
(2015) 05 GAU CK 0028
In the Gauhati High Court
Case No : CRP No. 429 of 2008

The Ahmed Tea Co. (Pvt.) Ltd.	Vs	APPELLANT
Tarsem Singh Bhogal and Others		RESPONDENT

Date of Decision : 19-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Citation : (2015) 05 GAU CK 0028

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : K.N. Choudhury, Senior Advocate, S. Shyam, J. Patowary and M. Mahanta, for the Appellant; R.P. Sarmah, Sr. Adv., A. Nath, R. Chakraborty, M. Mandal, D. Doley and R. Devi, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Hrishikesh Roy, J.—Heard Mr. J. Patowary, the learned counsel appearing for the petitioner (plaintiff). Also heard Ms. R. Devi, the learned counsel appearing for the respondents (tenants).

2. The Title Suit No. 97/2006 was filed for ejectment of the tenant from the tenanted premises measuring 24" x 60" under municipality Holding No. 273 (old) and 299 (new) of Graham Bazar, Ward No. 17 of Dibrugarh municipality. The plaintiff pleaded rent default since February, 1978 and also bonafide requirement. According to the pleaded case the tenant was inducted in the year 1961 and Rs. 70/- was the monthly rent payable for the premises, where the predecessor of the present respondents was operating a furniture shop in the style of Bhogal Furniture. However, the defendant failed to appear in the Court and accordingly the learned Munsiff No. 1, Dibrugarh proceeded to hear the matter ex-parte. The Trial Judge then considered the evidence of PW-1 and the Exbts.-1, 2 and 3 from where it was gathered that the defendant was a tenant under the plaintiff and that the tenant failed to pay the due rent. Accordingly the ejectment suit was decreed ex-parte on 28.09.2006 (Annexure-1) by the learned

Trial Court.

3. The aggrieved defendant then filed an application on 26.10.2006 (Annexure-2) under Order IX Rule 13 read with Section 151 of the CPC for setting aside the ex-parte decree passed on 28.09.2006. In his application the defendant pleaded that he never received any summon from the Court and learnt of the proceeding only on 28.09.2006 from his neighbour Jogendar Singh, a co-tenant under the plaintiff. The plaintiff opposed to the defendant's application, where they contended that the plaintiff was served with summon, but he deliberately kept away from the proceeding.

4. In the above proceeding, i.e. Misc.(J) Case No. 62/2006 the learned Trial Judge on 02.04.2008 (Annexure-5) declared that the point for determination is whether the summon in the Title Suit No. 97/2006 was duly served on the defendant and whether the signature appearing in the reverse of the summon [Exbt.-1(1)] was actually signed by the recipient. The Court examined the process server Atul Deka (DW-2), who stated that he served the summon to the defendant and that the noticee appended his signature [Exbt.-1(1)] in the Court's summon. Peculiarly the defendant's name was signed as "Tarsan Singh Bhagal" and the defendant in his cross-examination stated that his name is spelt wrongly as he signs his name differently as "Tarsem Singh Bhogal" and accordingly it was argued that the signature attributed to the defendant in the summon is not his signature. However, the wrong spelling was not considered to be of any clinching value and on the basis of the testimony of the process server, the Court held that the summon was served and accordingly the application filed by the defendant under Order IX Rule 13 was rejected by the order of 02.04.2008 (Annexure-5). It may be noted herein that the Court was not impressed by the fact that the process server was unable to say whether the summon (served on the defendant) was accompanied by a copy of the plaint.

5. The aggrieved defendant then filed the Misc.(J) Appeal No. 4/2008 by projecting that the Trial Court misconstrued the legislative intent for enactment of the Order IX Rule 13 provision in the CPC and further pleaded that since the signature of the defendant was collusively appended by the process server without actually serving the summon, the ex-parte ejectment order should be set aside to facilitate the defendant to contest the ejectment suit on merit. The discrepancy in spelling the name of the defendant as reflected in the signature on the summon, was contended to be the pointer to the conclusion that the summon was never served on the defendant.

6. The learned Civil Judge, Dibrugarh then considered the defendant's appeal and noted that the ejectment suit filed on 19.07.2006 was hurriedly decreed ex-parte on 28.09.2006, after showing service of summon on the defendant on 18.08.2006. The Appellate Court also noted that the defendant's name was wrongly spelt in the signature attributed to him in the summon. The uncertainty of the process server on whether the copy of the plaint was actually served on the defendant was taken into account. The Court then observed that without

opinion of the handwriting expert the genuineness of the Exbt.-1(1) signature attributed to the defendant cannot be confirmed. On the basis of these factors the defendant's appeal was allowed and the ex-parte judgment and decree passed in the ejectment suit was thus set aside and the matter was remanded back to the Trial Judge for fresh adjudication on merit in accordance with law.

