

(2005) 09 GAU CK 0081

In the Gauhati High Court

Case No : Regular First Appeal No. 19 of 1999

Reliance Capital and Finance Trust Ltd. and Others

APPELLANT

Vs

Bhawarlal Agarwalla

RESPONDENT

Date of Decision : 23-09-2005

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Order 43 Rule 1, Order 9 Rule 13, 96(2)
Criminal Procedure Code, 1973 (CrPC) — Section 147

Citation : (2006) 1 GLT 199

Hon'ble Judges : A. Hazarika, J

Bench : Single Bench

Advocate : A.K. Saraf, K. Gupta, S. Agarwalla and D. Barua, for the Appellant;
G.N. Sahewalla, A.K. Goswami, P. Bora and S. Senapati, for the Respondent

Final Decision : Dismissed

Judgement

A. Hazarika, J.—This is an appeal u/s 96(2) of the Code of Civil Procedure, by the Appellants/Defendants No. 1 the Reliance Capital and Finance Trust Ltd. and other two Defendants i.e. Defendant 2 and 3, who are the Secretary of Defendant No. 1, the Reliance Capital and Finance Trust Ltd. and the Registrar and Transfer Agent of Defendant No. 1 respectively, against the ex-parte judgment and decree dated 1.6.98 passed in Title Suit No. 203 of 1994 by the Civil Judge (Sr. Div.) No. 1, Kamrup, Guwahati decreeing the suit in favour of the plaintiff, for realisation of Rs. 1,28,000/- from the Defendants No. 1, 2 and 3, jointly and severally with cost of the suit.

2. Material facts giving rise to this appeal are, The Defendant No. 1 being the company, registered under the Companies Act, 1956 and deals with the allotment of share, equity shares and debentures through its agent had floated shares in the market. The plaintiff being a broker dealing in shares and debentures in the stock market had applied for 1000 Rights Shares from the Defendants vide Form No. 0115029 dated 4.1.93 by paying the value of shares amounting to Rs. 10,000/- through cheque which the Defendants had

acknowledged.

3. The terms and conditions as laid down in the prospectus of the company, for public issue of shares, stipulates that within 10 weeks from the date of closure of the subscription list, the Defendants are required to dispose of the application and in the instant case subscription was closed on 4.1.1993, meaning thereby, that the Defendants are either to issue allotment advice or to issue refund order within the prescribed period of 10 weeks. Since there was no communication, the plaintiff issued a letter on 5.4.93, conveying non-receipt of any communication from the Defendants which was followed by two communications, on 13.7.93 and 1.8.93 respectively. There was no communication from the Defendant in regard to allotment advice or refund order. However, in the month of September, 1993, the plaintiff received a Dividend Warrant for Rs. 61.64 from Defendants, wherein it had been specifically mentioned that the plaintiff had been allotted 1000 rights Shares in response to his application dated 4.1.93, which was followed by a letter dated 15.10.93, requesting the Defendants to send the Share Certificates including the call money required to be deposited in respect of the said shares. Thereafter, the Defendants sent a demand note asking a sum of Rs. 30,000/- towards full payments of the shares along with interest of Rs. 17.26 per day with effect from 4.1.93. In reply to the said demand note along with the interest as asked for by the Defendants, the plaintiff issued a communication on 16.11.93, stating that since he had not received the Share certificates till date due to laches on the part of the Defendants, he is not liable to pay the interest as demanded and requested for confirmation to enable him to remit the allotment/call money. In response, the Defendants vide its letter dated 21.12.93 conveyed the intimation that the plaintiff had been allotted 1000 equity shares and accordingly 10 Share Certificates, 100 shares each bearing certificate No. 714195 to 714204, and Distinctive Nos. 43289401 to 43290301 were prepared, however, in the process of forwarding the same, the said certificates have been lost/misplaced and the duplicate certificates are being prepared with a request to return the original lost certificates, in case the same came to his hands in future and with a further request not to sell/transfer or deal with the same. Thereafter, the plaintiff sent his confirmation vide letter dated 24.1.94 along with allotment money of Rs. 30,000/- as full payment for 1000 shares allotted to him which the Defendants have acknowledged. The Defendants however, did not make endeavour to send the Share Certificates allotted to the plaintiff and as a consequence the plaintiff issued another communication on 2.3.94, but he was not favoured with any reply till 19.4.94, on which date the plaintiff issued another notice, contending, to take up the matter before the Consumer Dispute Redressal Forum, if the Certificates are not received within 30.4.94. On receipt of the said notice, the Defendants sent 9 certificates in respect of 900 shares out of 1000 shares allotted to him and 100 shares has not been sent to him. However, on 11.6.94 the plaintiff received another letter from the Defendants contending that certificates No. 714200 covered by Distinctive No. 43289901 to 43290000 for hundred shares, were transferred in favour of Defendant No. 4 in view of

