
(1991) 01 AHC CK 0127

In the Allahabad High Court

Case No : F.A.F.O. No. 248 of 1989 & F.A.F.O. No. 28 of 1989

Rai Prem Chandra and Others

APPELLANT

Vs

Obeetee Pvt. Ltd.

RESPONDENT

Date of Decision : 19-01-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20, Order 5 Rule 20(1), Order 9 Rule 13

Citation : (1991) 01 AHC CK 0127

Hon'ble Judges : M.M. Lal, J;K.P. Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

K.P. Singh, J.—This is a Defendants' First Appeal from order against order dated 5-1-1989 passed by the 5th Addl. Civil Judge. Varanasi in Misc. Case No. 59 of 1987 Prem Chandra v. Obeetee Pvt. Ltd whereby their application for setting aside the ex parte judgment and decree dated 3-12-1986 had been dismissed.

2. Shorn of unnecessary details the Plaintiffs suit was dismissed on 21-1-1985 in the absence of the parties. Thereafter, the suit was restored to its original number on 11-4-1986. It appears that the Plaintiffs suit has been decreed on 3-12-1986 ex parte, on 27-5-1987, the Defendants filed an application for setting aside the ex parte decree dated 3-12-1986 alleging that the Defendants counsel was not served with any notice about the date in the case after the restoration of the suit on 11-4-1986 and that the Plaintiff had obtained service against the Defendants through publication on wrong facts. The Defendants came to know of the ex parte decree on 24-5-1987 through a representative of the Plaintiff and thereafter got the file inspected on 27-5-1987. On the aforesaid fact, the Defendants prayed for setting aside the ex parte decree dated 3-12-1986 against them. (See: Annexures "2" attached with the stay application).

The claim of the Defendants for setting aside the ex parte decree was contested on behalf of the Plaintiff as is evident from Annexure "3" attached with the stay

application in the above appeal. The trial court through the impugned order dated 5-1-1989 has refused to set aside the ex parte decree against the Defendants; tunes aggrieved by that order the Defendants have approached this Court through the above noted first appeal from order.

3 Learned Counsel for the Appellants has contended before us that the Plaintiff has got service of the summons against the Defendants through publication on wrong facts and that the trial court has acted illegally in permitting substituted service upon the Defendants in the facts and circumstances of the case and it has acted illegally in dismissing the application for setting aside the ex parte decree against the Defendants. The reasons given by the trial court in the impugned order are all wrong.

Learned Counsel for the Plaintiff-Respondent has tried to refute the contentions raised on behalf of the Defendants-Appellants and has asserted that the conduct of the Defendants in this case is such that every time the Defendants had been served through publication (substituted service). Therefore, the trial court has arrived at correct conclusion and has rightly refused to set aside the ex parte decree against the Defendants. The learned Counsel for the Plaintiff-Respondent has also emphasised that in the facts and circumstances of the case, if the ex parte decree is set aside, it should be subject to heavy cost.

4. We have considered the contentions raised on behalf of the parties and we have perused the impugned judgment. The first ground for rejecting the claim of the Defendants given by the trial court is to the effect that the Defendants did not file any rejoinder-affidavit to the counter-affidavit filed by the Plaintiff-Respondent opposing the application for setting aside the ex parte decree. True, that the Defendant-Appellants had not filed rejoinder-affidavit but the trial court has acted illegally in not examining the worth of the counter-affidavit filed by the Plaintiff-Respondent and placing reliance upon the allegations in the counter-affidavit. R.A. 1 to the rejoinder-affidavit filed in this case is the copy of the affidavit filed on behalf of the Plaintiff-Respondent opposing the Defendants' application for setting aside the ex parte decree. The verification clause in the affidavit indicated that the deponent has not sworn the affidavit strictly in accordance with the Rules, 1 has been stated in the verification clause that the contents of the affidavit from paragraph 1 to 12 are true to the personal knowledge and belief of the deponent. It has not been indicated which part is based on personal knowledge and which part is based on belief. Therefore, the affidavit filed on behalf of the Plaintiff Respondent is defective and this aspect of the matter has escaped the notice of the trial court while it placed reliance upon the affidavit in discrediting the claim of the Defendant Appellants. In our opinion, the affidavit filed on behalf of the Plaintiff-Respondent is no affidavit in the eye of law. Therefore, the trial court acted illegally in not placing reliance upon the allegations made by the Defendants in the affidavit filed in support of their application for setting aside the ex parte decree.

