

(1979) 12 AHC CK 0049
In the Allahabad High Court
Case No : F.A.F.O. No. 409 of 75

Raja Ram Gupta

APPELLANT

Vs

Firm Jaiswal Iron and Steel Works and Others

RESPONDENT

Date of Decision : 10-12-1979

Acts Referred:

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

Citation : (1980) AWC 101

Hon'ble Judges : V.K. Mehrotra, J;H.N. Seth, J

Bench : Division Bench

Advocate : M.C. Dwivedi, for the Appellant; S.R. Misra and M.C. Pant, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Seth, J.—This First Appeal From Order by Defendants Raja Ram Gupta is directed against the order passed by the Civil Judge Gorakhpur on 16th August 1975 rejecting Appellant's request for setting aside an ex-parte decree passed against him on 5th March 1974.

2. On 3rd April 1974 Appellant Raja Ram Gupta who was one of the Defendants in Suit No. 113 of 1973 of the court of Civil Judge, Gorakhpur made an application under Order IX Rule 13 CPC praying that the ex-parte decree dated 5th March 1974 passed against him be set aside, in the affidavit filed in support of the application, he stated that summons had been served on the Defendants by publication in a news paper Sanmarg which had no circulation in the village areas of the district of Varanasi and Jaunpur as also in village Thatra where the Defendant resided. The Defendants therefore, had no knowledge of the proceedings in the suit and of the ex-parte decree passed on 5th March 1974. It was only when on 2nd April 1974 the Appellant went to the shop of the Plaintiff at Golgarh Gorakhpur that he came , to know about the ex-parte decree and " thereafter he immediately filed the application under Order IX Rule 13 of the Code of Civil Procedure.

3. The prayer made by the Appellant was opposed by the Plaintiff-decree holder who related the assertion that the Defendants were not aware of the proceedings. The decree holder further asserted that on an application filed by him, the Court had made an order attaching before judgment various movable and immovable properties of the Defendants. In pursuance of that order the Vakil Commissioner appointed by the Court carried out the attachment of mills, machinery and raw material, belonging to the Defendant at Thatra. At that time Appellant Raja Ram Gupta and Defendant Ram Kripal another partner of Defendant No. 1 were also present at the shop, it could therefore not be said that the Defendants had no knowledge of the proceedings. Publication of summons was made in the newspaper Sanmarg, which had very wide circulation not only in the city of Varanasi but all round in the district of Varanasi and interior villages of Varanasi and Jaunpur,

4. Raja Ram Gupta filed an additional affidavit on 15-8-1975 wherein he denied that either he or Ram Gopal was present at the time when the Vakil Commissioner visited Thatra and carried out the attachment before judgment and that the report made by him mentioning their presence was incorrect.

5. The trial court observed that the version contained in the affidavit filed by the Plaintiff was fully supported by the Commissioner's report on the record and appeared to be probable, specially when a Superdar had been appointed to take charge of the attached properties. It therefore did not believe the statement of the Defendants that they came to know of the proceedings for the first time on 2nd April 1974 and made the impugned order dismissing the application for setting aside of the ex parte decree.

6. A perusal of the order passed by the trial court shows that it dismissed the application filed by the Appellant on the finding that the Appellant was aware of the suit and that despite this knowledge he did not care to put in appearance and to defend the suit. It did not express any opinion on the controversy between the parties in regard to service of summons on the Defendants by publication in the newspaper Sanmarg.

7. Order IX Rule 13 as applicable in this State, as it stood at the relevant time ran thus:

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 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 decree as against him 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;

Provided that where the decree is of such a nature that it cannot be set aside as against such Defendant only it may be set aside as against all or any of the other Defendants also.

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons if the court is satisfied that the Defendant knew or but for the wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the Plaintiffs' claim.

8. According to this rule a Defendant against whom a decree has been passed ex parte is entitled to have the same set aside if he satisfies the court:

(1) That summons was not duly served upon him ; or

(2) That he was prevented by sufficient cause from appearing when the suit was called on for hearing.

9. Second proviso to Rule 13, as added in this State, however, lays down that an ex parte decree shall not be set aside in a case where there has been some irregularity in service of summons i.e. is a case where the summons have not been duly served if it is satisfied either that the Defendant knew or he would have not for his wilful conduct known of the date of hearing in sufficient time to enable him to appear and answer the Plaintiff's case. It thus appears that the absolute right conferred upon the Defendant by the main rule to have the ex parte decree set aside in a case where the summons were not duly served had in this State been curtailed. According to the law prevailing in this State this right ceases to be available in a case where the Defendant knew or, but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the Plaintiff's claim. Accordingly in a case where summons have not been duly served upon the Defendant and the exact date of hearing is not known to the Defendant but he comes to know of the proceedings well in time he can easily find out the date and put in appearance and answer the Plaintiff's claim. If he without any justification fails to take steps to find out the date of hearing the only conclusion which can be drawn would be that but for his wilful conduct he would have known the date of hearing in sufficient time so as to enable him to appear and answer the Plaintiff's claim.

