

(2010) 04 CAL CK 0030

In the Calcutta High Court

Case No : G.A. No. 1494 of 2009 and C.S. No. 145 of 1991

Smt. Utpala Deb and Others

APPELLANT

Vs

Smt. Sita Devi Lohia and Others

RESPONDENT

Date of Decision : 29-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 41 Rule 4, Order 9 Rule 11, Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2010) 04 CAL CK 0030

Hon'ble Judges : Syamal Kanti Chakrabarti, J

Bench : Single Bench

Advocate : Swarnendu Ghosh and Krinjal Kumar Baral, for the Appellant; Pradip Kumar Dut and Chanchal Dutt for Defendant Nos. 28 and 31, Soumen Sen and Sakya Sen for Defendant Nos. 1(b) and 1(c), for the Respondent

Final Decision : Dismissed

Judgement

Syamal Kanti Chakrabarti, J.—This is an application for setting aside ex parte judgment passed on 16th March, 2009 in C.S. No.145 of 1991 partly on contest and partly ex parte after condonation of delay.

2. The petitioners/ defendants Nos. 1(a) and 1(c) have claimed that the defendant No. 1(b) Narayan Prosad Lohia was all along looking after the aforesaid proceedings and was dealing with the disputed property including matters relating to payment of rent and municipal taxes. He was entrusted with the sole responsibility of determining the entire suit proceedings including all interlocutory applications. He was discharging his responsibility on behalf of defendant No. 1(a) and 1(c). The said defendants never involved themselves personally in the pursuit of the said proceedings since said Narayan Prosad Lohia was son of defendant No. 1(a) and brother of defendant No. 1(c). Accordingly they used to hand over all documents and letters received from their advocates or from this Hon'ble Court from time to time in connection with this said

proceeding and the same were handed over to said Narayan Prosad Lohia, defendant No. 1(b). The petitioner/defendant No.1(a) is an old lady aged about 84 years and the petitioner 1(c) was all along looking after his mother.

3. On or about 11th April, 2009 the petitioners received a letter dated 7.4.09 from their advocate addressed to all the defendants and then came to know to their utter surprise that the said suit has been decreed ex parte. When they informed the matter to defendant No. 1(b) Narayan Prosad Lohia he feigned ignorance and thus they came to know that on the date of hearing the defendant No.1(b) did not take any step for which the suit was decreed ex parte. Defendant No. 1(b) also declined to hand over all relevant papers required for drafting the application for setting aside the ex parte decree. Then they engaged another advocate and ascertained that the suit was decreed ex parte on 16th March, 2009.

4. On 4.5.2009 they applied for obtaining certified copy of the judgment and decree and the same was available on 21.5.2009. Thereafter, they contacted another lawyer and filed the instant application after expiry of the statutory period for no fault of their own. They have now prayed for condonation of delay with prayer for setting aside the ex parte decree and interim order restraining the respondents/plaintiffs from taking any step for interfering with the possession of the petitioners in respect of the suit premises and from executing the decree for taking possession of the suit premises etc. The defendants 28 and 31 have opposed the move and claimed that the application is vague and not maintainable in law. No document has been filed to show that Narayan Prosad Lohia was not extending any cooperation with the petitioners and refused to supply any document to them on demand. No document relating to treatment of the petitioners has also been filed to prove her inability to pursue the suit diligently for which she entrusted her son the said Narayan Prosad Lohia to take all steps in the said suit. In fact, the instant application has been filed with wrongful intent to delay the delivery of vacant possession of the suit premises under wrongful occupation of the petitioners and other defendants. It is quite specifically claimed that defendant No.1(c) had all along knowledge of the proceeding and he was present in Court while witnesses were examined by the Hon'ble Court. Both the defendant Nos. 1(b) and 1 (c) were keeping watch over the instant proceedings and the application has been filed on the verge of expiry of three months period given in the aforesaid decree dated 16th March, 2009 within which the defendants were directed to deliver vacant possession of the suit property. The said period of three months had expired on 15th June, 2009 and just before that the instant application has been filed on 10th June, 2009 and the delay for preferring this application is intentional and abuse of the process of law to frustrate a valid decree by prolongation for which such prayer should be rejected.

