
(2015) 06 CAL CK 0071
In the Calcutta High Court
Case No : C.O. No. 2684 of 2014

Gulu Mohan Alim Chandani

APPELLANT

Vs

Harish Mohan Alim Chandani and Others

RESPONDENT

Date of Decision : 05-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2(b), Order 5 Rule 1, Order 8 Rule 1, 151

Constitution of India, 1950 — Article 227

Citation : (2015) 3 CALLT 514

Hon'ble Judges : Subrata Talukdar, J.

Bench : Single Bench

Advocate : Aniruddha Chatterjee and Shiv Sankar Das, for the Appellant

Final Decision : Allowed

Judgement

Subrata Talukdar, J.—The present application under Article 227 of the Constitution is directed against the order dated 10th July, 2014 passed by the Ld. 9th Bench, City Civil Court at Calcutta in Title Suit No. 381 of 1996. By the order impugned No. 123 dated 10th July, 2014 the Ld. Trial Court observed that by previous Order No. 122 dated 27th June, 2014 it was, inter alia, directed that preliminary issues regarding maintainability of the suit may be framed on the next date. The Ld. Trial Court also dismissed the prayer of the plaintiff on the point that while the suit was filed in 1996, the written statement was filed as late as on 23rd December, 2013 compelling the Ld. Lawyer for the plaintiff to raise objection with regard to the acceptance of the written statement.

2. On the contrary Ld. Lawyer for the defendant drew the attention of the Ld. Trial Court to a petition dated 16th September, 2013 by which the Ld. Court was pleased to direct the plaintiff to provide a copy of the plaint to the defendant. After receipt of the copy of the plaint the written statement was submitted. Therefore, the Ld. Trial Court agreed with the submission of the defendant that no delay was committed in filing the written statement. Accordingly, written

statement was accepted and the preliminary issues were framed.

3. The petitioner before this Court is the plaintiff. The suit was filed for declaration and permanent injunction. The plaintiff claimed declaration that he is a moiety shareholder in respect of the suit premises which the plaintiff claims to be in joint ownership with the defendant Nos. 1 and 2, who are his blood brothers.

4. Sri Aniruddha Chatterjee, Ld. Counsel appearing for the petitioner plaintiff submits that the Ld. Trial Court committed a gross error by accepting the written statement in 2013, thereby wiping out a delay of 18 years. Sri Chatterjee argues that the least the Ld. Trial Court could have done was to seek an explanation for the delay of 18 years in filing the written statement.

5. Taking this Court to the orders in Title Suit No. 381 of 1996, Ld. Counsel for the petitioner emphatically points out to Order No. 16 dated 16th September, 1996. By the said Order No. 16 it was, inter alia, recorded that the plaintiff had put in the necessary requisites. Sri Chatterjee also points out to the endorsement made by the Ld. Advocate for the defendants in the order-sheet acknowledging receipt of the copy of the plaint and the injunction application. Such endorsement was made on 28th November, 1996.

6. Sri Chatterjee, therefore submits that since it is an admitted fact from the records that when both the plaint and injunction application were received by the Ld. Advocate for the defendants on the 28th of November, 1996, the written statement ought to have been filed within the statutory period thereafter. Pointing out to the provisions of Order 5 Rule 1 of the Code of Civil Procedure (for short CPC), Ld. Counsel explains that Order 5 Rule 1 CPC is an enabling provision for the defendant to appear in the suit and place his defence. It is clear from the records that the defendant appeared in the suit in the year 1996 but chose not to file the written statement within the period prescribed by law.

7. With reference to the provisions of Order 5 Rule 1 CPC Sri Chatterjee points out that even after the amendment of the CPC brought into effect from the year 2002, merely because the provisions for filing written statement were read to be directory in nature, it does not imply that the written statement could be filed at any unreasonable length of time. Sri Chatterjee also submits that an unreported judgment of an Hon"ble Single Bench of this Court in CO 34 of 2015 in the matter of Chittanku Ranjan Das v. Sathi Das & Ors. is distinguishable on facts. According to Ld. Counsel, the Hon"ble Single Bench found that by their conduct the defendants had waived their right to the service of summons and since the written statement was filed within the outer limit prescribed under Order 8 Rule 1 CPC, such written statement was directed to be accepted.

