
(2014) 04 OHC CK 0060
In the Orissa High Court
Case No : W.P. (C) No. 18954 of 2009

Kishore Kumar Parichha

APPELLANT

Vs

Orissa State Civil Supplies Corporation Ltd.

RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2014) 118 CLT 671 : (2014) 2 ILR 172 : (2014) 2 OLR 35

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J.—Against the confirming order of dismissal of the application filed under Order 9, Rule 13, CPC, the defendant-petitioner has filed this petition to set aside the same.

2. The plaintiff-opposite party No. 1 filed Money Suit No. 30 of 1936 before the learned Civil Judge (Senior Division), Bolangir for realization of the amount Pursuant to the notice, the petitioner, being the defendant entered appearance through an Advocate, namely, Sri Rajani Kanta Bhoi. It was agreed between him and his advocate that he would Inform him to come to the Court when his presence would be necessary. On the basis of such impression, the petitioner did not come to the Court, but in the meantime his counsel, Sri Rajani Kanta Bhoi expired, which the petitioner only came to Know on 2.1.1995. In the meantime the suit has already been decreed ex parte on 12.5.1993. As the defendant-petitioner had no knowledge about the dismissal of the suit, he could not come to the Court earlier and participate in the hearing of the case. Therefore, by filing an application under Order 9, Rule 13, CPC. the defendant-petitioner sought to set aside the same and allow him to participate in the proceeding, otherwise it will cause irreparable loss to him. He also filed an application u/s 5 of the Limitation Act for condonation of delay stating that the Civil Court was closed for

summer vacation and on 22.6.1993 the Court was reopened after summer vacation. The petitioner having no knowledge about passing of the ex parte decree, could not file the petition on 22.6.1993. It is further stated that he came to know about the ex parte decree only on 2.1.1995 and thereafter, he filed the application on 7.1.1995 for setting aside the ex parte decree under Order 9, Rule 13, CPC and prayed the Court to condone the delay in filing the application.

3. The plaintiff-opposite party No. 1 raised objection stating that the agreement between the petitioner and his advocate is not true and the petitioner has deliberately adopted false plea for restoration of the suit, but admitted the fact that the lawyer namely, Sri Rajani Kanta Bhoi, who was appearing for defendant, has died and denied the fact with regard to the knowledge of the death of the advocate of the petitioner. It is stated that Sri Rajani Kanta Bhoi being a respectable person of Bolangir town and the news of his death was published in all the news papers and the defendant-petitioner having close relationship with the family of his advocate, the decree should not be set aside by invoking the jurisdiction under Order 9, Rule 13, CPC. It is further stated that the delay of 5 days from the date of knowledge of the petitioner in filing of the petition has not been explained. Therefore, he sought for dismissal of MJC No. 1 of 1995 filed before the learned Civil Judge (Senior Division), Bolangir.

4. In order to substantiate the case, the plaintiff-petitioner examined himself as P.W. 1. No witness was examined from the side or the opposite party. On the basis of the materials available on record, learned trial Court observed that MJC No. 1 of 1995 was filed under Order 9, Rule 13, CPC after more than one year of final disposal of the suit but no steps have been taken to set aside the ex parte order passed on 22.10.1990 and therefore concluded that the defendant No. 1-petitioner deliberately did not attend the Court and has neither filed written statement nor participated in the hearing. With such finding, the learned trial Court dismissed the petition on contest vide order dated 15.3.2007.

5. Assailing the said order, the petitioner preferred appeal before the learned District Judge, Bolangir, registered as FAO No. 9 of 2007. It is stated by the appellate Court that since the defendant No. 1-petitioner has not filed written statement in the suit, he was set ex parte on 22.10.1990 and as such, he did not choose to set aside the ex parte decree and therefore, the suit was decreed ex parte on contest against the other defendants on 12.5.1993. Admittedly, the petition to set aside ex parte decree was filed on 7.1.1995, which is grossly barred by limitation. But such plea has been taken due to the admitted fact that his advocate did not inform him about the date of hearing and also died during pendency of the proceeding itself. The learned appellate Court thereby confirmed the order of the learned trial Court stating that the application filed under Order 9, Rule 13, CPC is grossly barred by limitation.