5. Annexure-M to the instant application relates to the judgment dated 16.03.2009 passed by the Hon'ble Justice P.K. Deb in C.S. No.145 of 1991. By

such judgment the suit was decreed ex parte without cost against the defendant Nos. 1(a) to 1(i), the defendant Nos. 2 to 27 and defendant Nos. 32 to 36 and dismissed on contest against the defendant Nos. 28 and 31 without cost.

6. From the said judgment it will appear that while the proceeding was at the interlocutory stage the defendant Nos. 29 and 30 filed applications for transposition of their names as plaintiffs which was allowed with the result that the original defendant Nos. 29 and 30 were made co-plaintiff Nos. 3 and 4 respectively.

7. It also appears that in the said suit defendant No. 1, defendant Nos. 19, 21, 23, 28 and 31 filed written statements. The Hon'ble Court examined P.W. Anindya Dey, son of plaintiff No.1 and P.W. Swapan Kumar Das on behalf of the plaintiff No. 28 and D.W. Gopendranath Banerjee on behalf of defendant No. 31 and D.W. Ajit Khandelwal on behalf of D.Ws. 29 and 30 and admitted certain documents placed before the Hon'ble Court for arriving at a decision.

8. While deciding the matter on merit the Hon'ble Court also observed that legal heirs of original defendant No.1 ceased taking any interest in the proceeding. On the submission the advocate on record representing the substituted defendant Nos. 1(a) to 1(i) a notice was sent to the address of the substituted defendants. The notice was served on the substituted defendants. Even then they did not participate in the final proceeding of the suit. Some of the defendants filed written statements but they too stopped taking any interest in the proceedings and practically the claims of the plaintiff remain unchallenged. What the defendant Nos. 28 and 31 have sought to prove is that in view of their acquisition of a portion of disputed property by purchase they are not liable to be evicted from the disputed premises since they are ceased to be alleged sub-lessees under defendant Nos. 1(a) to 1(i) and have become co-owners of the same.

9. In the plaint it was claimed that the testator late Raibahadur Bhupathinath Dey executed his last will whereby it was clearly indicated that on the death of the testator the property would devolve upon his son and daughter. Ultimately probate in favour of the plaintiffs was granted (Exhibit-A) which was challenged in appeal but the appeal was dismissed for default with the result that the will of the original owner having been probated, the right, title and interest of the plaintiffs in the suit premises was established. The son and daughter of the testator are not signatories of any lease deed in favour of original defendant No. 1 and the same was never executed with their consent. Therefore, the Hon'ble Court has held that the defendant Nos. 2, 3, 12, 16 and 17 and the predecessors of defendant Nos. 4 to 11 and 13 to 15 have no authority and legal status to induct tenants in the properties owned by the plaintiffs by virtue of so-called lease deed tenure of which also expired by efflux of time. So, the plaintiffs have rightly claimed that those defendants would be treated as trespassers in respect of the suit property but the plaintiffs admitted execution of the sale deed in favour of the original defendant Nos. 28 and 31 by them and original defendant

Nos. 28 and 31 (now the plaintiff Nos. 3 and 4) purchased certain portions of the property from them and as such there cannot be any question of their eviction from the suit property now being co-owners.

10. On the backdrop of the above Judgment the plaintiff Nos. 1(a) and 1(c) have filed the instant application praying for condonation of delay in filing the application and setting aside the said judgment dated 16.03.2009 and further prayed for restraining the respondents from taking any step or interfering with the possession of the petitioners in respect of the suit premises.