5. The second ground given by the trial court is that there is no inspection

application on the record, therefore, the contention of the Defendants that they got the file inspected and thereafter came to know about the ex parte decree was not correct and in this way, the trial court has not accepted the contention of the Defendants that they came to know about the ex parte order after inspection of the record, The perusal of RA I. which is the affidavit filed on behalf of the Plaintiff-Respondent for opposing the application for setting aside the ex parte decree moved by the Defendants, indicates that according to the Plaintiff-Respondent the application for inspection dated 26-5-87 was fictitious and was moved with an intent to create false evidence of ignorance. In view of the aforesaid averment in the affidavit, the finding of the trial court on the possibility that the Defendants counsel had not inspected the record stands vitiated in law. This ground of the trial court in not accepting the claim of the Defendants about the knowledge of the ex parte decree after inspection of the record, appears to us as wrong.

6. The trial court has also emphasised that the Defendants did not make an attempt to get the reference of the inspection application, therefore, an adverse inference has been drawn against the Defendants. In our opinion, the trial court has acted to technically in this regard. The office record should have been examined by the trial court to ascertain the truth. However, in view of the averment made in the affidavit on behalf of the Plaintiff, it is clear that some inspection application had been moved on behalf of the Defendants but the same has been characterised as fictitious and with intent to create false evidence of ignorance. Therefore, the conclusion of the trial court that no application had been moved and adverse inference against the Defendants should have been drawn appears to us patently erroneous and the approach of the trial court in this regard is erroneous.

The following observation of the trial court appears to us based OR surmises and conjecture which cannot be maintained in the eye of law:

...tatha restoration hone ki jankari parathi ko samay samay par thi. Samanya tathya meyah manajayega ki 21-11-85 ke paschat vad ke pragati ki jankari prapta karne ke liye prarth nishit the nayalalaya aaya hoga aur jankari prapta kihogi. Kyonki 21-11-85 ko prativadi nyayalaya nahi aaya tha aur ukta tithi ki jankari swikrit roop me use thi.

The trial court has also observed that mere irregularity in service would not entitle the Defendants to get the ex parte decree set aside. In our opinion, the trial court has not appreciated the facts and circumstances involved in the present case in correct perspective.

7. The second proviso to Order 9 Rule 13 of the CPC reads as below:

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the Defendant had notice of the date of hearing and had sufficient time to appear and answer the Plaintiff claim."

In the present case, the trial court has observed as below:

Ant men prarthi ki ore ase yah kaha gaya hai ki us par summons niyamnanusar tamil nahi hua, kintu sanshodhit aadesh 9 niyam 13 CPC ke antargat summon ki tamili ki trutipurna prakripa ke tark parek pakshtya aagyapti ko nirast nahi kiya ja skta hai.

The trial court has not recorded any categorical and positive finding to the effect that it was satisfied that the Defendants had notice of the date of hearing and had sufficient time to appear and answer the Plaintiff's claim. Yet it has repelled the contention of the Defendants relying upon the proviso regarding the irregularity in the service of summons. We shall demonstrate hereafter that the Defendants had really not been served about the date of hearing after restoration of the suit dismissed in default of the parties. It is noteworthy that the trial court has patently erred in placing reliance upon the proviso quoted above, while rejecting the Defendants' application for setting aside ex parte decree.

8. The perusal of the order-sheet contained in Annexure "5" to the affidavit filed in support of the stay application in This Court, discloses that on 26-5-1986 the trial court directed that summons in the name of the Defendants be issued for filing written statement and issues on 24-7-1986. On 24-7-1986 it has been noted that the summons had not returned. It was ordered that pairvi through registered post should take place till 31-7-1986; On 31-7-1986 it has been ordered as below:

41-C. The Plaintiff filed affidavit in support of his application allowed. Let publication be made in Jaidesh Steps within 7 days.

Order 5 Rule 20 of the CPC provides as below:

20. Substituted serviced 1) Where the court is satisfied that there is reason to believe that the Defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court house, and also upon some conspicuous part of the house (if any) in which the Defendant is known to have last resided or earned on bussiness or personally worked for a gtin, or in such other manner as the court thinks fit.