transfer deed reportedly signed by the plaintiff which he never did and the said signature was said to be witnessed by the Defendant No. 5 and the Defendants have to despatch the certificates to the new transferee which is a fraud played on the plaintiff by the Defendants and in fact the plaintiff has not received the 100 shares nor signed by him in the transfer deed which can be said that the Defendants have done it for wrongful gain. The Defendants company have therefore communicated that in order to stop the despatching the said 100 shares to the transferee, an order of the court is required, in order to enable the Defendants to stop despatching the same. In the said communication the Defendants have enclosed a photocopy of the purported transfer deed which contains the back side of the alleged transfer deed and not the front page, in which the plaintiff was said to have signed. The loss that has been sustained by the plaintiff is Rs. 1,28,700/-, which is due to the negligence on the part of the Defendants company in sending the original Share Certificates in appropriate time and if he had received the original Share Certificates when the price of the shares gone upto Rs. 248/- per share, he could have earned a profit of Rs. 1,28,700 and the said calculation has been made on the basis of the current market price and the highest price reached on the shares in the stock market and hence the suit against the Defendants and prayed for decree which is quoted hereunder:

- i) a decree declaring and holding that the plaintiff is the bonafide registered owner of the 100 shares under Share Certificate No. 714200 issued by Defendant No. 1;
- ii) Declaring and holding that the transfer of the certificate No. 714200 already effected has been obtained fraudulently and thus null and void;
- iii) a permanent injunction restraining the Defendant Nos. 1 and 2 from transferring the share certificate Number 714200 to any other name except to the name of the plaintiff;
- iv) Declaring and holding that the Defendant No. 1 is bound to return the said share certificate to the plaintiff;
- v) Declaring and holding that the transfer of the share in question to the name of the Defendant No. 4 was obtained fraudulently and therefore, the Defendant No. 4 is not entitled to receive the same;
- vi) a decree for compensation of Rs. 1,28,700/- to be paid by the company to the plaintiff
- vii) Decree the cost of the suit;
- viii) Any other relief or reliefs that the plaintiff is entitled to;

4. That the plaint so filed had been registered by the learned Trial Court being Title Suit No. 203 of 1994 and accordingly summons were issued to the Defendants. The Defendants did not appear to contest the claim. However, the

Defendant No. 4 Mr. Joseph Chandy issued a letter to the Sheristadar of the court claiming to have purchased 100 equity shares of the Defendant No. 1 company from Geojit and Company after due payment and requested them to send shares with duly completed transfer deed.

5. Upon the pleadings of the plaintiff the Trial Court framed the following issues which is quoted hereunder:

- a) Whether the 100 shares in question were allotted to the plaintiff at first instance?
- b) Whether there was negligence in despatching the certificates by Defendant No. 1?
- c) Whether the plaintiff suffered loss of business for not supplying the allotted share in time?
- d) Whether plaintiff's loss of business quantities at the amount claimed?
- e) To what relief the plaintiff is entitled?

6. During the trial the plaintiff has examined himself as P.W. 1 and exhibited eighteen numbers of documents. None has appeared for the Defendants to cross-examine the said witness or to adduce any defence evidence.