11. The impugned judgment was passed on 16.03.2009 and the application was filed on 10.06.2009. The applicants have claimed that on 11th April, 2009 they came to know for the first time that the said suit has been finally disposed of (Para-18) and thereafter they took step for setting aside the said decree. In substance their application is intended to seek relief under Order 9 Rule 13 of the CPC after condonation of delay for which no application u/s 5 of the Limitation Act has been filed. For the purpose of discussion the relevant provision of Order 9 Rule 13 CPC is quoted below:

Setting aside decree ex parte against defendants:-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; and if he satisfied 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:

1. Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

2. Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree.

12. In the instant case the plea has been taken by defendant Nos. 1(a) and 1(c) that they were prevented by sufficient cause from appearing while the suit was called on for hearing and as such ex parte order against them may be set aside after condonation of delay.

13. Learned lawyer for the applicants has drawn my attention to the principles laid down in AIR 1987 Supreme Court 1353, AIR 2000 SC 1221 and 2008(1) CLJ

308 in support of his contention.

14. The ratio in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, postulates that in the matter of condonation of delay u/s 5 of the Limitation Act, Court should adopt liberal approach. In AIR 2000 1221 the plea of the appellant being sick and not in town on ground of employment and illness supported by medical certificate from private doctor was taken as "sufficient cause for non-appearance." But the application was made within a statutory period. In 2008(1) CLJ 308 it has been held inter alia that a technical approach in dealing with the application under Order 9 Rule 13 C.P.C. is unjustified.

15. In light of the principles laid down in the aforesaid cases and above factual matrix merit of the present application may now be considered so far as the maintainability point is concerned.

16. Plaintiff No. 1(b) in his affidavit-in-opposition has categorically stated that defendant No. 1(c) was personally attending Court during his examination in chief and even thereafter and only remained absent at the time of his oral examination. Their negligence to attend Court at the time of hearing was intended only to retain possession of the disputed property by virtue of a so-called lease deed which was not executed by the plaintiffs, who are now real owners of the disputed property. Therefore, they allowed the suit to be decided ex parte against them even after filing written statements and now have come up for condonation of delay and setting aside the ex parte judgment passed against them with the revival of the same claim of illegal detention of their possession over the suit property which is being dragged from 1991.

17. Learned lawyer for the plaintiffs/opposite parties has contended that while considering such type of prayer for condonation of delay and ex parte order learned Court should also consider the plight of honest and diligent litigant who is seeking redress through due process of law for decades together in the Court and ultimately has come out successful. Their case has in fact been decided on merit and even if the ex parte order is set aside against them there will be no improvement of the defence case which is relied upon so-called lease deed not executed by the actual owners of the property. Their appeal against the probate granted in favour of the son and daughter of the testator has also been frustrated on the ground of dismissal for default. Therefore, no substantial justice will be impaired if such prayer after expiry of period of limitation is not entertained. Learned lawyer has further contended that in view of what has been stated in order 17 C.P.C. the impugned judgment is partly decided ex parte and partly on contest. Where the suit is decided on contest in part against some defendants and ex parte against others, the application under Order 9 Rule 13 cannot be treated as maintainable.

18. For the sake of convenience, therefore, the provisions laid down in Order 17 Rule 2 C.P.C. is quoted below:

Procedure if parties fail to appear on day fixed.-Where, on any day to which the

hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit.

[Explanation.- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.]

19. From the case record of C.S. No.145 of 1991 it appears that the suit was filed on 5.3.91 and thereafter the parties appeared and the defendant No.1 filed written statement on 9th October, 1991, Defendant No.23 on 30th May, 1991, Defendant No. 19 on 24.06.91, Defendant No.31 on 21st January, 2000, Defendant No. 28 on 3rd March, 1999, defendant Nos. 29 and 30 on 28th June, 2007 but subsequently they were transposed to the category of plaintiffs being Nos. 3 and 4. Defendant No.27 also entered appearance and filed written statement on 28th January, 1992.