7.1 Mr. J. Patowary, the learned counsel submits that the defendant received the summon from the Court but deliberately kept away from the Court in order to delay the proceeding and accordingly he submits that the Appellate Court should not have disturbed the ex-parte ejectment decree.

7.2 The petitioner further contends that when the process server has proved the service of summon on the defendant, the Appellate Court should not have reversed the ex-parte decree by invoking the power under Order IX Rule 13 of the CPC. The petitioner relies on Sunil Poddar and Others Vs. Union Bank of India, AIR 2008 SC 1006 : (2011) 1 BC 155 : (2008) 1 CLT 604 : (2008) 141 CompCas 597 : (2008) 2 CTC 686 : (2008) 1 JT 308 : (2008) 149 PLR 767 : (2008) 1 SCALE 153 : (2008) 2 SCC 326 : (2008) 1 UJ 136 : (2008) AIRSCW 556 : (2008) AIRSCW 1633 : (2008) 1 Supreme 150 to further contend that the summon in spite of being served without the copy of the plaint, will not be fatal and the same will not justify the application for setting aside the ex-parte decree.

8.1 On the other hand, Ms. R. Devi, the learned counsel for the respondent (defendant) submits that no litigant gains by keeping away from the Court proceeding after summon is received and accordingly she argues that the defendant's plea of non-receipt of summon was rightly accepted by the Appellate Court particularly when, the defendant's signature was wrongly spelt in the signature attributed to him in the reverse of the summon. She further submits that only because somebody else copied the defendant's signature, there was spelling discrepancy and therefore she supports the Appellate Court which quashed the ex-parte decree and ordered for fresh adjudication of the ejectment suit on merit.

8.2 The respondent refers to the conspicuous haste with which the ejectment suit was decree ex-parte in less than 3 months and accordingly the collusion of the process server with the plaintiff is projected to be writ large in the summon serving exercise, to disable the defendant to contest the suit on merit.

9. When application is made for setting aside an ex-parte decree, the Court can intervene if it is satisfied that the summon was not duly served on the applicant. In the instant case, the fact that defendant's name was wrongly spelt in the signature appended to the summon raises considerable doubt on whether the summon was actually served on the defendant or whether someone else unauthorisedly signed as the defendant in the reverse of the Court's summon. If the defendant had actually signed, there could have been no occasion for misspelling his name and therefore this Court is more inclined to believe the version of the defendant that the process server collusively shown the summon

to have been served, without actually serving it on the defendant.

10. The conspicuous haste in which the ex-parte ejectment decree was passed cannot also be ignored by this Court as in normal situation an ejectment suit filed on 19.07.2006 cannot be expected to be disposed of in less than 3 months i.e. by 28.09.2006. This certainty warrants closer scrutiny as to whether the decree was stage managed by keeping the defendant uninformed which prevented him from contesting the case, by unlawful process.

11. Another vital aspect in the case is why should the defendant stay away from the ejectment suit if the summon was actually served upon him. A litigant gains nothing by absenting himself and therefore I have stronger belief that the defendant had no notice of the ejectment suit and the summon was wrongly shown to have been served on him by the process server, for extraneous consideration.

12. Without clinching evidence on the genuineness of the defendant's signature on the reverse of the summon, the Trial Court should not have held that the summon was served particularly when the defendant's name was spelt wrongly in the signature attributed to him. Therefore I feel that the interference by the Appellate Court in allowing the defendant's application under Order IX Rule 13 was justified in the facts of the instant case.

13. In adversarial litigation, each party must get adequate opportunity to project his case and in the instant suit, the decree of ejectment was issued without due opportunity to the defendant. This according to me has resulted in miscarriage of justice and therefore I feel that cause of justice will be better served, if the defendant is allowed to defend his case so that a decision on merit can be given by the Trial Judge, after considering the version of both parties.

14. In view of the above discussion and reasoning, I hold that the Appellate Court passed the correct order merited by the case and there is no infirmity in the impugned decision. Consequently I do not find any merit in this Revision petition and therefore the same is dismissed. The parties will bear their respective cost. The Registry should send a copy of this order to the court of the learned Munsiff No. 1, Dibrugarh, for deciding the Title Suit No. 97/2006 after providing due opportunity to both sides.