
(2014) 09 CAL CK 0084

In the Calcutta High Court

Case No : C.O. No. 3283 of 2013 With CAN 858 of 2014

Rehana Riaz

APPELLANT

Vs

Nausher Ali

RESPONDENT

Date of Decision : 12-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 14, Order 41 Rule 14(1), Order 41 Rule 14(4), Order 9 Rule 13, 148A
Constitution of India, 1950 — Article 227

Citation : (2014) 09 CAL CK 0084

Hon'ble Judges : Ranjit Kumar Bag, J

Bench : Single Bench

Advocate : Tapan Kumar Mitra and Farhan Ghaffar, Advocate for the Appellant; Ashis Chandra Bagchi, Amitabha Roy and Malyasree Maity, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

R.K. Bag, J.—The petitioners have preferred this revisional application under Article 227 of the Constitution of India challenging the order dated 31st May, 2013 passed by learned XIIIth Judge, City Civil Court, Calcutta in Misc. Appeal No. 32 of 2012, by which learned Judge of the Court below had set aside the order dated 2nd June, 2012 passed by learned Vth Bench, Presidency Small Causes Court, Calcutta in Miscellaneous Case No. 184 of 2006 under Order 9 Rule 13 of the Code of Civil Procedure.

2. The petitioners being plaintiffs instituted ejectment suit against the opposite party/defendant before the Presidency Small Causes Court, Calcutta and in the said suit ex parte decree was passed. The opposite party filed Misc. Case No. 184 of 2006 praying for setting aside the ex parte decree passed in the ejectment suit on 7th February, 2006. The said Misc. Case was disposed of on 2nd June, 2012. The opposite party challenged the said order passed in the Misc. Case by preferring Misc. Appeal No. 32 of 2012 before the City Civil Court, Calcutta. The

said Misc. Appeal was disposed of by order dated 31st May, 2013 and the petitioners being the respondents in the said Misc. Appeal has challenged the order dated 31st May, 2013 before this Court.

3. Mr. Tapan Kumar Mitra, learned counsel appearing on behalf of the petitioners submits that the petitioners being the respondents in the Misc. Appeal were not served with notice under Order 41 Rule 14(1) of the CPC and as such, the ex parte order passed in the Misc. Appeal is not sustainable in law. Mr. Mitra has relied on two decisions reported in AIR 2000 Madhya Pradesh 121 and AIR 2005 Rajasthan 288 in support of his above contention. Mr. Mitra has also contended that service of notice of appeal prior to the admission of the appeal cannot be considered by the Court to dispense with the mandatory provisions of Order 41 Rule 14(1) of the Code of Civil Procedure. It is also the contention of Mr. Mitra that notice of Caveat u/s 148A of the CPC cannot be considered by the Court to dispense with the mandatory provision of Order 41 Rule 14(1) of the Code of Civil Procedure. According to Mr. Mitra, the petitioners/respondents must be given opportunity of hearing in the appeal, which has been disposed of ex parte by learned Judge of the First Appellate Court.

4. Mr. Ashis Chandra Bagchi, learned counsel appearing on behalf of the opposite party/appellant has referred to the order dated 4th April, 2013 passed in Misc. Appeal No. 32 of 2012 and submits that learned advocate for the petitioners/respondents appeared before the First Appellate Court after receiving copy of memorandum of appeal and as such, fresh service of notice on the petitioners/respondents under Order 41 Rule 14(1) of the CPC is not required. The further submission of Mr. Bagchi is that the object of service of notice on the respondent in an appeal is to give the respondent opportunity of hearing and when the respondent will appear in the appeal, the question of fresh service of notice on the respondent cannot arise.

5. It appears from the materials on record that the appeal was filed on 10th July, 2012. It appears from the order dated 3rd August, 2012 passed by learned Judge of the First Appellate Court that copy of memorandum of appeal was served on learned advocate for the petitioners/respondents who filed the Caveat before the learned Court below. The appeal was admitted on 3rd August, 2012. It is crystal clear from the order dated 4th April, 2013 passed by learned Judge of the First Appellate Court that both parties were present before the Court on that date and the case was transferred from the Court of learned Chief Judge, City Civil Court to learned XIIIth Judge of the said Court for hearing and disposal. The specific contention made on behalf of the petitioners is that the notice under Order 41 Rule 14(1) of the CPC must be served on the petitioners/respondents even when the petitioners/respondents have appeared before the Appellate Court to contest the appeal.

6. On perusal of the case of "Smt. Kamala and Others V. Harbhajan Singh and Anr." reported in AIR 2005 Rajasthan 288, I find that the Rajasthan High Court has decided that the service of notice of appeal can be dispensed with under

Order 41 Rule 14(4) of the CPC only for the purpose of proceeding incidental to the appeal. It has also been decided by Madhya Pradesh High Court in the case of Smt. Sushila and Another Vs. Rajveer Singh and Others, that the mandatory requirement of service of notice of appeal under Order 41 Rule 14(1) of the CPC can be dispensed with under Clause (4) of Rule 14 of Order 41 in respect of any proceeding incidental to an appeal. Both these decisions do not decide the issue whether notice of appeal is required to be served on the respondent under Order 41 Rule 14(1) of the CPC even after appearance of the respondent in the appeal and as such, the ratio of both the decisions cannot be made applicable in the facts of the present case. It goes without saying that the object of service of notice of appeal on the respondent is to give the respondent opportunity of hearing in the said appeal.

7. Since it appears from the order dated 4th April, 2013 passed by learned Judge of the First Appellate Court that both parties made their appearance before the First Appellate Court by filing Hazira, I do not find any logic in the submission of learned counsel for the petitioners that fresh service of notice under Order 41 Rule 14(1) of the CPC on the petitioners/respondents is required. Since the notice of appeal was given to the petitioners/respondents through learned advocate for the petitioners/respondents who filed Caveat before the First Appellate Court, I cannot persuade myself to hold that there is further requirement of service of notice on the petitioners/respondents under Order 41 Rule 14(1) of the CPC as contended on behalf of the petitioners. Since the petitioners got the opportunity to contest the appeal but the petitioners did not avail of the opportunity, I do not think that there is any illegality in the order under challenge.

8. In view of my above findings, the order dated 31st May, 2013 passed by learned XIIIth Judge, City Civil Court, Calcutta in Misc. Appeal No. 32 of 2012 is affirmed. The revisional application and the application being CAN 858 of 2014 are disposed of.

The department is directed to send down a copy of this judgment to the learned Court below for favour of information and necessary action.

Urgent certified Photostat copy of this order, if applied for, be given to the learned advocates appearing for the parties upon compliance of all necessary formalities.