(1-A) where the court acting under Sub-rule (I) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the Defendant is last known to have actually and Voluntarily resided, carried on business or personally worked for gain.

(2) Effect of substituted service-Service substituted by order of the Court shall be as effectual as if it had made on the Defendant personally.

9. The learned Counsel for the Plaintiff-Respondent has emphasised before us

that in the facts and circumstances of this case, the substituted service upon the Defendants was as good as personal service on the Defendants. Therefore, the trial court was right in holding that the Defendant's application for setting aside the ex parte decree was beyond time. It is note worth that the trial court has not paid due regard to the provisions of Order 5 Rule 20 of the CPC in the present case. A perusal of the order-sheet indicates that the direction of the trial court for issuing notice intimating the Defendants about the date of hearing had not been carried out yet on 31-7-1986, the trial court ordered for sub-stituted service by publication in Jaidesh. In our opinion, the trial court has hastened to take recourse to the substituted service in the facts and circumstances of the present case without paying due regard to the provisions of Order 5 Rule 20 Code of Civil Procedure.

10. General Rules (Civil) for the subordinate civil courts vide para 141 provides as below:

141. Service by publication-Recourse to the mode of substituted service by publication in a newspaper shall be had only when service by any other method is considered impracticable.

A careful discretion shall be exercised in selecting the newspaper in which the publication is to be made under order v Rule 20 CPC only a daily news paper circulating in the locality in which Defendant to be served is last known to have actually and voluntarily resided or carried on business or personally worked for gain, shall be selected. No summons or notice shall be published in a magazine.

The above rule also emphasises that the recourse to substituted service by publication can be adhered to only when service by any other method is considered impracticable. In the present case, the trial court did not wait to see that its order dated 26-5-1986 had been carried out. On 3-7-1986 on the application of the Plaintiff-Respondent it had ordered for service of summons upon the Defendants through publication. We think that the trial court had acted wrongly and illegally in adhering to substituted mode of service in the facts and circumstances of this case.

11. In the affidavit filed in support of the application for setting aside the ex parte decree (see: Annexure "3" attached with the affidavit to the stav application filed in This Court) vide para 6, plea has been raised to the following effect ;

Yah ki vad restoration mitkdma No. 203/83 me bhi ham saylan ya saylan ke adhivakta ko mukadme ke karyavahi ke babat koi soochna Ya summon nahi diya gaya aur dinank 8-9-86 isvi ko galat tathyon ka izhar karke prativadigan No. 6/1 ta 6/4 ko summon ki tamili zariye pra c ashan akhbar ho gai hai, mukadma me ke pakshiya karyavahi ka aadesh kara liya aur mukdma number dinak 3-12-86 ko ek pakshiya faislava decree hasii kar liya. Ukta aadesh va decree ki koi jankari ha a saylan/prativedi ko nahi rahi.

In the impugned judgment leading to the above noted First Appeal from Order, we do not find that the trial court has considered this plea of the Defendant-Appellants and has answered it satisfactorily. The perusal of the order-sheet of the trial court indicates that the Defendants were not intimated of the date of hearing after restoration of the suit in accordance with law. Therefore, the trial court has acted illegally in proceeding ex parte against the Defendants in the facts and circumstances of this case.

In *Mool Chand Vs. Ganga Sahai*, , a learned Single Judge of this Court has made the following observation in the last paragraph of the judgment.

It appears to me that apart from authority, I cannot possibly decide that a Defendant is not entitled to notice of the hearing of the case against him. In this case both the Plaintiff and the Defendant were absent on the original hearing. When the Plaintiff is allowed a second chance by having the application for restoration granted, it appears to me inequitable that the Defendant should not have notice of the date fixed for the hearing. Apart from authority therefore, I decide that in any such case the Defendant is of right entitled to notice of the hearing of the suit.

12. We think that in law and equity when a suit is restored after dismissal of the suit due to absence of the parties, it is the bounden duty of the court to see that the Defendant is communicated the date of hearing after restoration. In the present case on material placed before us we are not satisfied that the Defendant-Appellants were communicated about the date of hearing after restoration) of the suit dismissed in the absence of the parties.