7. The learned trial Court while deciding the issue No. 1 has held that the plaintiff had applied for 1000 shares and out of the said 1000 shares only 900 shares were received and after filing of the suit he had received the remaining 100 shares and the said fact has been proved vide Exhibits 6 and 16 and therefore the learned trial Court answered the issue in favour of the plaintiff.

The learned Trial Court while deciding the issue No. 2 and 3 has held that the plaintiff has incurred loss in the business due to the fault on the part of the Defendants. The learned trial Court has come to the said conclusion on the basis of positive evidence of the plaintiff and the material Exhibits being No. 1, 3, 4, 5, 6, 10, 11, 12, 13, 16, 17 and 18. The admitted facts as proved would show that the original share certificates were misplaced and/or could not be sent as evident from the exhibits proved by the plaintiff and negligence on the part of the Defendants company has been proved. The plaintiff has further proved vide Exhibits 17 that the market price of the shares was higher in the month of February, 1994. At the bottom of Exhibits 17 would show that the price of the shares rose to 248 for share and the plaintiff had to sell the shares at the rate of Rs. 116 per share in the month of May, 1994 which finds supports from Exhibits-18. Therefore, the Court has held that plaintiff had sustained loss due to negligence on the part of the Defendant company and answered the issue in Positive

The learned trial court while deciding the issues No. 4 has held that, the market price of the shares were 248 per share on 2.2.94 and on 24.5.94 the price came down to Rs. 116 per share and due to non-receipt of the shares in time which is

attributable on the Defendant company, the plaintiff had to incur loss to the tune of Rs. 1,28,700/- and answered the issue in positive.

The learned trial court while deciding the issue No. 5, has held that, as the plaintiff had suffered loss of Rs. 1,28,000/- due to lapse and negligence on the part of the Defendants No. 1, 2 and 3, the plaintiff is entitled to realize the said amount from Defendants No. 1,2 and 3. As the plaintiff had received the remaining 100 shares, he had no claim against Defendants No. 4 and 5 and accordingly decreed the suit for realisation of Rs. 1,28,000/- and hence the present appeal.

8. Opening the argument, the learned Counsel Mr. Devashis Baruah, on behalf of the Appellant has raised the following points and in support of his contentions the following decisions have been cited-

a) The Exparte judgment and decree dated 1.6.98 passed by the learned trial court is bad in law and is liable to be set aside and in support of his contentions he has referred the decisions reported in Ramesh Chand Ardawatiya Vs. Anil Panjwani, more particularly referred paragraph 33 of the judgment.

In support of his contentions he argued that the plaintiff has failed to prove that he suffered the loss of Rs. 1,28,700/- and/or prove that he sold the share at Rs. 116/- per share in the month of May, 1994, more so, when he has received 100 share after filing of the suit and the document proved vide Ext. 18, which is the quotation of shares as on 24.5.94 is not a proof or any sort of evidence to claim that he sold the shares in the month of May, 1994. Therefore, urged that even in an ex-parte judgment, the court would scrutinize the available pleadings and documents and a duty is cast on the Court even in absence of Defendant, not to admit evidence, the admissibility whereof is excluded by law.

9. The second limb of argument advanced, that the compensation sought for by the plaintiff is too remote a damage which could be passed by the learned Trial Court. In support of his contention the learned Counsel has referred Parimi Chakrapani Naidu Vs. Mattapalli Venkataraju (deceased) and Another, Municipal Board, Kheri Vs. Ram Bharosey and Others, and Parimi Chakrapani Naidu Vs. Mathapalli Venkataraju, . Advancing the argument, the learned Counsel submitted that the claim made by the plaintiff, that he would have sold the shares on 2.2.94 when the share was Rs. 248/- per share is not conceivable, because of the fact that though the plaintiff was asked to pay the remaining amount of Rs. 30,000/- on 26.10.1993 vide Exhibit-8, the plaintiff paid the amount on 24.1.94 vide Exhibit-11 and hence he cannot expect to receive the share certificate by 2.2.94 to sell the same on the aforesaid date. The plaintiff has further intended to dispose of his shares vide Exhibit-5 which perhaps could not fetch Rs. 116/- per share even and too remote to claim a damage and hence the claim is not maintainable.

