
(1989) 02 OHC CK 0021
In the Orissa High Court
Case No : Misc. Appeal No. 90 of 1984

Samir Snigdha Chandra

APPELLANT

Vs

Pranaya Bhusan Chandra and Others

RESPONDENT

Date of Decision : 27-02-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 19A, Order 5 Rule 19A(2), Order 9 Rule 13, Order 9 Rule 14

Citation : AIR 1989 Ori 185 : (1989) 68 CLT 631 : (1989) 68 CLT 22 : (1989) 1 OLR 513

Hon'ble Judges : H.L. Agrawal, C.J

Bench : Single Bench

Advocate : Ramakanta Mohanty, on behalf of P.K. Patnaik, for the Appellant; Sk. Rahenoma, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Agrawal, C.J.—This is an appeal by defendant 4 whose application for setting aside an ex parte decree has been dismissed by the trial Court.

2. Although the appeal on the face of it is of a common nature, yet, on the facts, some intricate questions have fallen for consideration, namely,

(1) Whether the trial Court could rely only on the service of summons by registered post for setting the appellant ex parte;

(2) Whether notice of the application filed under Order 9, Rule 13, C.P.C. or of the present appeal should also issue to the other defendants; and

(3) Whether the decree could be set aside as a whole even when it happens to be in favour of some of the defendants.

3. In order to answer the above questions, the facts of the case may be briefly noticed.

The plaintiff-respondent 1 filed Title Suit No. 29 of 1981 for partition impleading

the members of the family including the appellant as defendant 4. The suit was contested by defendant 1 only and the other defendants were set ex parte. In view of the provisions of Order 5, Rule 19-A, C.P.C. summonses were issued simultaneously by registered post and for personal service in the ordinary manner.

""It appears that the service report of the summons through the ordinary process was not traceable on the record. But there are materials to indicate that they had been issued. Be that as it may, the Court, on the endorsement made by the Postman (P.W. 3) on the registered envelope regarding refusal, held the service as valid and set the appellant ex parte and ultimately on 15-4-82 an ex parte preliminary decree was passed. On 3-5-82, the application under Order 9, Rule 13, C.P.C. was filed by the appellant on the ground of non-service of summons.

4. In support of his case, the appellants examined himself as P.W. 1 and the Postman as P.W. 3. But when P.W. 3 did not support his case, he was permitted to cross-examine him. P.W. 3 very successfully withstood the test of cross-examination and the trial Court did not accept the plea of the appellant that the endorsement made by P.W. 3 on the registered envelope, was false.

5. The plea of the appellant in the trial Court that summons in the ordinary way had not been issued has been repelled by the learned Subordinate Judge on the basis of the nothings made in the order sheet which prima facie show that the processes had not only been filed, but had also been sent to the Judge-in-charge under the Court's memo, so much so that the Service return in respect of defendant 19 was also received. This obviously shows that the summons had been issued. The stand of the trial Court must be accepted in view of the judicial presumption that "judicial and official acts had been regularly performed". The contention of the appellant that summons in the ordinary way had not been issued cannot be accepted.

6. It was next contended that in the absence of positive proof that the summons was served on the appellant in the usual process, the purported service by registered post could not be pressed into service for setting the appellant ex parte. In support of his contention, Sri Ramakanta Mohanty, learned advocate for the appellant, relied on a Bench decision of the Kerala High Court in Mohan Traders v. A.V.M. Cattle and Poultry Feeds Manufacturing Industries, ILR (1980) 1 Ker 612.

Although the Kerala High Court in its own Rules had specifically provided for service of summons even without a prior attempt through Court, it made the following observations : --

"..... Even though service by registered post is permissible, it has to be done in addition to and simultaneously with the issue of summons for service in the manner provided in Rules 9 to 19. In other words, the Statutes does not contemplate service of summons through registered post in cases where

summons through Court has not been taken, xx xx xx xx xx. An endorsement of refusal can be acted upon only if the procedure in Order 5, Rule 19 has been followed."

With great respect to the above authority of the Kerala High Court, I find myself unable to concur with the same.