We have already indicated that the affidavit filed by the Plaintiff-Respondent in opposition to the affidavit filed in support of the application for setting aside the ex parte decree, the verifying clause was not strictly in accordance with the rules. Therefore, we have no option but to rely upon the statements made by the Defendant-Appellants to the effect that the Defendants and their counsel had no notice of the date of hearing fixed by the trial court after restoration of the suit dismissed in default of the parties.

13. We do not agree with the contention of the learned Counsel for the Plaintiff-Respondent that the limitation for setting aside the ex parte decree should be computed from the date of the ex parte decree. Rather, we think that the limitation for the setting aside ex parte decree moved by the Defendants should be computed from the date of knowledge of the ex parte decree alleged by the Defendants in the affidavit filed in support of the application for setting aside the ex parte decree. To our mind, the application is well within time and there exists sufficient cause for setting aside the ex parte decree passed by the trial court on 3-12-1986 against the Defendant-Appellants in the facts and circumstances of this case.

In *Gobardhan Ram Bisheshar Ram Vs. Banarsi Ram and Others*, , a single Judge of this Court has emphasised that whenever a date is fixed for the hearing or a

date is adjourned it is the bounden duty of the court to inform the parties or their counselor their representative of such date if they are not so informed the party not informed will not be bound by the proceedings. In the present case, the trial court ordered on 21-5-1986 that the Defendants' counsel be informed as is event from annexure CA-1 to the counter affidavit but that order has not been complied with and the trial court has failed to notice this aspect of the matter when it ordered for substituted service. In the facts and circumstances of this case, we arrive at the conclusion that the trial court is at fault in proceeding with the suit and the Defendants had not been communicated of the date of hearing fixed after restoration of the suit dismissed in default of the parties.

In *Ram Bharose Vs. Ganga Singh*, it has been held that the limitation of thirty days for filing the application would be computed from the date of the Defendant's knowledge of the decree. After examining the record of the trial court we think that the Defendant-Appellants were not communicated of the date of hearing after restoration of the suit dismissed in default of the parties. We rely upon the averments made in the affidavit of the Defendant filed in support of the application for setting aside the ex parte decree. Since the Defendants and their counsel were not communicated the date of hearing after restoration of the suit there exists sufficient cause for setting aside the ex parte decree against the Defendants passed on 3-12-1986.

14. Order 9 Rule 13, CPC contemplates setting aside the decree upon such terms as to costs, payment into court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit. In the present case, the learned Counsel for the Plaintiff-Respondent has suggested for heavy cost against the Defendant-Appellants in case the ex parte decree is set aside. We have considered the question and, in our opinion, since the trial court is at fault in proceeding with the suit in the manner it did, we think that the ends of justice would be sufficiently met if the ex parte decree dated 3-12-1986 passed by the trial court against the Defendant-Appellants is set aside subject to payment of costs by the Defendant-Appellants to the tune of 500/- looking to the valuation of the suit. However, the Appellants are entitled to costs of this appeal before This Court.

15. The learned Counsel for the parties have suggested that the suit giving rise to the above noted appeal had been filed in the year 1983. Therefore, an observation be made that the trial court should decide the suit hereafter expeditiously and preferable within a year from the date of receipt of the record. The counsel for the parties have also stressed that the parties shall cooperate and not take unnecessary adjournment so that the case may be finally disposed of within a year from the date when the record of the suit is received by the trial court hereafter. We think it desirable to observe that it is expected of the trial court to decide the claims of the parties in the suit expeditiously so that the parties may not have any grievance regarding delay in the disposal of the suit.

16. In view of the above discussion this appeal is allowed and the order of the trial court dated 5-1-1989 rejecting the Defendants' application for setting aside

the ex parte decree dated 3-12-1986 is hereby set aside. On the findings recorded by us above there exists sufficient cause for setting aside the ex parte decree dated 3-12-1986 against the Defendant-Appellants which is also hereby set aside subject to payment of cost to the tune of Rs. 500/- to the Plaintiff-Respondent within a month from today, and the suit giving rise to the above noted appeal is restored to its original number.

The Appellants shall be entitled to the cost of the above appeal before This Court.

It is expected that the trial court shall decide the suit expeditiously as indicated in the body of the judgment.