

Probir Kumar Das Vs. Pradip Kumar Das

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Court : Kolkata

Decided On : Jul-15-2014

Judge : Debangsu Basak

Appellant : Probir Kumar Das

Respondent : Pradip Kumar Das

Judgement :

ORDER

SHEET GA No.1995 of 2013 WITH CS No.222 of 2013 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE PROBIR KUMAR DAS Versus PRADIP KUMAR DAS BEFORE: The Hon'ble JUSTICE DEBANGSU BASAK Date : 15th July, 2014.

Appearance : Mr.Sabyasachi Chowdhury, Adv.Mr.Sayantana Bose, Adv.for the petitioner Mr.D.Ghosh, Adv.Mr.B.Das, Adv.for the defendant The Court : In a suit for partition an application was made for injunction and for preliminary decree.

An interim order dated July 25, 2013 was passed restraining the parties from dealing with or disposing of or encumbering or parting with possession of the suit premises.

The interim order was passed in presence of the parties to the suit.

The application came up for final hearing before me.

Mr.D.Das, learned advocate appeared on behalf of the defendant and filed affidavit-in-opposition.

The plaintiff filed affidavit-in-reply.

On the previous day when the application was taken up none appeared for the defendant.

I brought into the notice of the learned advocate appearing for the plaintiff the fact that the notice of motion of the application was annexed to the affidavit of service as Annexure-A and that it was not in accordance with the Rules of the Original Side.

The learned advocate wanted time to come back and make submission on the same.

When the application was taken up for hearing it was contended on behalf of the petitioner that, there was a notice of motion on record.

The notice of motion was Annexure-A to the affidavit of service.

The notice of motion was not arranged in accordance with Chapter XX Rule 7A of the Original Side Rules.

He also referred to the provisions of Rule 17 of Chapter XX to submit that, there was no penalty for non-compliance with Rule 7A laid down in Rule 17.

He submitted that, the defect in arrangement of the notice of motion was not fatal to the application and that his client should not be penalized.

In couRs.of hearing I suggested that, the plaintiff should take out a fresh application with a proper notice of motion and obtain the same relief if it was entitled to and withdraw the present application.

The plaintiff was not agreeable to my suggestion and invited the Court for judgment on the issue.

In such circumstances consideration of Chapter XX of the Original Side Rules is necessary.

Chapter XX speaks of motion and rule nisi.

Rule 3 requires every application which in accordance with the Original Side Rules could not be made in Chambers should be made on motion after notice to the parties affected thereby, unless, according to the practice existing at the time of the rules, an order might be made absolute ex parte at the first instance.

Rule 4 specifies the title, contents and signature of the notice of motion.

Rule 7 specifies that four clear days is required between the service of a notice of motion and the day named for bringing on the motion.

Rule 7 also specifies the filing of the notice as well as filing of the affidavits in answer or reply.

Rule 7A required the notice of motion to come first.

Rule 17 specifies the consequence of non-compliance with the provisions of the Rules 6, 7 and 8 as to the filing.

It specifies that, in the event of non-compliance with the provisions of rule 6 as to the filing of the rule and affidavit or affidavits of service, or in the event of non-compliance with the provisions of Rules 7 and 8 as to the filing of the notice of motion, and affidavit or affidavits of service the rule or motion, as the case may be, shall not, without the leave of the Registrar, be set down in the peremptory cause list under Rule 29 of Chapter X.

Rule 29 of Chapter X allows interim placement of all proceedings, applications and matters required be set down in a list before the Court and not specifically provided for in the Rules, on the day fixed for taking the same.

The Original Side Rules lays down a specific procedure for making of an application.

The applications which are not required to be moved in Chamber, are specified to be made by way of a notice of motion.

The contents of the notice of motion are also specified.

Elaborate mechanism is put in place for the purpose of taking out of the notice of motion, service of the same on the parties, and filing an affidavit of service showing service of the notice of motion.

A notice of motion is required to be submitted with the department for the purpose of the matter to appear in the peremptory cause list of the learned Judge taking up such matters. The fact that, the notice of motion was served is required to be proved by way of an affidavit of service or affidavits of service as the case may be.

Rule 7 required that the notice of motion together with the affidavit or affidavits of service to be filed in the Registrars Office immediately after service of the notice, but not less than four days before the day named for bringing on the motion.

Rule 7A specified that the notice of motion will come first.

Rule 7A specified that in attaching the notice of motion to the affidavit of service, the documents should be so arranged that the notice of motion came first.

It was submitted that, the consequence of non-compliance of Rule 7A is not specified in Rule 17 of Chapter XX required.

Rule 17 of Chapter XX required that in the event of non-compliance with the provisions of rule 6 as to the filing of the rule and affidavit or affidavits of service, or in the event of non-compliance with the provisions of rules 7 and 8 as to the filing of the notice of motion, and affidavit or affidavits of service the rule or motion, as the case may be, shall not, without the leave of the Registrar, be set down in the peremptory list of motions under rule 29 of Chapter X.

In the instant case, the notice of motion was made annexure A to the affidavit of service.

It was therefore not arranged in terms with Rule 7A of the Rules.

In the instant case, this mistake in arrangement of the notice of motion and the affidavit of service was not brought to the notice of the Registrar, Original Side.

The application was set down in the peremptory cause list and was entertained by a learned Judge and an interim order was passed.

At the stage of final hearing, the defect was noticed.

When the defect was noticed, learned advocate for the plaintiff contended that, the defect was not fatal to the application.

In my view, an application is born with the taking out of the notice of motion.

The date of birth of the application is the date of the notice of motion.

The notice of motion specified, as is required by the Rules, the grounds on which the reliefs arranged in the notice of motion are sought.

Such grounds usually is the petition made for the purpose of obtaining the reliefs specified in the notice of motion.

Apart from the petition, the Rules permitted the parties to seek the reliefs specified in the notice of motion on other grounds stated in the notice of motion.

A notice of motion is therefore an independent document and under the scheme of the Rules of the Original Side could not be made an annexure to an affidavit of service.

Affidavit of service or affidavits of service, notice of motion and the petition are separate documents and could not be made an annexure to each other.

If a notice of motion is allowed to be annexed to an affidavit of service, by the same logic and reasoning, the main petition can also form an annexure to the affidavit of service.

The application could not have been placed in the peremptory cause list in absence of compliance with Rule 6,7 and 8 of Chapter XX.

The mistake of the Registrar in placing the application in the peremptory cause list in the fiRs.place could not be utilized as a shield to obtain orders on an application which in the fiRs.place could not have been placed in the peremptory list at all.

Since the mistake was detected during the couRs.of hearing of the application and the plaintiff did not want to rectify such mistake, there is no point in continuing with an application which could not have been placed in the peremptory cause list in the fiRs.place at all.

In couRs.of submission, it was submitted on behalf of the petitioner that the petitioner be allowed to re-arrange the papers filed in Court.

I am not in a position to accept such prayer.

Firstly, it will allow a party who is negligent to take benefit of his negligence and meddle with the records of the Court.

Secondly, the petitioner is not remediless.

Thirdly, if the notice of motion is allowed to be extracted from an affidavit of service, the same will give rise to an incurable anomaly in the affidavit of service.

The affidavit of service will continue to state that the notice of motion is annexed to it while in effect it is not so.

In such circumstances G.A.No.1995 of 2013 is dismissed.

All interim orders passed stand vacated.

No order as to costs.

(DEBANGSU BASAK, J.) akb/

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