10. The third limb of argument advanced by the learned Counsel is that, the impugned judgment and decree has been passed without any application of mind

and in a most perfunctory manner. The argument advanced relates in calculation of amount decreed viz-a-viz finding of issue No. 4 and the averments made in paragraphs 24 and 25 of the plaint are contradictory and the loss of profit in respect of 900 shares allegedly sold earlier was Rs. 133/- per share and 100 shares sold later was Rs. 90/- per share and the non-application of mind is too glaring to sustain the decree.

11. The last argument advanced relates to selling of shares at Rs. 116/- per share and argued that in absence of pleading no evidence can be looked into and the trial court has travelled beyond the pleadings while decreeing the suit, which is not sustainable under the law. The learned Counsel relied on a decision reported in *Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others*,

12. The learned Counsel Shri. G.N. Sahewalla, Sr. Counsel assisted by Ms. S. Senapati, Advocate appearing for the Respondent/plaintiff argued that on a plain reading of the plaint and the evidence adduced, both orally and documentary, would show that the plaintiff has proved his case claiming loss of Rs. 1,28,700/- due to laches attributable to the Defendants, more so, when inspite of summons they choose to take the risk and did not come forward to contest the suit even though, 100 shares were despatched to the plaintiff after filing of the suit and the calculation made by the learned trial court, though there are some mistake, but in the plaint, it was specifically mentioned that the plaintiff suffered a loss of Rs. 1,19,700/- in respect 900 shares and Rs. 9,000/- for 100 shares and accordingly the decree is passed of Rs. 1,28,700/- and the Appellants cannot agitate the matter, more so, when they understand the decree and supported the judgment and decree passed by the learned trial court.

13. This Court considered the rival contentions of the parties, perused the plaint, material evidence, both oral and documentary, the grounds in the appeal and the decisions cited. Before dealing with the argument advanced, this Court finds that admittedly this is an appeal u/s 96(2) of the Code of Civil Procedure, filed against ex-parte judgment and decree, which cannot be converted into proceedings for setting aside the decree with the concomitant duty of affording the party an opportunity of adducing evidence on any ground that may be raised in support thereof under Order IX Rule 13 of the Code. Nor can such an appeal be converted into an appeal under Order XLIII Rule 1(d) of the Code. However, the Defendants under appeal, can demonstrate on merits, that evidence adduced by the plaintiff on which ex-parte judgment and decree has been passed is not sufficient to establish a prima facie case to pass a decree or even as the evidence prima facie is deficient for passing the decree. Therefore, it is essential for this Court to satisfy itself as to whether the Appellants have make out a case for setting aside the judgment and decree.

14. In order to determine the lis between the parties, this Court finds that admittedly the summons were served on the Appellant and they did not contest the claim of the plaintiff though order VIII of the Code provides that even

without filing written statement the Appellants could have participated in the remaining proceeding and can contest the suit which they did not and allowed the suit to proceed exparte of their own disadvantage.

15. Admittedly, the Defendants company floated shares in the market and the terms and conditions have been stipulated to the effect that the application received for issuance of share certificate was required to be disposed of within ten (10) weeks from the date of closure of the subscription list which was closed on 4.1.93 and accordingly the plaintiffs have applied for 1000 rights shares on 4.1.93 and it was incumbent on the Defendant company either to send allotment order or Refund order within the stipulated period of 10 weeks. The Appellants did not make any endeavour to do the needful. However, in September, 1993 the plaintiff received a dividend warrant for Rs. 61.64 from the Appellants and in the body of the warrant it was mentioned that 1000 Rights shares has been allotted to him which again could not be despatched due to misplace and/or lost and the Appellants were trying to send the duplicate share certificates requesting the plaintiff/Respondent to pay a sum of Rs. 30,000/-.