20. It also appears that P.W. Anindya Dey was examined in chief on and from 7.9.07 and he was cross-examined on behalf of the defendant Nos. 28 and 31 on 13.01.09. It also appears from order dated 12.7.07 passed by Hon'ble Justice Prabudha Sankar Banerjee that Mr. R.L. Mitra was present on that date to represent substituted defendant Nos. 1(a) to 1(b) but he wanted to retire on behalf of defendant No.1(b) and as such the Hon'ble Court permitted him to retire on behalf of defendant No. 1(b) from the case. It also appears from the order dated 31.03.07 passed by the Hon'ble Justice Prabudha Sankar Banerjee that on that day Mr. Sen, learned Counsel for the defendant Nos. 1(a), 1(c) to 1(e) was present and submitted that he was not getting any instruction from substituted defendant No.1(b). On that day defendant Nos. 29 and 30 were represented by Mr. S.N. Mitra, learned Counsel with Mr. N.S. Tewary while defendant Nos. 28 and 31 were represented by Mr. T.K. Datta, learned Counsel while the matter was taken up. After recording evidence of P.W. Anindya Dey the case was adjourned to 16.01.09. On that day one Ajit Khandelwal was examined in chief by Mr. S.N. Mitra on behalf of defendant Nos. 29 and 30 and his examination in chief was adjourned to 21.01.2009. On 21.1.2009 one Mr. Gopendranath Banerjee was examined in chief by Mr. R. Datta on behalf of defendant No.31 from question Nos. 1 to 56. But his cross-examination was declined on behalf of all the plaintiffs. On that day another witness Mr. Swapan Kumar Das was examined in chief by Mr. R. Datta, learned Counsel for the defendant No.28 from question Nos. 1 to 35 and his cross-examination was also declined on behalf of all plaintiffs.

21. It appears that on 16th March, 09 the judgment was delivered and by order dated 6th May, 2009 some typographical errors in the judgment were rectified.

22. Thus, it appears that after service of due notice of filing the suit defendant Nos. 1, 23, 19, 31, 28, 29, 30 and 27 appeared on several dates and filed written

statement although defendant Nos. 29 and 30 after filing written statement were transposed to the category of plaintiff Nos. 3 and 4. Thus, defendant Nos. 1, 19, 23, 27, 28 and 31 filed written statement on several dates denying claim of the plaintiffs and they were intimated to contest the suit and to cross examine witnesses.

23. At the time of examination of witnesses, which began on 07.09.2007, defendant Nos. 28 and 31 only contested the suits and others remained absent. On 12.07.2007 learned lawyer for substituted defendant Nos. 1(a) to (b) sought for leave of the Court to retire. On 31.03.2007 learned lawyer Mr. Sen for the defendant Nos. 1(a), 1(c) to 1(e) also submitted that he has no instruction from the substituted defendant No. 1(b). On that day defendant Nos. 29 and 30 were represented by Mr. S.N. Mitra with Mr. N.S. Tewary while defendant Nos. 28 and 31 were represented by Mr. T.K. Dutta, learned Counsel. On behalf of defendant Nos. 29 and 30 one PW namely, Ajit Khandelwal was examined on 16.01.2009 which was subsequently deferred. On 21.01.2009 another defence witness namely, Gopindra Nath Banerjee was also examined on behalf of defendant No. 31 and his cross-examination was declined. Thereafter, the Hon'ble Single Judge delivered the Judgment on 16th March, 2009 and some typographical errors crept therein, were rectified on 6th May, 2009. Therefore, ipso facto it will appear that upon due consideration of the merit of case the suit was dismissed on contest against defendant Nos. 28 and 31 and decreed ex parte without cost against the defendant Nos. 1(a) to 1(i), defendant Nos. 2 to 27 and defendant Nos. 32 to 36. Therefore, the relevant question that comes up for consideration is that whether such a decree which is decided on merit and passed partly on contest and partly ex parte can be set aside under Order 9 Rule 13 C.P.C or it would be treated as an appealable order.

