

(2008) 03 OHC CK 0028

In the Orissa High Court

Rabi Sankar Sharma

APPELLANT

Vs

State Bank of India and Another

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

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

Citation : (2008) 106 CLT 426 : (2008) 1 OLR 683

Hon'ble Judges : S.R. Singharavelu, J

Bench : Single Bench

Judgement

S.R. Singharavelu, J.—This Miscellaneous Appeal arises out of the order dated 11.10.1999 passed by the Civil Judge (Senior Division), Kuchinda in Misc. Case No. 5 of 1997, filed by the appellant-defendant No. 1 - petitioner under Order 9 Rule 13 C.P.C. to set aside the ex parte decree dated 12.5.1992 passed in T.M.S. No. 10/90.

2. T.M.S. No. 10/90 filed by the respondent No. 1 - plaintiff is for recovery of Rs. 3,33,819.95.

3. The learned trial Judge dismissed the application filed by the defendant No. 1 under Order 9 Rule 13 C.P.C. taking into consideration the fact that the said defendant had not proved that he had got knowledge of the decree for the first time only on a date prior to the date of filing of the application under Order 9, Rule 13, C.P.C. In this connection, the trial Judge burdens the petitioner-defendant No. 1 to say that the signature found in the summons said to have been served by the process server, who was examined in the Court by the respondent No. 1/plaintiff, does not belong to him.

4. When a person stoutly denies the signature in the summons by saying that it does not belong to him, he cannot be further burdened to say as to whose signature it is. In other words, once defendant No. 1 denied his signature on the notice, it was for the plaintiff to prove the same. The defendant No. 2 as opposite party No. 2 cannot prove the existence of a negative thought.

5. The respondent-plaintiff has proceeded with by examining the process server who could only say that he had served the summons and got the signature of defendant No. 1. If it is found that he had not served the notice upon the defendant No. 1, then he would be out of job. In this context, no process server will come to say against his own interest.

6. Once there is a dispute regarding the service of summons by the process server, one cannot solely and safely rely upon his evidence and come to the conclusion that he had actually served the summons upon the defendant No. 1. Therefore, it was imperative on the part of the respondent No. 1/plaintiff to have examined some other person who had witnessed the service made by the process server upon the defendant No. 1. That has not been done in this case.

7. As mentioned earlier, no credibility would be attached in this context to the evidence of the process server even though he is an officer of the Court. It is also a matter to note that there is no witness examined for having witnessed the service made upon the defendant No. 1 by the said process server. Local villagers have not been examined. Therefore, still it is an unanswered question as to whether the defendant No. 1 was served with the summons at all. It is in these circumstances, we have to think of the plight of any person like the defendant No. 1 who would suffer out of the decree which is more than Rs. 3 lakhs without even being given an opportunity of being heard, Necessarily that opportunity is to be given to him.

8. However, the matter is pending for long time. The loan was said to have been borrowed in 1981. In the circumstances, in the interest of justice, defendant No. 1 is to be directed to deposit 50% of the decretal amount, besides paying cost of Rs. 2,000/- (Rupees two thousand) to the respondent No. 1-plaintiff.

9. Both the payments shall be made within a period of one month and in default, the Misc. Appeal will be dismissed without making any further order. The amount of Rs. 3 lakhs be deposited in the trial Court and the amount of Rs. 2,000/- (Rupees two thousand) will be handed over to the learned Counsel for respondent No. 1-plaintiff within the stipulated time

10. The Misc. Appeal is accordingly disposed of. The L.C.R. be sent back.