
(1989) 06 GAU CK 0005
In the Gauhati High Court
Case No : Civil Revision No. 303 of 1988

Subahu Kumar Jain

APPELLANT

Vs

Jagdish Prasad Choudhury and Others

RESPONDENT

Date of Decision : 01-06-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : AIR 1990 Guw 66

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : R.L. Yadav and K. Yadav, for the Appellant; J.N. Sarma and R.C. Sancheti, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Saraf, J.—This is an application u/s 115 of the CPC directed against the judgment and order dated 14-7-88 passed by the Assistant District Judge, Bar-peta in Misc. Case No. 51/87 and Title Suit No. 21/87 rejecting the petition for addition of the petitioner as a defendant and for setting aside the ex parte decree.

2. The facts of the case may be briefly stated as follows :--

The opposite parties 1 and 2 Jagdish Choudhury and Smt. Rukmini Choudhury filed a suit against the opposite party 3 Shri Vikram Chand Daga who is the father of the present petitioner for eviction from the suit premises. The suit was disposed of on 30-10-87 by an ex parte decree. The opposite party 3, Shri Vikram Chand Daga was the defendant in the said suit who filed a petition under Order 9, Rule 13, C.P.C. for setting aside the ex parte decree. In course of hearing of the aforesaid petition, after the recording of the evidence of the parties at the argument stage, a petition was filed by the present petitioner stating that he was the real tenant of the suit premises and not his father Vikram Chand Daga and he should be impleaded as a party in the original suit. By the

said petition, the petitioner also prayed for setting aside the ex parte decree by treating the application under Order 9, Rule 13, C.P.C.

3. The Assistant District Judge heard the said petition and held that the petitioner was not a tenant, and as such, he had no locus standi in the suit and, therefore, there was no necessity of impleading him as a party to the suit. The petition was rejected on that ground. Against the said order, the present revision petition has been filed.

4. Mr. R. L. Yadav, learned counsel for the petitioner submitted that the finding of the Assistant District Judge is wrong inasmuch as the receipts filed by him showed that he was a tenant and as such, the Assistant District Judge acted erroneously and without jurisdiction in rejecting his petition.

5. Mr. J. N. Sarma, learned counsel for the opposite parties 1 and 2, however, submitted that the petition filed by the petitioner before the Assistant District Judge itself was not maintainable in view of the provisions of Order 9, Rule 13, of the C.P.C. which permits filing of such petition only by the defendant. According to Mr. Sarma, as the petitioner was not a defendant in the suit decided ex parte, he had no right to file the petition under Order 9, Rule 13, C.P.C. and the petition ought to have been rejected on that ground alone without going into the merits of the petition as to whether the petitioner was a tenant or not.

6. I have considered the submissions of the learned counsel for both the parties. I propose to deal with the objection regarding maintainability of the petition filed by the petitioner under Order 9, Rule 13 for setting aside the ex parte decree in a suit where admittedly the petitioner was not a defendant. Rule 13, of Order 9 of the C.P.C. which provides for setting aside the decree passed ex parte against the defendant reads as follows :--

"13. Setting aside decree ex parte against defendant.-- 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 satisfies 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".

A bare reading of Order 9, Rule 13 makes it clear that an application under the said provisions can be filed only by a defendant and not by any other person. This view gets full support from a decision of this Court in the case of B.N.C.L.M. Saha v. S. R. Dev reported in AIR 1976 Gau 7. In that case in a suit, one of the defendants was a minor not represented by a guardian. An ex parte decree was

passed in that suit. On attaining majority, a petition for setting aside the ex parte decree was filed. The Court held it to be not maintainable on the ground that since he was a minor and not represented by a legal guardian, he could not be legally deemed to be defendant in the suit, and as such, the application filed by him under Order 9, Rule 13 for setting aside the ex parte decree was not maintainable as it was not a petition made by a defendant". In that case, it was observed that the minor, if aggrieved, might have a remedy by way of a suit and he might get the benefit of Section 6 of the Act. But in view of the fact that the ex parte decree was not effective against him, he being not a party to the suit, there was no necessity of setting aside the decree so far as the said minor was concerned. The reasoning given was that because in law the ex parte decree was no decree at all so far as the minor was concerned he had no business to ask for setting aside the same. In view of the aforesaid decision of this Court. I hold that it is only the defendant who can file an application under Order 9, Rule 13 for setting aside the decree.

7. Mr. Yadav in this connection placed a decision of the Allahabad High Court in the case of Surajdeo Vs. Board of Revenue, U.P., Allahabad and Others, wherein it was held that even a stranger who was not a party to the suit can bring the correct facts of the case to the notice of the Court and pray for setting aside of an ex parte decree and the Court acting on such information received from a stranger also can exercise power to set aside such decree. I have gone through the aforesaid decision and I find myself unable to agree with the same. In that view of the matter I hold that the petition filed by the petitioner praying for setting aside, an ex parte decree was not maintainable, and the rejection of the same by the impugned order was fully justified.

8. However, it may be appropriate to mention that the reasoning given by the learned Assistant District Judge for rejecting the petition is not correct. The Assistant District Judge ought not to have entered into the factual questions whether the petitioner was the tenant of the suit premises as it was not necessary for the purpose of the petition filed by him for setting aside the ex parte decree. Even if the petitioner was held to be the tenant of the suit premises, and as such, aggrieved by the ex parte decree, the petition filed by him under Order 9, Rule 13 would not have been maintainable as admittedly, he was not defendant in the suit decided ex parte. This is so because the ex parte decree is not effective against him, he being not a party to the suit. The finding arrived at by the Assistant District Judge that the petitioner was not a tenant is, therefore, without jurisdiction and, therefore, set aside. The same shall have no legal effect and shall not be binding on the parties. The impugned order of the Assistant District Judge shall stand modified accordingly,

9. In view of the discussions made above, the revision petition is rejected subject to the directions and observations made above. No order as to the costs.