6. To the above pleadings of the parties, Mr. A.R. Dash, learned counsel for the petitioner states that if sufficient cause has been shown to set aside an ex parte decree under Order 9, Rule 13, CPC, then the Court should not be reluctant to

consider the same and pass appropriate order, if it satisfies that the defendant is sufficiently prevented not to participate in the proceeding with sufficient cause. He further stated that to provide complete justice, there should be liberal construction and sufficient cost should have been ordered by the Court. In support of such contention, he has relied upon the judgments in G.P. Srivastava Vs. Shri R.K. Raizada and Others, , Khetrabasi Srichandan and Others Vs. Gopinath Srichandan, and Pramod Kumar Sharma and Others Vs. Upender Kumar Agarwal,

7. Mr. B.K. Sharma. learned counsel appearing for the plaintiff-opposite party No. 1 strenuously opposed the stand taken by the petitioner and stated that while filing an application under Order 9, Rule 13, CPC no sufficient cause has been shown so that the same can be entertained at this stage and therefore, the learned Court below is wholly and fully justified in rejecting the application filed under Order 9, Rule 13. CPC and the confirmation thereof by the learned District Judge. Bolangir is also justified. It is further stated that the plaintiff-opposite party No. 1 being a State owned Corporation, the amount has to be realized from the petitioner and in the event this Court sets aside the ex parte decree, it will cause great prejudice to the Corporation.

8. Considering the provisions of Order 9, Rule 13, CPC, the apex Court in G.P. Srivastava (supra) has held as follows:

"Under Order 9. Rule 13 CPC, an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" Is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9. Rule 121 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The Court have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause- is made out for non-appearance of the defendant on the dale fixed for hearing when ex parte proceedings initiated against him. he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.""

9. Referring to the judgment in G.P. Srivastava (supra), this Court in Khetrabasi Srichandan (supra) held that the word "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. "Sufficient cause" for the purpose of Order 9, Rule 13, CPC has to be construed as elastic expression for which no hard and fast guidelines can be prescribed and the Courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. In the case in hand, It is the admitted fact that the defendant-petitioner had received the notice and on receipt of the notice, he engaged his lawyer namely, Sri Rajani Kanta Bhoi, who was taking steps day to day. But fact remains, the lawyer having died, the petitioner could not get any information about the position of the case and when he came to Court then only it was brought to his notice that his lawyer has already died and nobody is there to intimate him and by the time it was brought to his knowledge, the suit has already been set ex parte and ex parte decree has already been passed against him.

10. In similar circumstances, in Pramod Kumar Sharma (supra) the High Court of Andhra Pradesh in paragraph 6 has held as follows:

"On a careful examination of the facts and circumstances of the case, although the learned trial Judge has given adequate and perhaps even convincing reasons to technically hold that the defendants had failed to show sufficient cause to condone the delay for filing the petition for setting aside the ex parte decree, this Court having been persuaded by the decision of the Supreme Court supra, feels that the learned trial Judge could have been, more liberal. When the matter is entrusted to an Advocate, the litigant normally depends upon him for further instructions. If the Advocate dies, there will be vacuum unless somebody informs the party about the death of the Advocate. It is also not improbable whether It is his own son or the Juniors, the death of a senior Advocate creates lot of dislocation in the management of the office of an Advocate. In such a situation, it is possible that further proceedings of the suit as against the defendants would not have been known to them. Therefore, without judging the matter merely in a technical manner and applying the principles laid down by the Supreme Court in the decision supra, this Court feels that it will not be totally unjustified to accept the grounds set up by the defendants to hold that the delay in filing the petition for setting aside the ex parte decree was sufficiently explained. Moreover the reasons for delay given in the affidavit could not have been lightly dealt with, in the circumstances stated above. As a whole, this Court feels that the order of the trial Judge cannot be sustained. Therefore, the order of the learned II Additional Judge, City Civil Court deserves to be set aside."

11. Analyzing the situation, the Andhra Pradesh High Court allowed the revision application and set aside the order passed by the learned trial Court as well as the appellate Court by condoning the delay.

12. Considering the law laid down by the apex Court as well as the fact and law enunciated by the High Court of Andhra Pradesh, the present case falls into the same category inasmuch as if the lawyer would have been alive and intimated the petitioner with regard to the next course of action and the petitioner failed to take steps, in that case, the Courts should not set aside the ex parte decree under Order 9, Rule 13, CPC. In this case the position is just reverse because after the death of the lawyer, his death has not been brought to the notice of the defendant-petitioner, consequent upon which he could not take steps and with apprehension when he came for enquiry, he could know that the suit has already been decreed ex parte.

13. In view of the foregoing reasons and taking a liberal view realizing the position, to give opportunity to the defendant-petitioner. this Court sets aside the impugned order dated 15.3.2007 passed in MJC No. 1 of 1995 by the learned Civil Judge (Senior Division). Bolangir and the order dated 6.11.2009 passed by the learned District Judge, Bolangir in FAO No. 9 of 2007. However, the petitioner shall pay a cost of Rs. 500/- to the opposite party. On payment of such cost, the Money Suit No. 30 of 1966 shall be restored to file, This order is passed without prejudice to the rights and liabilities of the parties to be decided in the suit ultimately. However, since the suit is of the year 1986, the trial Court is directed to expeditiously dispose of the same as early as possible preferably by the end of December, 2014 and parties are directed to cooperate in early disposal of the suit.

14. With the aforesaid observation and direction, the writ petition Is allowed No cost.