
(2014) 04 GAU CK 0003
In the Gauhati High Court
Case No : C.R.P. No. 207 of 2006

Ritanath Sarkar

APPELLANT

Vs

Branch Manager, Central Bank of India and Others

RESPONDENT

Date of Decision : 07-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1(d), Order 9 Rule 13 115 151 96

Citation : (2015) 1 GLD 465

Hon'ble Judges : Abhay Manohar Sapre, C.J

Bench : Single Bench

Advocate : B.R. Dey, Advocate for the Appellant; A.C. Sarma, Advocate for the Respondent;

Final Decision : Partly Allowed

Judgement

Abhay Manohar Sapre, C.J.

1. This civil revision is filed by defendant No. 2 under Section 115 of the Code of Civil Procedure against the order dated 18.4.2006 passed by District Judge, Kokrajhar in Misc. Appeal No. 6 of 2005 which in turn arise out of order dated 2.8.2005 passed by Civil Judge (Sr. Division) Kokrajhar in Misc. (J) Case No. 22 of 2004 which arose out of M.S. No. 8 of 1998/51 of 99 and Misc (J) Case No. 3 of 2004 decided by Civil Judge (Sr. Division) on 30.4.2002. Facts of the case lie in a narrow compass. They however need mention in brief infra:--

The petitioner is the defendant No. 2 whereas the respondent No. 1 is the plaintiff and respondent No. 2 is the defendant No. 2.

The respondent No. 1-a Nationalized Bank filed a civil suit being M.S. No. 8 of 1998/51 of 99 against the respondent No. 2 and petitioner as defendant No. 1 and 2 respectively for recovery of Rs. 1,93,176 in the Court of Civil Judge (Sr. division) Kokrajhar. It was the case of the respondent No. 1 that they advanced loan to the respondent No. 2 as their borrower and to safeguard repayment/recovery of their loan, the petitioner (defendant No. 2) stood as his guarantor for

respondent No. 2. It was alleged that since the respondent No. 2 i.e. borrower failed to repay the loan amount despite demand made and hence they filed the aforementioned money recovery suit (8/98-51/99) against the respondent No. 2 and petitioner for the recovery of aforesaid money in the Court of Civil Judge (Sr. Division).

2. The respondent No. 2 and petitioner both filed the written statements and contested the suit. By judgment and decree dated 30.4.2002, the Civil Judge (Sr. Division) decreed the suit for the said sum against the petitioner and respondent No. 2 jointly and severally.

3. The petitioner then filed an application under Section 151 of the Code being Misc. (J) Case No. 3 of 2004 for setting aside the said judgment/decreed dated 30.4.2002. This application was dismissed by order dated 15.10.2004. The petitioner then filed an application under Order IX, Rule 13 of the Code being Misc. (J) Case No. 22 of 2004 for setting aside the judgment/decreed dated 30.4.2002. According to the petitioner, (defendant No. 2) since the judgment/decreed was passed ex parte against her and hence it was liable to be set aside by taking recourse to Order IX, Rule 13 *ibid*. It was alleged that there was "sufficient cause" for her non-participation in the suit and hence a case was made out to set aside the judgment/decreed dated 30.4.2002.

4. This application was contested by the respondent No. 1 (plaintiff) contending *inter alia* that no case was made out to set aside the decree within the meaning of Order IX, Rule 13 *ibid* and hence the application filed by the petitioner be dismissed.

5. By order dated 2.8.2005, the Civil Judge dismissed the application. He held that since the judgment/decreed dated 30.4.2002 was not an ex parte judgment/decreed within the meaning of Order IX, Rule 13 *ibid*, but was a decree passed on contest by party and hence the application filed under Order IX, Rule 13 of the Code was not maintainable. It is clear from his finding recorded in Paras 8 and 11 of the order, which reads as under:

"8. I have gone through the M.S. No. 51/99 (8/99), judgment and order dated 30-4-2002 passed by my learned predecessor. On perusal of the same, the issue No. 4 and 5 which relates to the present petitioners interest. In the said judgment passed by my learned predecessor on 30-4-2002 in order, it is written that the suit is decreed on contest with which cost against the defendant No. 1 and 2. So, I read the said order which speaks as follows:

"30-4-2002

Plaintiff is represented by engaged lawyer.

(1) The suit is decreed on contest with cost against the defendant Nos. 1 and 2.

(2) The suit is also decreed for future interest @ Rs. 10% p.a. from the date of filing of the suit till full realization of the decretal amount.

(3) It is also ordered for attachment and sale of hypothecated goods in public auction and to adjust the sale proceeds towards satisfaction of the decree.

(4) It is also ordered for sale of mortgage properties of defendant No. 2 described in the schedule-"B".

11. Whatever may be as I discussed above, the said money suit No. 51/99 was decided on contest and this Court has no jurisdiction to interfere the said judgment under Order IX, Rule 13 r/w. Section 151, CPC as prayed by the present petitioner. So, accordingly I don't find any merit in this misc. case."

