

Bansidhar Lenka Vs. Kumar Barik

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Court : Orissa

Decided On : Jan-11-1985

Reported in : AIR1986Ori11

Judge : K.P. Mohapatra, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 9, Rule 13; Limitation Act, 1963 - Schedule - Article 123

Appeal No. : Civil Revn. No. 522 of 1983

Appellant : Bansidhar Lenka

Respondent : Kumar Barik

Advocate for Def. : D.S. Nanda and ;A. Routray, Adv.

Advocate for Pet/Ap. : B.B. Mohanty, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

K.P. Mohapatra, J.

1. This revision is directed against the order passed by the learned Subordinate Judge, Bhubaneswar setting aside the ex parte decree passed in Original Suit No.

22 of 1979(1) for specific performance of contract. The plaintiff is the petitioner.

2. According to the defendant's case he was never a resident of village Palasuni, but has all along been a resident of Tulsipur, Cuttack. He did not enter into an agreement with the plaintiff for sale of land for a consideration of Rs. 10,000/-. Nevertheless, on the basis of a forged document the plaintiff instituted Original Suit No. 32 of 1979(1) in the trial Court for enforcement of the contract and praying for a decree for specific performance thereof. In the said suit service of summons was fraudulently suppressed. By making manipulations it was made to appear that he entered appearance in the said suit through Advocate, Shri B. C. Rath who, however, had instituted the suit on behalf of the plaintiff and could not have entered appearance for the defendant. By perpetration of such fraud, the plaintiff managed to obtain an ex parte decree on 10-1-80. The defendant obtained certified copies of the decree and other documents on 17-4-82 and 3-5-82 from which he became aware of the fraudulent ex parte decree passed against him. So by a petition under Order 9, Rule 13, C.P.C. presented on 10-5-82 along with a petition for condonation of delay under Section 5 of the Limitation Act, he implied for setting aside the ex parte decree.

3. The plaintiff in his counter denied the allegations and averred that the defendant was a resident of Palasuni and had in fact executed a deed of agreement for sale of land in his favour. He did not execute the sale deed and so the plaintiff brought the suit in which summons was duly served on the petitioner. He entered appearance in the suit through Advocate, Shri M. M. Patnaik and Shri P. K. Das and applied for adjournment to file his written statement. Ultimately he did not file the same, was set ex parte and an ex parte decree was passed. It was further averred that the petition under Order 9, Rule 13, C.P.C. was barred by limitation.

4. The learned Subordinate Judge in an exhaustive order found that there was fraudulent suppression of service of summons on the defendant and further and records of the suit revealed that one Shri B. C. Rath, Advocate who instituted the suit for the plaintiff had also entered appearance for the defendant, which created suspicion in the conduct of the suit giving rise to an inference that attempt was made for keeping the defendant completely in dark about the suit so as to gain an

easy walkover by getting an ex parte decree. Accordingly, he condoned delay under Section 5 of the Limitation Act and set aside the ex pane decree. It is against this order that the present civil revision has been filed.

5. Before the trial Court the defendant adduced evidence both oral and documentary to prove that there was fraudulent service of summons. The plaintiff did not examine himself, but examined an outsider. While the opposite party stated on oath that there was fraudulent service of summons, no attempt was made by the plaintiff to prove that actually summons was served on the opposite party both by post and through Process Server. Worst of all, the documents relating to service of summons which ought to have been in the record of the suit were alleged to have been lost. In view of the evidence before it, the trial Court came to hold that there was fraudulent service of summons on the defendant in the suit. No material was placed before me to arrive at a different finding. In a civil revision the finding of fact recorded by the trial Court is not to be ordinarily interfered with unless it is found that material evidence has not been taken into consideration or the finding of fact has been recorded without having jurisdiction, as a result of which, it has occasioned failure of justice (see (1968) 34 Cut LT 396, Maguni Naik v. Chemei Naik, and AIR 1964 SC 1336, Manindra Land and Building Corpn. Ltd. v. Bhutnath Banerjee). I do not, therefore, find compelling reasons to disturb the finding of fact recorded by the trial Court.

6. Learned counsel appearing for the petitioner strenuously urged that the petition under Order 9, Rule 13, C.P.C. was barred by Article 123 of the Limitation Act, because it was not presented within 30 days from the date of knowledge of the ex parte decree by t'he defendant. Article 123 of the Limitation Act prescribes a period of limitation for 30 days for an application for setting aside an ex parte decree. The period of 30 days shall run from the date of the decree or where the summons or notice was not duly served, the date when the applicant had knowledge of the decree. In para 6 of the petition, the defendant stated that one Suresh Chandra Sahu informed him on 18-3-82 that the plaintiff had obtained a sale deed in his favour through Court by virtue of a decree. In para 7 of the petition he stated that he obtained certified copies of the decree and other documents on 17-4-82 and 3-5-82. The petition under Order 9, Rule 13 C.P.C. was filed on 10-5-

82. If 18-3-82 was the date of knowledge, the petition shall be barred by limitation. If, on the other hand, 17-4-82 or 3-5-82 shall be deemed to be the date of knowledge, the petition shall be within the limitation as envisaged in Article 123 of the Limitation Act. On 18-3-82 the defendant seems to have received oral information, the authenticity of which was to be verified by documents. On receiving oral information and without knowing full facts as to the suit, service of summons and the ex parte decree, it was not possible on the part of the defendant to come straight to the Court in haste and file a petition under Order 9, Rule 13 C.P.C. to set aside the ex parte decree. Normally in such cases enquiries are made in the Court regarding the above facts and thereafter applications for setting aside ex parte decrees are made. In this case the opposite party obtained certified copies on 17-4-82 and 3-5-82. As a matter of fact, it appears from the certified copy of the ex parte order (Ext. 1) and the certified copy of the ex parte decree (Ext. 2) that they were obtained by the defendant on 17-4-82 and 3-5-82 respectively. The date of knowledge appropriately therefore was 17-4-82 when the defendant obtained the certified copy of the ex parte order. The petition under Order 9, Rule 13 C.P.C, having been filed on 10-5-82 it was not barred by Article 123 of the Limitation Act (See AIR 1967 SC 1384, Panna Lal v. Murari Lal, AIR 1972 Patna 310, Mst. Nagina Devi v. Brijnandan Pd. Sinha and (1977) 43 Cut LT 584, Badhoram Mistri v. Dandapani Sahu).

7. For the reasons stated above, I do not find adequate grounds to interfere with the impugned order. The civil revision is accordingly dismissed. There shall be no order as to costs.