Thereafter, 900 shares out of 1000 have been allotted to the plaintiff/Respondent and in respect of 100 shares it has been allotted to Defendant No. 4, since the Appellants have received a transfer deed signed by the plaintiff and ultimately received the same after filing of the suit. In the process, due to laches and/or negligence of the Appellants, the plaintiff has sustained loss to the tune of Rs. 1,28,700/- since he failed to sell the same when the price of each share has gone to Rs. 248/- during February, 1994 and had to sell it out at Rs. 116/- per share in the month of May, 1994. In support of the pleadings the plaintiff has proved Exhibits-17 and 18 during the trial which would go to show that the price of the shares rose to 248 per share and he had to sell it out at Rs. 116/- per share vide Exhibit-18 which remained unrebutted and the learned trial court has rightly assess the loss sustained by the plaintiff due to negligence on the part of the Appellants. The decision cited in support of his contention reported in Ramesh Chand Ardawatiya Vs. Anil Panjwani, would show that the Apex Court has rightly held as quoted in paragraph 33 at page 2519. The case relates to a suit filed by Anil Panjwani, the plaintiff claiming a decree for declaration, possession and permanent injunction. The said plaintiff entered into an agreement for purchase of suit property for a consideration of Rs. 4500/- from one Shri. Niwas Vaidhya, the owner of the suit property. A document in writing was executed Rs. 4000/- were paid by way of earnest. Rs. 500/- were to be paid at the time of registration. The said plaintiff constructed a boundary wall, in consequence thereof, that on later date, he had found that the Appellant before the Supreme Court has raised a hutment through a mason at his behest and as a consequence, the plaintiff filed the suit praying for following relief (i) declaration of plaintiff's title as owner of the suit plot; (ii) restoration of possession from the trespasser Defendant to the plaintiff, (iii) Mandatory injunction for removal of the construction raised by the trespasser; (iv) permanent prohibitory injunction from raising any further construction; (v) costs and (vi) such other relief as the court

may deem fit and proper. The case proceeded *ex parte* and the trial court decreed the suit declaring the plaintiff as the owner of the suit plot and directed the Defendant to restore possession of the plot. The Defendant preferred first appeal, which was dismissed. Thereafter, second appeal preferred by the Defendant was dismissed in limine by the High Court and hence the SLP before the Apex Court. The Apex Court has rightly held that the plaintiff cannot be declared to be a owner of the suit plot, since there was an agreement for sale and therefore the Supreme Court has rightly held that even in an *ex parte* proceedings, the plaintiff is required to prove his case which is not the case in hand. In the instant case, the plaintiff has proved his case of loss sustained due to the negligence on the part of the Appellants and the decision cited has no bearing in the instant case and therefore the contention raised is rejected.

16. In regard to the Second limb of argument advanced, in respect of the compensation sought for is too remote a damage which could be passed by the learned trial Court. It is true that in the share market the price of shares go by ups and downs. However, it is an admitted fact that the plaintiff has proved vide Exhibits- 17, that the price of each share rose to 248 on 2.2.1994 and due to non-receipt of shares in time, he had to sell it out at Rs. 116/- vide Exhibit-18 and therefore it cannot be urged that it is too remote a damage which cannot be granted by a court of competent jurisdiction in terms of loss sustained. In support of his contentions the learned Counsel has referred three decisions viz. AIR 1938 Mad 958 (Supra), *Municipal Board, Kheri Vs. Ram Bharosey and Others*, : *Parimi Chakrapani Naidu Vs. Mathapalli Venkataraju*,

The decision cited and reported in AIR 1938 Mad 958 relates to obstruction of legitimate construction of a temporary dam across an irrigation channel and in obtaining orders from the Courts which prevented the plaintiff from having the use of water to which he was entitled, pending Magisterial and Civil Courts proceedings. The obstruction was on 31 st August 1924. After interfering with the making of this dam, the Defendant moved the Magistrate and procured an order u/s 147 of the Code of Criminal Procedure on 21st November, 1924, restraining the plaintiff from damming the channel and taking water to his land. The plaintiff had to file a Civil suit and got a decree and thereafter filed the suit for damages which was not based on the original obstruction of the Defendant in August, 1924, which could not have affected the crops grown at the end of 1925, 1926 and 1927. The basis of claim for damages was the basis in procuring the courts orders by the Defendant. Therefore, the Court has held that no action lies against any one for damages resulting from erroneous decision of court and the appeal filed by the Defendant was allowed. This Court do not find any relevance with the decision cited in the instant case.