6. The petitioner felt aggrieved of the aforesaid order, filed the Misc. Appeal out of which this revision arises under Order XLIII, Rule 1(d) of the Code before the District Judge. By impugned order, the District Judge dismissed the appeal and affirmed the order passed by the Civil Judge (Sr. Division) dated 2.8.2005. It is against this order; the petitioner felt aggrieved and filed this revision petition under Section 115 *ibid*.

7. Having heard the learned counsel for the parties and on perusal of the record of the case, I am constrained to allow the revision in part and while setting aside the impugned order remand the case to the appellate Court for deciding the appeal afresh as indicated below.

8. The need to remand has occasioned for the reason that firstly appellate Court failed to comprehend the point involved in appeal for his decision and secondly he further failed to keep in mind the scope of appeal filed under Order XLIII, Rule 1(d) of the Code which arose out of the order passed by Civil Judge under Order IX, Rule 13 *ibid* and the one when filed under Section 96 *ibid* filed against the judgment and decree.

9. The appellate Court decided the appeal as if it was a regular first appeal under Section 96 of the Code against the judgment and decree dated 30.4.2002 passed in C.S. No. 8/99 of 1999 which in fact it was not and then proceeded to examine the legality and correctness of the judgment/decreed dated 30.4.2002 on merits and finding no merit therein upheld the order dated 2.8.2005. In other words, the appellate Court examined the legality and correctness of judgment/decreed dated 30.4.2002 and upheld the order dated 2.8.2005. It is like he examined the correctness of "A" order and upheld "B" order.

10. The appellate Court should have seen that the appeal filed before him had arisen out of the order dated 2.8.2005 and this order was passed on an application filed by the petitioner under Order IX, Rule 13 *ibid* holding that the application filed under Order IX, Rule 13 was not maintainable. He was therefore expected to examine the legality and correctness of order dated 2.8.2005 on its merits rather than to examine the legality and correctness of judgment/decreed dated 30.4.2002 on its merits.

11. In other words, the question involved in the appeal was firstly whether Civil Judge (Sr. Division) was justified in dismissing the petitioner's application under

Order IX, Rule 13 as being not maintainable and secondly whether judgment and decree dated 30.4.2002 passed by the Civil Judge was ex parte or by parte as against the defendant No. 2 (petitioner herein) so as to enable the defendant No. 2 to file an application under Order IX, Rule 13 ibid for its setting aside and lastly whether any "sufficient cause" within the meaning of Order IX, Rule 13 ibid was made out on facts for its setting aside or not?

12. In my opinion, the appellate Court completely failed in his duty in deciding the appeal little realizing the scope and jurisdiction of appeal when filed under Order XLIII, Rule 1(d) ibid. While hearing the appeal under Order XLIII, Rule 1(d), he had no jurisdiction to enter upon the merits of the controversy involved in the money suit with a view to find out as to whether Civil Judge was justified in decreeing the plaintiff's suit but it had jurisdiction to confine itself to the inquiry as to whether application filed by the defendant No. 2 under Order IX, Rule 13 of Code was maintainable or not and if it was held maintainable, then whether the defendant No. 2 was able to make out on facts any "sufficient cause" for setting aside the decree?

13. If he was of the view that application was not maintainable, then the question as to whether there existed "sufficient cause" within the meaning of Order IX, Rule 13 did not arise for consideration but, if he was of the view that application was maintainable, then the second question was whether any "sufficient cause" was made out within the meaning of Order IX, Rule 13 so as to entitle the Court to set aside the ex parte decree dated 30.4.2002?

14. As observed supra, in the opinion of the Civil Judge, since the judgment/decree dated 30.4.2002, was passed on contest and it was by parte and therefore it could have been termed as being "ex parte" so as to entitle the defendant No. 2 to invoke the provisions of Order IX, Rule 13, ibid. He therefore held that application was not maintainable. In the light of this finding, the Civil Judge did not consider the question as to whether there was a "sufficient cause" within the meaning of Order IX, Rule 13, ibid.

15. I am constrained to say that District Judge (appellate Court) did not advert to the aforesaid distinction in mind and instead devoted himself more to the question as to whether judgment/decree dated 30.4.2002 passed by Civil Judge on merits was good or bad and on appreciating the evidence on record, dismissed the appeal and upheld the order dated 2.8.2005.

16. It is for this reason, in my considered view, the order impugned suffers from apparent jurisdictional error and hence cannot be upheld. It is liable to be set aside.

17. The inevitable conclusion is that matter deserves to be remanded to the appellate Court for deciding the appeal afresh on merits on the question involved in the appeal as noted above.

18. In view of foregoing discussion, the revision succeeds and is allowed in part.

The impugned order is set aside. The appeal out of which this revision arises is restored to its file. The appellate Court will decide the appeal after affording an opportunity to the parties in the light of observations made supra. Parties to appear before the appellate Court on 28.4.2014. The appeal shall be decided within three months from the date of parties' appearance.

No cost.