8. However, Ld. Counsel for the petitioner strongly argues that in the facts of the present case the written statement is sought to be filed after 18 years and the Ld. Trial Court cannot just automatically accept the same.

9. Per contra, Sri Saptangsu Basu, Ld. Senior Counsel appearing for the defendants-Opposite Party Nos. 2 and 3 (for short OPs 2 and 3), takes this Court to the Order of the Ld. Trial Court No. 117 dated 16th September, 2013. By the said order No. 117 the Ld. Trial Court was pleased to consider a petition filed by the defendant Nos. 2 and 3 seeking a direction upon the plaintiffs for service of a copy of the plaint to the defendants. On perusing the copy of the petition and the case records, the prayer was allowed and the plaintiff was directed to serve the copy of the plaint to the defendant Nos. 2 and 3 by the next date, i.e. 3rd October, 2013.

10. By Order No. 118 dated 3rd October, 2013 the Ld. Trial Court was pleased to observe that the copy of the plaint be served on the defendant Nos. 2 and 3 by the plaintiff by the next date which was fixed on 23rd December, 2013 for framing of issues.

11. By Order No. 119 dated 23rd December, 2013 it was, inter alia, recorded that the plaintiff has filed hazira and copy of the plaint. The defendants have filed their written statement with the registered addresses and copy has been served. The defendants have filed an application under Order 14 Rule 2(b) read with Section 151 CPC praying for dismissal of the suit. Therefore, the next date is fixed on 7th February, 2014 for hearing the petition under Order 14 Rule 2(b) CPC filed by the defendants.

12. By Order No. 122 dated 27th June, 2014 the Ld. Trial Court, inter alia, noticed that the defendants have raised a point regarding the maintainability of the suit. Such point requires to be decided by framing a preliminary issue. Such preliminary issue requires to be decided first since the suit is an old one and pending since 1996. Therefore, the next date was fixed on 10th July, 2014 wherein by the Order impugned No. 123 the Ld. Trial Court was pleased to dismiss the prayer of the plaintiff for non-acceptance of the written statement.

13. Sri Basu, Ld. Senior Counsel emphatically points out that the written statement was filed by the defendants within the statutory period after the direction was passed vide Order No. 117 dated 16th September, 2013 upon the plaintiff to supply a copy of the plaint. Therefore, Ld. Senior Counsel argues that there has been no delay in filing the written statement and there is no illegality in the order impugned of the Ld. Trial Court accepting the same.

14. Sri Basu makes the corollary point that the plaintiff ought to have challenged the Order No. 117 dated 16th December, 2013, Order No. 118 dated 3rd October, 2013 and Order No. 119 dated 23rd December, 2013 by which interconnected directions were given by the Ld. Trial Court to serve a copy of the plaint by the plaintiff upon the defendants culminating in the filing of the written statement by the defendants vide Order No. 119 dated 23rd December, 2013. In the absence of any challenge to the abovenoted orders, it is not open to the petitioner plaintiff to now challenge the Order No. 123 dated 10th July, 2014 since such order is merely a consequential order to the earlier orders as noted above.

15. Ld. Senior Counsel taking this Court to the provisions of Order 5 Rule 1 and Order 8 Rule 1 CPC argues that the suit was filed in the year 1996 when, admittedly the amendments to the CPC in the year 2002 had not come into effect. Therefore, according to Sri Basu, the procedural progress of the present suit should be governed by the unamended CPC and not by the amended provisions.

16. Admittedly there is no service of the writ of summons upon the defendants. Under the unamended provisions of CPC the written statement can only be filed if and, only if, the writ of summons is served on the defendants. The mere receipt of the plaint on 28th November, 1996 as recorded against Order No. 16 dated 16th September, 1996 does not mean and, is not equivalent to the service of summons. Therefore, without the summons having been served there was no obligation on the part of the defendants to file their written statement. However, soon after the Court directed the service of the plaint, the written statement came to be filed.