10. The rule further contemplates that even where the summons have been duly served or where the Defendant comes to know of the proceedings in good time so as to enable him to find out the date of hearing to put in appearance and answer the Plaintiff's claim he can still have the ex parte decree set aside if he satisfies the court that he was prevented by sufficient cause from appearing before the Court.

11. In the case before us the Defendant based his claim for the setting aside of the ex parte decree on the ground that the summons were not duly served upon him and that he did not come to know of the proceedings in time to appear and answer the Plaintiff's claim. The request for the setting aside of the ex parte decree was not at all based on the ground that even though the Defendant wanted to appear and answer the Plaintiff's case he was prevented by some sufficient cause from appearing before the court when the case was called for hearing. The case set up by the Defendant in support of his prayer was that the

summons in this case were published in the newspaper Sanraarg which had no circulation either at the place where the Defendants "carried on their business or at the place where they resided. The service so effected was irregular and it cannot be said that the summons had been duly served upon them. Further, as they never became aware of the proceedings right till 2nd April, 1974 they were not in a position to appear before the court and to answer the Plaintiff's claim. According to them there was nothing on the record to show that but for their wilful conduct they would have known of the date of hearing in sufficient time to enable them to appear and answer the Plaintiff's case. They were therefore entitled to have the ex parte decree set aside. A perusal of the record indicates that after filing the suit the Plaintiff filed an application on 22nd May 1973 praying for the attachment before judgment of the movable and immovable properties belonging to the Defendants. The court appointed a Vakil Commissioner to go to village Thatra & attach moveable and Immovable properties belonging to the Defendant. The Vakil Commissioner submitted a report, according to which he visited the spot on 26th May, 1973. There he met Defendant's Ram Kripal and Raja Ram Gupta. As the Defendants refused to furnish security as required by the court he attached the properties belonging to the Defendant which consisted of building of the rolling mills including godowns, office room etc. as also the mill-machinery, raw material and finished material, and prepared a list thereof. Thereafter he placed all the attached properties in the Supurdgi of one Purshottam whose name was suggested to him by the Defendants themselves. The report therefore indicated that the Defendant had acquired knowledge of the proceedings on 26th May 1973. The suit was decreed ex parte on 5th March 1974. Accordingly the Defendants had more than sufficient time to ascertain the position in the case, to put in appearance and to answer the Plaintiff's claim. If they did not know of the exact date of hearing it could be attributed only to their wilful conduct in not faring to put in appearance before the Court.

12. In the original affidavit sworn by Raja Ram Gupta in support of the application for setting aside of the ex parte decree he did not mention any thing about the appointment of the Vakil Commissioner for attachment before judgment of his movable and immovable properties and the report made by the Commissioner. However, when the Plaintiff filed an affidavit asserting that properties of the Defendants had been in the presence of the Appellant attached in connection with these proceedings and that the Appellant was fully aware of the proceedings, Raja Ram filed a second affidavit on 16th August, 1975. In that affidavit he did not deny the fact that moveable and immovable properties belonging to the Defendants had in fact been attached by the Vakil Commissioner as stated by him in his report. All that he stated was that the statement made in the report of the Vakil Commissioner that Raja Ram Gupta and Ram Kripal were present at the time of attachment was not correct, and that the Plaintiff had manoeuvred to procure the attestation of some persons for such a false report. The averments made by the Appellant imply that the property belonging to the

Defendants had in fact been, as mentioned in the Commissioner's report, attached on 26th May, 1973, but then the attachment was made in the presence of some other persons who had been wrongly identified as the Defendants before the Commissioner. Be that as it may, if the properties belonging to the Appellants, as mentioned in the Commissioner's report were in fact attached on 26th May 1973 and placed in the Supurdgi of Purshottam, it is difficult to believe that the Defendants did not come to know of such attachment and consequently about the proceeding soon after 26th May 1973. As the Appellant suppressed the fact with regard to attachment of properties in the affidavit filed by him and the fact that the Commissioner's report fully corroborates the affidavit filed by the Plaintiff, the court below cannot be blamed for accepting the averment made in Plaintiff's affidavit that the Defendants became aware of the suit proceedings at least on the date of such attachment i. e. 26th May, 1973.

13. As despite any irregularity in service of summons (if there was one) the Defendants became aware of the proceedings in the suit on 26th May 1973 or very soon thereafter they could have but for their wilful conduct, known about the date of hearing in sufficient time so as to appear and answer the Plaintiff's claim. The second proviso to Rule 13 therefore forbids the court from making an order setting aside the ex-parte decree on the ground that service of the notice by publication in the newspaper Sanmarg was irregular. In this view of the matter it was not at all necessary for the trial court to go into the question as to whether in the circumstances of the case, service of summons on the Defendants by publication in the newspaper Sanmarg was regular and whether such a service can be said to be due service within the meaning of the expression as used in Rule 13. The Defendants are clearly disentitled to claim the relief prayed for by them because of the second proviso to Order IX Rule 13 as added in this State.

14. In the result the appeal fails and is dismissed. We, however, direct the parties to bear their own costs.