

(2003) 03 OHC CK 0040
In the Orissa High Court
Case No : Misc. Appeal No. 695 of 2000

Union of India (UOI)	Vs	APPELLANT
Shri Surjan Singh and Another		RESPONDENT

Date of Decision : 24-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 5 Rule 27

Citation : (2003) 2 OLR 11

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

Bench : Single Bench

Advocate : N. Panda, for the Appellant; Savitri Ratho and B.P.B. Bahali, for the Respondent

Final Decision : Allowed

Judgement

B.P. Das, J.—This appeal under Order 43, Rule 1 of the CPC (in short "C.P.C.") is directed against the order dated 17.7.2000 passed by the Civil Judge (Senior Division), Rayagada, in M.J.C. No. 30 of 1997 rejecting an application under Order 9. Rule 13 read with Section 151 of the C.P.C. praying for , setting aside the ex parte decree passed against defendant No. 1, i.e., the present appellant, in Money Suit No. 42 of 1995.

2. The case of the appellant, as it transpires from the facts narrated in the appeal memo, as well as the impugned order and from the submissions made by the learned counsel for the parties, is that respondent No. 1 herein filed the aforesaid Money Suit No. 42 of 1995 in the Court of the Civil Judge (S.D.), Rayagada, against defendant No. 1- the General Manager, South Eastern Railways, Calcutta, and defendant No. 2, one of the employees of defendant No. 1, claiming compensation of Rs. 3,10,000/-for the loss sustained by him in a railway accident. The plaintiff-respondent No. 1, who was the owner-cum-driver of the truck bearing registration No. OSS 5457, was carrying on the business of transportation of goods. While transporting coal of one A.K. Tiwari in his truck from Brajarajnagar to Rayagada, in the early morning of 12.4.1993 the plaintiff

after crossing Bissam Cuttack found that the Level Crossing Gate at K.M. No. 308/2 was open and the road was clear for vehicular traffic for which he approached the railway track but at that point of time the Link Express train which was coming from Visakhapatnam towards Raipur hit the truck and smashed the same causing bodily injuries to the plaintiff as well as other occupants of the truck, one of whom having died later on. At this stage, it may be stated that along with the plaint the plaintiff-respondent No. 1 had filed an application under Order 33, Rule I C.P.C. praying to allow him to sue as an indigent person, which was registered as M.J.C. No. 5. of 1994, wherein the present appellant was arrayed as opposite party No. 2. That M.J.C. application was allowed by order dated 25.10.1995 and on the same day the plaint was registered.

3. In the suit, as defendant No. 1-appellant did not appear he was set ex parte and the suit was ultimately decreed ex parte by judgment dated 10.3.1997. Thereafter defendant No. 1 filed an application under Order 9, Rule 13 read with Section 151 of the C.P.C. for setting aside the ex parte decree, which was registered as M.J.C. No, 30 of 1997. Along with the said application, defendant No. 1 also filed an application u/s 5 of the Limitation Act praying to condone the delay in filing the application for setting aside the ex parte decree. The trial Court by order dated 17.7.2000 dismissed both the applications. Against this order, defendant No. 1 has come up with the present appeal.

4. According to the appellant, the plaintiff-respondent No. 1 had not complied with the provisions of law regarding service of suit summons on him. The Chief Claims Officer, Calcutta, came to know about the ex parte decree only on 30.4.1997 when he received the certified copies of the judgment and decree of the suit sent by the plaintiff and after the matter was examined at the level of different authorities, the M.J.C. petition was filed on 16.7.1997 along with the application u/s 5 of the Limitation Act to condone the delay. The Court below in the impugned order observed that the above M.J.C. petition ought to have been filed on the re-opening day of the Court after the summer vacation, i.e., on 23.6.1997, and, therefore, there was a delay of 22 days in presenting the M.J.C. petition. According to the counsel for the appellant, the exparte decree should have been set aside as the appellant had not been served with the suit summons either through ordinary process or registered post with acknowledgment due. It was also pleaded that there being no specific order of the Court for service of summons either through ordinary process or by registered post, the plaintiff ought to have complied with the provisions of law regarding proper service of summons on defendant No. 1 by both the modes. Apart from the aforesaid ground, the appellant also contended that the trial Court dismissed the application for setting aside the exparte decree on a wrong premises that the pendency of the money suit was within the knowledge of the Divisional Railway Manager, Waltair, since the D.R.M. as per the Court summons produced certain documents before the trial Court in the aforesaid suit. It was also contended that neither the D.R.M. was a party to the suit, nor the notice issued to the D.R.M.,

