

(1955) 06 CAL CK 0039
In the Calcutta High Court
Case No : Suit No. 4819 of 1950

Tulsiram Shaw

APPELLANT

Vs

Rambadal Sambhunath
 Rambadal Sambhunath Vs
Tulsiram Shaw

RESPONDENT

Date of Decision : 27-06-1955

Acts Referred:

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

Citation : AIR 1956 Cal 17

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Advocate : H.N. Ghosh and S. Mukherji, for the Appellant;

Judgement

G.K. Mitter, J.—This is an application for setting aside an ex parte decree passed on 6-4-1955, and for restoration of the said suit to the peremptory list to be re-heard by this Court.

2. In this suit the plaintiff claimed a decree for Rs. 8,100/- on account of arrears of rent, Interest and costs. The suit was instituted in 1950. It appeared in the warning list on 2-4-1955, according to the applicant and on 1-4-1955 according to the respondent. The defendant had also filed a suit against the plaintiff herein in the year 1951 being suit No. 1124 of 1951, claiming a sum of Rs. 22000/-.

On 2-4-1955 the attorney for the defendant Sri B. B. Ghose wrote a letter to the Registrar of this Court as follows:

"The above suit, I find is appearing in the warning list of His Lordship the Hon"ble Mr. Justice G. K. Mitter. The above suit as also the suit No. 1124 of 1951 (Rambadal v. Tulsiram) filed by my client against the defendant Tulsiram Shaw, are cross suits and as such the same should toe tried together.

The second mentioned suit is also ready for hearing for a long time. Please therefore be good enough to direct your Board-maker to place the above two suits in the list of His Lordship the Hon"ble Mr. Justice G. K. Mitter one after the

other and oblige."

On 5-4-1955 Mr. Ghose wrote to Messrs. T. Banerjee and Cov., enclosing a copy of the above letter and stating:

"I trust you will agree with me that the above suit as also the suit No. 1124 of 1951 (Rambadal Sambhunath v. Tulsiram Shaw) should be tried together Inasmuch as one cannot be heard without the other. I am also instructed to state, that my client is now in Vindhyachal in connection with a Mundan Ceremony of his family members and is expected back to Calcutta some time next week.

In the circumstances aforesaid, my client's counsel will ask for a short adjournment of the above suit tomorrow the 6th instant at 10.30 a.m. till one week after the Easter Holidays to which I trust you will be so good as to consent" The suit actually came into the peremptory list on 5-4-1955. On the 6th April the suit was called on for hearing when adjournment was asked for by learned counsel appearing for the defendant; on such adjournment being refused counsel retired from the case and the suit was decreed ex parte.

3. The case made by the petitioner is that he had left Calcutta on 21-3-1955 for Vindhyachal in connection with Mundan Ceremony of his grandson. Soon after his arrival there he was attacked with Influenza and Bacillary dysentery and was confined to bed. The petitioner, it is alleged, was under the treatment of one Gopinath Misra, a practising Vaidya.

This gentleman has affirmed an affidavit herein to the effect that Rambadal Sambhunath was under his treatment from 30th March to 10th April 1955 and he was advised complete rest and as such was unable to return to Calcutta within that period. The petitioner also states that during his absence there was no responsible person at Calcutta who could give evidence on his behalf.

It is stated that his Munib one Mahesh Prosad was also away at Gamar, District Gazipur, U. P., to attend the Sradh Ceremony of his mother.

4. By his affidavit in opposition filed herein the plaintiff contends that no adjournment was asked for by letter of 2-4-1955 and the Registrar was only being requested to have the two suits placed on -the list one after the other.

It is also contended that on 6-4-1955 the petitioner's Munib Gomostha Mahesh Prosad was present in Court when the suit was called on for hearing and that it was never mentioned that the petitioner was III and the only ground for adjournment put forward was that he had gone to Vindhyachal in connection with the Mundan Ceremony of his grandson and that he would not be able to come back within a week.

5. In his affidavit Mahesh Prosad states that he was away from Calcutta from 3-3-1955 until the middle of April 1955 in connection with the Sradh Ceremony of his mother. Rambadal has also affirmed an affidavit in reply in this case.

6. On behalf of the respondent a point was taken that there had been no compliance with the provision of Order 9 Rule 13 which by the Calcutta amendment makes it incumbent on the defendant to serve a copy of the application along with his notice of motion or notice of application in order to entitle this Court to pass an order in his favour.

7. I have already dealt with this contention in its various aspects in the case of - Biswanath Dey Vs. Kishori M. Pal, , in which I have delivered judgment today.

8. I have held following the judgment of P. B. Mukherji, J. that it would be sufficient compliance with the provisions of Order 9 if a copy of the notice of motion and a copy of the application were served on the respondent at any time before the Court passed an order. In this case such a step was taken and, therefore, I see no obstacle to my passing an order in favour of the applicant.

9. Turning to the merits of the application, if one has to go by the affidavits there is nothing on the record except that the defendant was lying ill at Vindhyachal on the 5th and 6th April and was advised by his physician to take complete rest.

It does not appear that the defendant was at any time informed by his solicitor that his suit was on the list and that he should come down to Calcutta to arrange for his defence. No letters have been disclosed showing that he had been informed of the appearance of the suit in the Warning List or that the suit was likely to be transferred to the Peremptory List within a short space of time.

The only ground urged on his behalf for the adjournment of the suit was that he was away at Vindhyachal in connection with the Mundan Ceremony of his grandson. The ground then urged would not accord sufficient cause for non-appearance.

Taking into consideration the allegation of illness which has not been disproved and in view of the fact that the suit is one for rent and that it has been pending for the last 5 years I propose to put the defendant on terms and I direct the setting aside of the ex parte decree on condition that the defendant do furnish security to the satisfaction of the Registrar of this Court, for Rs. 6000/- within three weeks from date.

In default of the security being furnished the application will stand dismissed with costs and in any event the respondent will be entitled to the costs of this application. In case the security is furnished the respondent will also be entitled to all costs thrown away. If and when the security is furnished both the suits are to appear in the Warning List one after the other.

The applicant took out a second notice of motion and served a copy thereof along with a copy of the grounds on the plaintiff. Really this was not necessary and the applicant must pay the costs of the second application of the respondent.