

(1954) 06 GAU CK 0001
In the Gauhati High Court
Case No : Misc. First Appeal No. 20 of 1951

Jagadish Prasad Khakalia

APPELLANT

Vs

Firm Jesraj Talakchand Lalchand

RESPONDENT

Date of Decision : 14-06-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 12, Order 9 Rule 13

Citation : AIR 1954 Guw 223

Hon'ble Judges : Sarjoo Prasad, C.J.; Haliram Deka, J

Bench : Division Bench

Advocate : B. Sarma, for the Appellant; J.C. Sen, for the Respondent

Judgement

Sarjoo Prasad, C.J.—The Appellant in this miscellaneous appeal filed an application under Order 9, Rule 13, Code of Civil Procedure, for setting aside an ex parte decree in a suit for recovery of mesne profits. There were various Defendants in the suit, the Applicant being Defendant 8 in the action. The decree itself was passed on 2-3-1951 and the present application to which this appeal relates was filed on 31-3-1951 within the period of limitation.

2. The learned Subordinate Judge has rejected the application. He has held firstly that the application purports to be in Money Suit No. 15 of 1950 and not in Money Suit No. 115 of 1950 and therefore the application should be thrown out on this ground alone. The Petitioner-Appellant sought to rectify the mistake but the Court refused that permission. The second ground on which the learned Subordinate Judge has refused the application is that although notices in this case were served by "hanging" as he calls and not personally, yet the Applicant had some knowledge of the suit and" therefore the application cannot be maintained. In our opinion, both these grounds are unsustainable.

3. The application under Order 9, Rule 13 itself which was filed by the Appellant was registered in Money Suit No. 115 of 1950. The mistake in the cause title was merely a clerical mistake in that (instead of mentioning Money Suit No. 115 of

1950, it mentioned Money Suit No. 15 of 1950. I do not understand why a petty clerical mistake of this nature should not have been allowed to be amended by the learned Subordinate Judge. It was a highly technical objection which the learned Subordinate Judge induced himself to entertain in rejecting the application under Order 9, Rule 13. The objection is frivolous, in our opinion, and should have been rejected and the Appellant allowed to amend the petition accordingly.

4. The second ground taken by the learned Subordinate Judge also does not appeal to us. The provisions of Order 9, Rule 13, are specific. The rule says that in any case in which a decree is passed ex parte against a Defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the ex parte decree.

In this case, on the finding of the learned Subordinate Judge himself, the service was by affixing a copy of the notice on the doors. Rule 13 requires that the summonses should be "duly served"; in other words, the service should be effected according to the rules laid down under Order 5 of the Code. Now, Rule 12 of that order requires that wherever it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

In this case, the peon's report shows that the Defendant had left for Shillong and that the peon took the notice to the Manager of the Defendant and then served it by affixing a copy of it on the door of the shop-house. The peon has not been examined. The person who has been examined to prove the service on behalf of the Plaintiff says on the contrary that the Defendant-Appellant before us was present at the time of the service which was on 20-1-1950. The Applicant himself has stated that he was absent at Shillong at the time and had left everything in charge of Krishnalal so far as his Gauhati shop is concerned. There is therefore a conflict between the peon's report and the evidence of the Respondent's witness on the point," and that seems to be the reason why the learned Subordinate Judge has accepted the position that the service was by affixing the copy of the notice in the absence of the Applicant.

There is no evidence that the so-called Manager or anyone else was authorised to accept notice on behalf of the Appellant. This is not service in accordance with Rule 12 of Order 5. Indeed, it has been repeatedly pointed out that mere temporary absence is not enough to entitle the peon to serve in that manner. The peons should make an endeavour to serve the notice personally upon the Defendant which was not done in this case and therefore, we are not prepared to hold that the service was duly made in the circumstances. It may be that the Appellant had knowledge of the suit but that will; not debar him from presenting an application under Rule 13 of Order 9 for setting aside the ex parte decree, if in fact, the summonses had not been duly served. It has to be noticed that in

this case, there were several Defendants in the suit and it is quite possible that this Appellant may have thought that there was no definite claim against him and therefore no step was required to be taken unless he had a copy of the plaint itself which would go to fasten him with notice of the actual claim made against him.

5. In the circumstances, we think that the appeal "should be allowed and the ex parte decree should be set aside so far as this Defendant goes. The decree will stand in regard to the other Defendants who have not appealed against the decree or filed any application for setting it aside. In the circumstances of the case, we do not think that the Defendant-Appellant is entitled to any costs. We would not therefore award any cost to the Appellant either of this Court or of the Court below.

6. Let the records be sent down to the Court below at once and the hearing of the suit expedited.

Deka, J.

7. I agree.