Waltair, for production of certain documents could waive service of summons to the General. Manager. S.E. Railway, G.R.C., Calcutta.

5. On persual of the impugned order, I find that the trial Court has observed that the Senior Divisional Safety Officer, Waltair, sent the relevant papers to the Senior D.E.N. (Co-ordination), Sambalpur, for taking necessary steps in the matter as the place of accident came under Sambalpur Division but the Divisional Traffic Manager again referred the matter to the Senior Safety Officer, Waltair. on 23.5.1997 to deal with the same. Then the matter was consulted with the advocate whereafter the M.J.C. petition was filed along with the application for condonation of delay. According to the trial Court, defendant No. 2, i.e., G. Musalayya, the Gate Man at the Level Crossing Gate, appeared and contested the suit by filing his written statement. Miss Ratho for the respondent, therefore, contends that it cannot be said that the summons was not properly served on defendant No. 1 in the suit. The further finding of the trial Court is that the Assistant Manager (Operation), Railway, Visakhapatnam, who was examined as P.W. 1 in the proceeding, under Order 9, Rule 13, C.P.C. in his evidence has stated that the General Manger's office, Calcutta, sent a letter to the D.R.M., Waltair on 30.5.1997 to Jook into the matter but the D.R.M, office sent the matter to Sambalpur and the Sambalpur Division returned the same to Waltair. It further transpires from the impugned order that the summons was issued to defendant No. 1 by regd. post with A.D. vide postal receipt No. 2810 dated 25.3.1996 and the service of summons was held sufficient in terms of Order 5, Rule 19-A. C.P.C.

6. The questions to be decided here are whether there was any lapse on the part of the Court below not to issue the notice to the appellant through both the modes provided for in the C.P.C. and whether issue of summons to the appellant by RP. /AD. notwithstanding non-receipt of A.D. could be taken as sufficient service of summons on him. or service of summons could be taken as not proper/ sufficient due to non-receipt of A.D.

7. According to Mr. N. Panda for the appellant, summonses were not issued through process of Court and by RP./A.D. simultaneously, but summons was issued only by registered post and as there is nothing in the order-sheets to indicate that summons was served in terms of Order 5, Rule 10 and Rule 19-A, C.P.C, it cannot be said that there was valid and proper service of summons on the appellant for which the date of knowledge of the exparte decree by the appellant would be the date only when the certified copies of the judgment and decree were received by the Chief Claims Officer. S.E. Railways, Calcutta. Fact remains. Order 5, Rule 19- A is the provision for simultaneous issue of summons by registered post in addition to personal service. So, personal service is a must which should be done in terms of Order 5, Rule 10. C.P.C. According to him. the provision of Order 5, Rule 10, C.P.C. is mandatory and there is no question of dispensing with the said provision while considering the sufficiency or otherwise of service of summons on other side.

8. From the facts as narrated above as well as from the evidence of P.W. 1, it transpires that the appellant was "fully aware of the pendency of the suit before the Civil Judge (S.D.), Rayagada and had not taken appropriate steps to appear or contest the claim in the suit. It further appears that the D.R.M. (Safety) had produced certain documents in the Suit before the trial Court which were called for from him, which revealed that the appellant was well aware of the suit against him. But the fact remains, the officers of the appellant were not that vigilant in the matter.

