroneously exercised, Mr. Ray proceeds, it commits no error of jurisdiction justifying interference. In support of such contention Mr. Ray relies upon a decision of the Supreme Court in the case of Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, .

12. After hearing the learned counsel for the parties and after going through the materials on record I am of the view that it is a fit case where the order impugned should be set aside and the learned trial Judge should be directed to hear out the said Misc. Case afresh on the basis of materials on record and to arrive at a conclusion whether the summonses have been served upon the petitioners. The learned trial Judge, as mentioned earlier, after recording the respective submissions of the parties did not arrive at any conclusion as to whether the summonses of this suit were really served upon the petitioners; but on the other hand, he took into consideration the fact that the petitioners are doctors of repute and that the opposite party has become blind which are immaterial for the purpose of deciding an application under Order 9 Rule 13 of the Code.

13. Once a suit is decreed ex parte, the court passing such decree gets jurisdiction to set aside one only if it is established that either the summons was not served upon the defendant or in case summons has been served, that the defendant was prevented by sufficient cause from appearing when the suit was decreed ex parte, Existence of the aforesaid conditions is the sine qua non for exercising jurisdiction under Order 9 Rule 13 of the Code. Therefore, in an application under Order 9 Rule 13 for setting aside ex parte on the ground of non-service of summons, the court can set aside ex parte decree only if it is established that no summons was served upon the defendant. By the proviso added by the Amending Act of 1976, it has been further made clear that even if there is irregularity in the service of summons the court will not set aside ex parte decree if the court is satisfied, that defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. Therefore, in the absence of any finding that summons was not served upon the defendant and that the defendant had no notice of date of hearing and had no occasion to appear and answer the plaintiff's claim, the court cannot set aside an ex parte decree.

14. I have already pointed out that in the instant case although evidence has been led by the parties, the court did not consider the evidence on record and it has not arrived at any conclusion whether the summons has been served or not. Thus, the learned trial Judge refused to exercise jurisdiction vested in him by law

by not going into that question and acted illegally and with material irregularity in setting aside the ex parte decree on different considerations.

15. The decision of Supreme Court relied upon by Mr. Ray has no application to the fact of the present case. In the said decision of Pandurang Dhondi Chougule vs. Maruti Hari Jadav, all that was held by the Supreme Court was that a plea of limitation or a plea of res judicata is a plea of law which concerns jurisdiction of the court which tries the proceedings. A finding on those pleas in favour of the party which raises them would oust the jurisdiction of the court. An erroneous decision on those pleas, the Supreme Court held, therefore can be said to be concerned with the questions of jurisdiction falling within the purview of Section 115 of the Code. But an erroneous decision on a question of law having no relation to questions of jurisdiction cannot be corrected by the High Court u/s 115. In the instant case I have already pointed out that court gets jurisdiction to set aside ex parte decree only after arriving at a finding that summons has not been served. In the absence of such finding, if the court sets aside such ex parte decree it acts without jurisdiction and in such a case a High Court will be justified in setting aside such illegal order u/s 115 of the Code.

16. Next question is whether a court can impose condition of payment of decree costs and giving security of the claim of the plaintiff in the suit. In my view, if an application under Order 9 Rule 13 of the Code is filed on the ground that on the date fixed for hearing, the defendant was absent on sufficient ground, in such a case, court can in appropriate cases set aside ex parte decree after imposing those conditions upon the defendant. In such a case, the court can always award cost to compensate the plaintiff for inconvenience and loss caused to the said party because the defendant was in fault or there was omission on his part and it was because of his act that there had been delay in disposal of the case. But in a case where there is no fault on the part of defendant and the court finds that plaintiff obtained ex parte decree without due service of summons upon the defendant, the court is powerless to impose any condition as to payment of decretal costs or giving security of the claim as condition of setting aside ex parte decree.

17. In the case of Jayshree Distribution Piplani Katra and Others Vs. Jayshree Tyres and Rubber Products, Allahabad and Another, , relied upon by Mr. Ray, the defendant admitted the claim of the plaintiff so far the principal amount was concerned but the rate of interest was in dispute. Ultimately, the matter was referred to the Arbitrator and the Arbitrator gave an award holding that plaintiff was entitled to a sum of Rs. 9 lakh and odd as principal and was further entitled to get interest at the rate of 18% p.a. The award was in the knowledge of the defendants. Ultimately, the learned Civil Judge passed a decree in terms of the award u/s 17 of the Arbitration Act, 1940. In such a case the defendant came up with an application under Order 9 Rule 13 of the Code on the ground of non-service of summons u/s 17 of the Arbitration Act. The court allowed such application imposing condition that the defendant would furnish bank guarantee

of 50% of the decretal amount along with Rs. 250/- as costs. In the fact of the said case, where there was no dispute as regards principal amount of Rs. 9 lakh and odd, the court was quite justified in imposing a condition of deposit of 50% of the decretal amount. But in the instant case it is yet to be decided whether the petitioners are really guilty of the alleged negligence. Therefore, in such a case, once it is established that there has been no service of summons, court cannot impose any condition of payment of decretal costs or direction for security.

18. Thus, on consideration of the materials on record I set aside the order impugned and direct the learned trial Judge to dispose of the Misc. Case afresh on the basis of materials on record. After hearing the learned counsel for the parties he will arrive at a conclusion whether there has been service of summons of the suit and whether the proceedings are barred by limitation. If it is established that there has been service of summons or that the proceedings are barred by limitation he will dismiss the Misc. Case but if it is held that there was non-service of summons and that the Misc. Case is not barred by limitation, he will allow the application and will impose no condition for giving security or payment of decretal costs. The learned trial Judge must arrive at such conclusion within 15 days from the date of communication of this order. In the facts and circumstances there will be however no order as to costs.