
(2009) 12 GAU CK 0001
In the Gauhati High Court
Case No : FAO No. 18 of 2007

T and I Ltd.

APPELLANT

Vs

Suraj Tea Manufacturing Co. Ltd.

RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (2011) 1 GLT 598

Hon'ble Judges : Ranjan Gogoi, J; Brojendra Prasad Katakey, J

Bench : Division Bench

Advocate : G. Choudhury, M. Bezbaruah, P. Borah, K.M. Saikia and P.K. Roy Choudhury, for the Appellant; G.N. Sahewalla Md. Aslam, D. Senapati and M. Jain, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—This appeal is directed against the order dated 5.7.2007 passed by the learned Civil Judge, Senior Division, Tinsukia in a proceeding registered as Misc. (J) Case No. 50 of 2006. By the said order, the learned Court below has dismissed the application filed by the present Appellant (Defendant in the suit) under Order 9, Rule 13 of the CPC for setting aside the ex-parte judgment and decree dated 25.8.2004 passed in Money Suit No. 166 of 2000.

2. We have heard Mr. G. Choudhury, learned Counsel for the Appellant and Mr. G N. Sahewalla, learned senior counsel for the Respondent.

3. The main ground on which the application under Order 9, Rule 13 CPC was filed by the present Appellant is that the Appellant was not informed about the judgment and decree dated 25.8.2004 passed in Money Suit No. 166 of 2000 by the engaged lawyer one Shri B.L. Agarwalla and Shri H.P. Agarwalla. According to the Appellant, they had come to know of the judgment and decree dated 25.8.2004 only on 21.7.2006 when the Appellant received a letter from the Respondent (Plaintiff) demanding withdrawal of another suit filed in the Calcutta

High Court failing which it was stated that the decree in M.S. No. 166 of 2000 will be executed. Thereafter, according to the Appellant, it applied for a certified copy of the judgment and decree dated 25.8.2004 and, on receipt thereof, had filed the application under Order 9, Rule 13 CPC on 3.8.2006 i.e. within 30 days of the knowledge of the decree. It is the further case of the Appellant that by way of abundant caution they filed an application for condonation of delay, if any, u/s 5 of the Limitation Act. However, according to the Appellant, the learned trial Court dismissed the application for condonation of delay and, on that basis, had also refused the prayer for setting aside the ex-parte decree dated 25.8.2004. Aggrieved, the present appeal has been filed.

4. We have perused the order dated 5.7.2007 in detail; the miscellaneous application filed for setting aside the ex-parte judgment and decree dated 25.8.2004 as well as the documents brought on record by the Appellant in the present appeal.

5. Our perusal of the order dated 5.7.2007 has indicated that the learned Trial Court had recorded its findings on the merits of the contentions advanced by the Appellant for setting aside the ex-parte judgment and decree and in this regard took the view that no material had been laid by the Appellants to show that they had engaged Shri B.L. Agarwalla and Shri H.P. Agarwalla as their counsels in the suit. Consequently, the explanation offered i.e. that knowledge of the decree was acquired on 21.7.2006 was found to be not acceptable.

6. After recording the aforesaid finding, the learned Trial Court proceeded to consider the application for condonation of delay and in this regard, on the basis of the findings already recorded on merits, arrived at the conclusion that the delay is not liable to be condoned. In arriving at the said conclusion, the learned Trial Court also came to the finding that the Appellant, as the Defendant, was grossly negligent in pursuing the suit and had not filed its written statement for over a period of three years.

7. The manner in which the learned Trial Court has considered the matter cannot to be appreciated. The contentions raised in the main application were considered first and, thereafter, the condonation matter was taken up. In doing so, the manner of conduct of the suit by the Appellant-Defendant was taken into account. That apart, from the materials placed before this Court, particularly the document annexed as Annexure-A to Misc. Case No. 3774 of 2007, it transpires that the Appellant had engaged one Shri H.P. Agarwalla as their counsel through Shri B.L. Agarwalla, another counsel. From the ex-parte judgment and decree dated 25.8.2004, it also appears that the counsel for the Defendant had withdrawn from the case. There is no material to indicate that after the counsel for the Appellant had withdrawn from the case, any notice of such withdrawal was issued to the Appellant to enable it to participate in the further stages of the case. Such a requirement is mandated by the law laid down by the Apex Court in *Thali Ram Issardas Sadarangani and Ors. v. Ramchand Issardas Sadarangani and Anr.* (1993) Suppl. 3 SCC 256 (para 4). Proof of the engagement of Shri H. P.

Agarwalla and Shri B.L. Agarwalla by the Appellants and their withdrawal from the case, according to us, makes the version offered i.e. that the Appellant was not informed about the ex-parte judgment and decree dated 25.8.2004 by their counsel sufficiently credible and worthy of acceptance. On the said basis, the version offered by the Appellant that they came to know of the ex-parte judgment and decree dated 25.8.2004 only on 21.7.2006 has a ring of truth. The said facts, therefore, would make the order dated 5.7.2007 passed by the learned Trial Court untenable in law.

8. We accordingly set aside the order dated 5.7.2007 and on the findings recorded by us deem it appropriate to set aside the ex-parte judgment and decree dated 25.8.2004 passed in Money Suit No. 166 of 2000. The aforesaid suit will now be heard afresh by the learned Trial Court. We make it clear that in view of the order dated 1.6.2004 passed by the learned Trial Court, the suit will proceed from the stage at which it was then pending. As the evidence of the Plaintiff had already been laid before the learned Trial Court, the Appellant-Defendant will be at liberty to cross-examine the Plaintiff's witnesses.

9. Consequently, the appeal is allowed subject to the direction as above. The Appellant will pay a cost of Rs. 5,000/- to the Respondent-Plaintiff.

10. Both the parties to the suit will appear before the learned Trial Court on 4th January, 2010. The Trial Court will make all endeavour to dispose of the suit as expeditiously as possible.

11. We are told that in terms of interim orders passed by this Court, the proceedings in Money Execution Case No. 8 of 2008 pending in the Court of the learned Civil Judge, Senior Division, Sonitpur, Tezpur has been stayed by the Court subject to deposit of Rs. 5 lakhs by the Appellant. As the ex-parte judgment and decree dated 25.8.2004 has been set aside and the same is the subject matter of the execution case, we direct that whatever amount has been deposited by the Appellant in the Money Execution Case No. 8 of 2008 may be withdrawn by the Appellant.