9. Learned counsel for respondent No. 1 in support of her submission relied upon a decision of the Patna High Court in *Mali Ram Sharma and Another Vs. Smt. Gayatri Devi*, and submitted that even if there be any irregularity in the service of summons"or that summons was not duly served, the same is not a sufficient ground for setting aside the exparte decree as the appellant had knowledge that such a decree having been passed against him. The Court was to be satisfied that summons had been duly served on the appellant so as to set aside the exparte decree. The very fact that the Court ordered the suit to proceed exparte would show that the Court was satisfied that summons had been duly served on the defendants including the appellant. Learned counsel for respondent No. 1 then relied upon a decision of the Andhra Pradesh High Court in *Yelavarti Anasuyamma Vs. Chennupati Raghavamma*, wherein it was held that as per the proviso to Order 9, Rule 13, C.P.C., no Court shall set aside a decree passed ex pane 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. Relying upon the aforesaid decision of the Andhra Pradesh High Court, the learned counsel for respondent No. 1 submitted that the appellant had sufficient knowledge regarding the suit filed in Court.

10. The mode of service of summons is incorporated under Order 5, Rule 10 C.P.C. which reads as follows :

"10. Mode of Service - Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court."

I have already stated in the foregoing paragraph that there is ample evidence to indicate the knowledge of the appellant about the suit even though the summons was not served on him in usual mode, but law in this regard has been well settled. In the case of *Narendra Kishore Das Vs. Banamali Sahu Dibakar Sahu Firm*, ,this Court held that it is a well settled principle that a party"s knowledge of the institution of a suit is not sufficient so long as he is not effectively served with summons of the suit. He may from various circumstances or after his own enquiry come to know that a suit has been filed against him, but he is entitled to expect service of summons from Court. In another decision in *State of Orissa Vs. Suresh Chandra Deo*, this Court following its earlier decision in *Narendra Kishore Das v. Banamali Sahu* {supra} held as follows:

"It is thus paramount that even if a defendant might have knowledge of the suit, yet he is within his rights to expect an effective service of summons on him calling upon him to appear in Court and unless such service is made, he may avoid the Court."

But the fact remains, the authorities of the Railways have not acted as they ought to have, while on the other hand respondent No. 1 was running from pillar to post to get justice. Fact also remains, the summonses were issued by regd. post with A.D. on the head of the railway authority which can be construed to be in terms of Order 5, Rule 27, C.P.C. and as the trial Court has rightly made the notice sufficient under the proviso to Order 5, Rule 19-A, C.P.C. that too one of the officials of the Railways, i.e. defendant No. 2, who is the gateman has appeared and contested the suit by filing a written-statement.

11. Considering the submission of the learned counsel for the appellant that unless the ex parte decree is set aside and the suit is heard on merit, the Railway authorities would suffer irreparable loss as they would be non-suited. Looking into the background of the case and also in the interest of justice and equity. I set aside the ex parte decree passed in M.S. No. 42 of 1995 as also the impugned order dated 17.7.2000 passed by the Civil Judge (S.D.), Rayagada. in M.J.C. No. 30 of 1997, arising out of that suit and restore the suit to file, subject to payment of cost of rupees twenty thousand within a period of eight weeks hence. The trial Court is directed to dispose of the suit within a period of four months of receipt of judgment. If the cost is not paid within the time stipulated above, this appeal shall be deemed to have been dismissed and the ex parte decree passed against the appellant shall revive. The cost shall be paid by way of an account payee bank draft drawn in favour of respondent No, 1- Surjan Singh. I have awarded cost keeping in view the of the observations of the Apex Court in M.K. Prasad Vs. P. Arumogam, which are as follows :

".....While deciding the application for setting aside the ex parte decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account, of the appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs....."

12. In the result, the appeal is allowed with the above directions. The L.C.R. fee sent back forthwith