17. In support of his arguments Sri Basu, in addition to relying upon the unreported judgment of the Hon"ble Single Bench in CO 34 of 2015 (supra) also relies upon Nani Gopal Mitra Vs. The State of Bihar, in the matter of Nani Gopal Mitra v. State of Bihar , Transmission Corporation of A.P. Vs. Ch. Prabhakar and Others, and Zile Singh Vs. State of Haryana and Others,

18. Having heard the parties and considering the documents on record this Court finds that the Ld. Trial Court by the Order Nos. 117 dated 16th September, 2013, 118 dated 3rd October, 2013 and 119 dated 23rd December, 2013 undertook the exercise of directing service of the plaint upon the defendant Nos. 2 and 3 and thereafter upon completion of service accepted the written statement. It also strikes the notice of this Court that by Order No. 16 dated 16th September, 1996 a similar exercise was carried out by the Ld. Trial Court recording the filing of requisites by the plaintiff and, there is a simultaneous acknowledgment of the receipt of the copy of the plaint and injunction application by the Ld. Advocate for the defendants.

19. Therefore, in the event this Court is required to take notice of the conduct of the parties and whether such conduct would entitle the defendant to claim waiver of the service of summons or otherwise, the abovenoted proposition pertaining to waiver by conduct has been dwelt with in detail in the unreported judgment in CO 34 of 2015 (supra).

20. From the progress of the suit as evident from the order sheets this Court cannot but help notice that the defendants participated in the proceedings and even filed their written objection to the injunction application of the plaintiff. The interim order of status quo passed by the Ld. Trial Court vide Order No. 3 dated 16th February, 1996 was made absolute long back by Order No. 89 dated 4th August, 2009. Throughout the above period since filing of the suit in 1996 it transpires that the defendants-OPs took steps and even received the copy of the

plaint along with injunction application on the 28th of November, 1996. However, although the defendants filed written objection to the injunction application no effort appears to have been made by them to file their written statement to the plaint which was served upon their Ld. Advocate on the same date, i.e. 28th November, 1996.

21. Thereafter by Order No. 117 dated 16th September, 2013 a similar exercise of service of the plaint was carried out and this time the defendants were wiser by filing their written statement within time and obtaining the acceptance of the Ld. Trial Court. It is not the case of the defendants that during, the second exercise in the year 2013 any insistence was made regarding formal service of writ of summons prior to filing of the written statement. It does not therefore stand to reason that the argument advanced by Sri Basu to the extent that no formal writ of summons was served upon the defendant, if applied to the receipt of plaint and injunction application in the year 1996 could equally apply to the service under orders of court in 2013.

22. It remains a matter of speculation whether the application filed by the defendants seeking a copy of the plaint as recorded by the Ld. Trial Court vide Order No. 117 dated 16th September, 2013 can be said to be based on acute legal advice with the view to regularize the filing of the written statement which had remained un-filed for the past nearly 18 years. By filing the application for receipt of the plaint and obtaining the direction of the Ld. Trial Court and thereafter quickly filing the written statement appears to have been an effort by the defendants to legitimize the filing of the written statement fully knowing that they have been in default.

23. At the same time this Court cannot be oblivious to the fact pointed out by Sri Chatterjee, that the plaint and injunction application were admittedly received on behalf of the defendants by their advocate on 28th November, 1996. Hence, if the defendants could file their written objection to the injunction application and contest the same, they could equally file the written statement knowing fully well that the statutory time was running out.

24. In the backdrop of the above discussion this Court is of the considered view that having regard to the passage of the suit as emanates from the order sheets it cannot be said that the acceptance of the written statement by the Ld. Trial Court can be simplicitor and automatic in view of its Order Nos. 117, 118 & 119 (supra). This Court is of the further opinion that the Ld. Trial Court was required to call for a possible explanation from the defendants with regard to the circumstances which prevented them from filing the written statement within time and in the backdrop of the facts as recorded above in this judgment.

25. For the above reasons the Order No. 123 dated 10th July, 2014 cannot be sustained to the extent it holds that the defendants had not committed any delay in filing the written statement. Accordingly, the order is set aside to the above extent.

26. It will be however open to the defendants to approach the Ld. Trial Court with an explanation for the delayed filing of the written statement which shall then be considered by the Ld. Trial Court on its own merits after giving an opportunity of hearing to both sides. The Ld. Trial Court will be free to then proceed to the stage of considering the preliminary issues as recorded by it on the 10th of July, 2014.

27. CO 2684 of 2014 stands accordingly disposed of. There will be, however, no order as to costs.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.