The case cited and reported in *Municipal Board, Kheri Vs. Ram Bharosey and Others*, relates to damages caused due to unlawful granting of licence of Sardar Teja Singh who had established flour mill, damaging the building of the plaintiff. The suit was decreed and on second appeal the Court allowed the appeals filed

by the Municipal Board and dismissed the appeals filed by Sardar Teja Singh, holding that the Board is not liable for damages being not a direct consequence of granting licence. This decision do not support the case of the Appellants herein in the fact and circumstances of the case.

The decision cited and reported in Parimi Chakrapani Naidu Vs. Mathapalli Venkataraju, has a direct and same bearing in the case reported in Parimi Chakrapani Naidu Vs. Mattapalli Venkataraju (deceased) and Another, The judgment reported in 1937 Madras was delivered by Hon''ble Cornish, J, which could not be effected because one of the parties was dead at the time when the appeal was heard and the fact of inoperative of the judgment reported in Parimi Chakrapani Naidu Vs. Mathapalli Venkataraju, has finds place in Parimi Chakrapani Naidu Vs. Mattapalli Venkataraju (deceased) and Another, Therefore, this Court do not find any relevancy of the decisions cited in the present case and hence rejected the contentions raised as indicated above.

17. The argument advanced in regard to non application of mind in decreeing suit for damages/realisation, amounting to Rs. 1,28,7000/- and therefore the calculation so made has no relevancy to the amount claimed and decreed, this Court has perused the calculation relating to loss of profit incurred by the plaintiff. Apparently, there are some mistake in calculating the amount, but in overall calculation the method of approach is correct and this Court is not inclined to interfere with the calculation as urged and hence refused the contention so raised.

18. In regard to the last submission, that no evidence can be looked into in absence of pleadings, there is no controversy about the aforesaid proposition. The learned Counsel, in the context, cited a decision reported in Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others, . The facts pleaded and averred in the pleadings would show, that the positive case of the Respondent/plaintiff is that due to laches on the part of the Appellants/ Defendant company, he could not sell the shares, when the market price rose to Rs. 248/- per share and had to sell at Rs. 116/- per share, since he had received the same in the month of May, 1994. The laches on the part of the Appellants have been proved and a conjoint reading of paragraphs 24 and 25 of the plaint, coupled with material Exhibits 17 and 18 and the oral evidences of the plaintiff would establish that the sale of shares at Rs. 116/- per share has been proved and established. The case referred to above relates to Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955 and Adverse possession. While dealing with the question of Adverse possession, the Apex Court has held that in the pleadings there was not a Single overt act, on the basis of which it could be inferred or ascertained that from a particular point of time, his possession (i.e. the Appellant) became hostile and notorious to the complete exclusions of other heirs and he is in possession openly and hostilely and dismissed the appeal. There is no ambiguity with the above proposition of law.

19. In recapitulating the entire gamut of the case, this Court do not find any

merit to interfere with the judgment and decree passed by the trial Court, more so, when the position of law, save as to quantum of proof has changed, by reason of new amendments introduced by the Code of Civil Procedure, 1976 and brought into force with effect from February 1, 1977 and now it is lawful for the court to pronounce exparte judgment, if despite opportunity, Defendant files no written statement and the said judgment and decree can be challenged u/s 96(2) of the Code, which has been done in the instant case and the appellate court can interfere with the judgment and decree only when the Appellants can show that the evidence adduced by the plaintiff is not sufficient to establish a case to pass a decree which is not the case in hand.

20. This Court, therefore, holds that, there is no merit in this appeal and it fails. The impugned judgment and decree of the learned court below is hereby affirmed. The appeal is dismissed. In view of the facts and circumstances of the case, there shall be no order as to costs.