7. The whole scheme of Rule 19-A is to expedite the process of service of summons which usually takes a long time. The only requirement of this rule is, issue of summons simultaneously in the ordinary manner and by registered post. And once that is done, then it cannot be contended that in the absence of proof of proper service of summons in the ordinary manner, the service by post, would be rendered ineffective. In my opinion, taking such a view would make the amendment completely nugatory and defeat the intention of the legislature. On reading the Proviso to Rule 19-A, I find myself very much assured for taking the above view since Rule 19-A is unambiguous and clear in its terms. I would accordingly hold that once a declaration under Sub-rule (2) of Rule 19-A is made by the Court, service by registered post on the defendant shall be deemed to be sufficient.

Question No. 2

8. Now I come to consider the second question which has assumed a little importance in view of an earlier order passed in this case. On 4-7-88, the appellant was required to file appeal notices for service on as many as six respondents (all defendants in the Court below) within 3 days failing which the appeal was to stand dismissed against them. The order having not been complied with, the appeal stood dismissed against those respondents and an argument of in competency of the appeal was advanced on behalf of the plaintiff-respondent.

In this connection it is relevant to quote Rule 14 of Order 9, C.P.C :-

"Rule 14. No decree to be set aside without notice to opposite party --

No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party."

The words "opposite party" had fallen for consideration before some High Court and have been interpreted to mean "only such parties to the suit who are interested in opposing the application" and in that context it has been held that "a co-defendant in a case is not such a party". I find myself in respectful agreement with the above view and would add that in the trial Court on account of the non-service of notice on such a party who is not interested to oppose the application, or, for that matter, the dismissal of the application against such party, or, even on the failure of a defendant to implead all such parties, the question of maintainability or competency of the application may not be germane. But if this happens in the appellate Court, it may give rise to some complications and also the question of in competency of the appeal, particularly of a decree of the present nature, i.e., a preliminary decree for partition.

It is well known that in a suit for partition, every defendant stands in the position of a plaintiff and is entitled to get along with the plaintiff a share in the joint family properties according to his position. From the preliminary decree for partition, certain rights flowed in favour of some of the defendants as well. In this Court, the dismissal of the appeal against them closed the chapter for disturbing; the said decree in their favour. In my considered opinion, the position that would obtain in the present situation would be that if this Court allows the appeal and sets aside the preliminary decree in favour of the plaintiff and the other respondents against whom it survives, then it will give rise to an innocuous, anomalous and inconsistent position. A suit for partition normally contemplates that there has been no earlier partition in the family and that the joint family properties are available for partition. In view of the existence of a preliminary decree running parallel in the suit in which another preliminary decree is sought to be passed, a situation is bound to arise which would attract the principle of two conflicting decrees/orders. The appeal, therefore, has rendered itself incompetent due to its dismissal against the aforesaid respondents.

Question No. 3

9. For the view that I have taken on the second question, it is not necessary to decide the third question which becomes academic. But since long arguments were advanced. I would like to dispose of that also in a few words.

Mr. Rahenoma was not fair to the Court in putting reliance on the single Judge decision in *Madan Naikani Vs. Ranjit Mahakur and Others*, and the unreported decision of another learned Judge in *Misc. Appeal No. 356 of 1983, Rabindra, Prasad Kamilla v. Abhaya Prasad Kamilla*, disposed of on 23-6-87 (reported in 1987 (5). IJ Rep 577), taking the same view on following the above decision as that decision *Madan Naikani Vs. Ranjit Mahakur and Others*, has been disapproved by an unreported Bench decision of this Court in *Civil Revision No. 485 of 1979 Akura Dash v. Jagannath Dash and others*, disposed of on 14-5-1987, taking a contrary view that an ex parte decree can be set aside even when it is passed in favour of some of the defendants if it would give rise to two inconsistent decrees, by interpreting the expression "against" occurring in Rule 13 of Order 9, C.P.C. I find myself in respectful agreement With the ratio of the decision in *Akura Dash's* case, and if called upon to answer the third-question, I must answer it in the affirmative.

10. In the result, the appeal is devoid of merit and is hereby dismissed. I shall, however, not saddle the appellant with costs in view of the peculiar circumstances of the case.