24. It appears from Order 17 Rule 3 CPC that the Court is empowered to proceed notwithstanding either party fails to produce evidence and Clause (b) provides that if the parties are, or any of them is, absent, proceed under Rule 2. Rule 2 Order 17 C.P.C. provides the procedure to be followed while parties or any of them fails to appear on the day fixed for hearing of the case as quoted in paragraph 11 above. It empowers the Court to dispose of the matter in one of the modes directed by Order 9 or make such other order as it may think fit. In explanation to this rule it has been further clarified that if the evidence or substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing is adjourned, the Court may in its discretion proceed with the case as if such party were present. In the instant case this explanation will be of no use because no evidence or substantial portion of the evidence of the present petitioner has been recorded in her presence but she failed to appear on a subsequent date. Obviously the suit was decreed ex parte against the present petitioner but dismissed on contest against defendant Nos. 28 and 31. Order 9 Rule 11 C.P.C. has laid down the procedure in case of non-attendance of one or more of several defendants and it empowers the Court to proceed with the suit where there are more defendants,

than one and one or more of them appeared but others did not appear. Thus I conceive, that the instant suit was proceeded by the Court under Order 9 Rule 11 CPC in presence of contesting defendants and ex parte against those who either did not appear at all after service of summons or retired after appearance and filing of written statements at a later stage while the suit was proceeding against contesting defendants.

25. Order 9 Rule 13 C.P.C obviously empowers a party against whom a decree has been passed ex parte for setting aside such decree but proviso to Rule 13 provides, inter alia, "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". So a decree which is passed under Order 9 Rule 11 is sought to be set aside under Order 9 Rule 13 on the grounds stated by the petitioner in the instant case.

26. What is apparent from the face of record that the petitioner was contesting the suit through lawyer and assigned him to take steps and her son is also a party to this proceeding having common interest and common reference. It is contrary to normal human conduct to refrain from contesting a suit in which own interest of the son is at peril. If the son so entrusted to take steps in the suit fails to perform his duty causing substantial loss to the mother, she may seek remedy but such procedure must be in accordance with the procedural law laid down in CPC and the Limitation Act. Unless the aggrieved party fulfils these two conditions no legal remedy will be available and permissible.

27. The trial in this case of 1991 began in 2007 and Judgment delivered in 2009. During these two years the defaulting defendants remained silent after filing of written statement without reasonable cause and woke up only after passing of decree which is obviously with some oblique motive as pointed out by the learned lawyer for contesting opposite parties.

28. I hold that where after appearance and filing of written statement some of the defendants fail to appear before Court while the suit is proceeded against contesting defendants and decided on merit and decreed on contest against some and dismissed ex parte against others, action taken by the Court will come under the purview of Order 9 Rule 11 CPC to be read with Order 17 Rules 2 and 3 and remedy to set aside such order based on common defence cannot be sought for under Order 9 Rule 13 CPC but appeal shall lie under Order 41 Rule 4 CPC which is quoted below:

Rule 4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

29. I have already pointed out that the common defence of all the defendants in this case is that they are tenants in the disputed premises and inducted by the owners of the property. While considering merit of the suit the Court has already decided that original defendant No. 1 did not acquire the property by virtue of any lease deed since the present plaintiffs who acquired it by virtue of probated will never executed any such deed in his favour. All subsequent transactions through original defendant No. 1 was, therefore, held to be invalid and inoperative. Since the suit is decided on merit after due consideration of such common defence, such order is indivisible and cannot be sustained against contesting defendant and set aside against defaulting defendants. It will come under the purview of Order 41 Rule 4 CPC as quoted above and as such this is held to be an appealable order which can only be assailed by any of the contesting or defaulting defendants under such specific provision and not under Order 9 Rule 13 CPC as claimed by the petitioners.

30. Therefore, I hold that there is no justification and scope for condonation of delay in entertaining the present application which is not maintainable in its present form and as such the petition is dismissed.

31. The interim order stands vacated.

32. Urgent photostat certified copy of this judgment, if applied for, be supplied to the party or parties on usual undertakings.