

Bramhananda Mishra Vs. Jogen Kumar Mishra

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Court : Orissa

Decided On : Jan-28-2004

Reported in : 97(2004)CLT627

Judge : P.K. Tripathy, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 9, Rule 13

Appeal No. : Civil Revision No. 170 of 2001

Appellant : Bramhananda Mishra

Respondent : Jogen Kumar Mishra

Advocate for Def. : D.K. Mahapatra and M. Mishra

Advocate for Pet/Ap. : B. Misra, R. Misra, S. Mishra, S.K. Jena, P.K. Sahoo, S.K. Jena, B.K. Misra and B.S. Misra

Disposition : Revision dismissed

Judgement :

P.K. Tripathy, J.

1. Plaintiff in Title Suit No. 66 of 1997 of the Court of Civil Judge (Sr. Division), Rourkela has filed this Civil Revision challenging to the order passed on 9.4.2001 by the Addl. District Judge, Rourkela in Civil Misc. Appeal No. 6 of 2000. The sole

defendant is the opposite party.

2. Plaintiff filed the suit for damages on the allegation that in 1997 when he contested for the post of the President of Rourkela Steel Executive Association, defendant published and circulated defamatory and libellous pamphlets with false and frivolous allegations and as a result of that not only he lost the election but also his reputation was damaged and he suffered humiliation and mental agony. Accordingly he filed the suit claiming for damages of Rs. 99,900/-(rupees ninety nine thousand nine hundred). Defendant entered appearance in that case and applied for adjournments for filing written statement. His last application was rejected on 25.8.1998 and the suit was posted for ex parte hearing, On 19.1.1999 ex parte hearing was taken up and on 9th February, 1999 judgment was delivered decreeing the suit ex parte.

3. Defendant filed an application Under Order 9, Rule 13, CPC, registered as Misc. Case No. 16 of 1999, in the Court of Civil Judge (Sr. Division), Rourkela. In that application he advanced the contention that on 28.11.1998 he collected information about the next date from his counsel and was intimated that the suit had been posted to 19.2.1999. Thus, he got the written statement prepared and on 19.2.1999 filed the written statement and it is learnt that on the basis of ex parte hearing of the suit on 19.1.1999 the suit had been decreed on 9.2.1999. Claiming bonafide in his conduct and absence of deliberate laches, he prayed for setting aside that ex parte decree. Plaintiff, as the opposite party, contested that case. Both the parties adduced their oral evidence respectively as P.W. No. 1 and O.P.W. No. 1. On assessment of such evidence, learned Civil Judge found no bonafide in the conduct of the defendant in as much as by 25.8.1998 he had already been set ex parte and the case had been posted to 19.1.1999 for ex parte hearing and therefore, in the absence of the lawyer, who gave him the wrong date, contention of the petitioner that he was intimated that the suit had been posted to 19.2.1999 for ex parte hearing is not acceptable. Accordingly he rejected the application under Order 9, Rule 13, CPC and dismissed the Misc. Case.

4. Defendant preferred the above noted Civil Misc. Appeal No. 6 of 2000 under Order 43, Rule 1, CPC. After hearing the parties, learned Addl. District Judge on

perusal of the L.C.R. and the evidence of both the parties adduced in the Misc. Case, recorded the finding that written statement of the defendant was filed on 19.2.1999 and that indicates that he has a bonafide desire to contest the case. He further recorded the finding that evidence of the defendant as P.W. No. 1 that his lawyer had given him the date as 19.2.1999 has not been shattered in the cross-examination and therefore, that statement of the defendant is acceptable to consider his prayer for setting aside the ex parte decree. Taking such view in the matter, learned Addl. District Judge set aside the impugned order as well as the ex parte decree and directed for restoration of the suit for disposal in accordance with law.

5. Mr. B. Mishra, learned counsel for the petitioner advanced a strenuous argument contending that the appellate Court went wrong in invoking the discretion in favour of the defendant when the defendant had not established sufficient cause for setting aside the ex parte decree. He further argued that as per the ratio in the cases of Bidyadhar Behera v. Smt. Kanakalata Nayak, 96 (2003) CLT 725 and Basant Singh and Anr. v. Roman Catholic Mission, 95 (2003) CLT 324 (SC), an ex parte decree is not liable to be set aside in the absence of proof of sufficient cause.

6. Mr. D. K. Mohapatra, learned counsel for the defendant/ Opp. Party, on the other hand argued that existence of sufficient cause was failed to be properly appreciated by learned Civil Judge whereas learned Addl. District Judge considered and construed the same in a meaningful way. The decisions relied on by the petitioner are not applicable to the facts and circumstances of the present case and therefore, while considering the matter under Section 115, CPC this Court should not interfere with the factual finding recorded by the Court below in as much as such factual finding does not suffer from illegality or perversity. In support of his contention he relied on the cases of Rabindra Prasad Kamilla v. Abhaya Prasad Kamilla, 1987 (II) OLR (NOC) 1 and Nakula Swain and Ors. v. Jogendra Das, 1996 (I) OLR 534.

7. In the case of Basant Singh (supra) the fact before the Apex Court was relating to non-service of summons as the ground to set aside the ex parte decree. In that

context, the Apex Court did not like to interfere with the ex parte order passed against the appellants. The said ratio, therefore, is not applicable to the facts and circumstances of the present case.

In the case of Bidyadhar Behera (supra) a similar contention relating to non-service of summons was advanced and considered and found against the defendant. Under that circumstance, contention of the defendant/petitioner was rejected relating to setting aside the ex parte decree for granting an opportunity on the principle of substantial justice. The ratio in that case also is not applicable to the facts and circumstances of the present case.

In the case of Rabindra Prasad Kamilla (supra) this Court considered the contention as to whether ex parte decree against all the defendants is to be set aside when only one of the defendants applied for setting that aside. That ratio is also not relevant so far as the present dispute is concerned.

In the case of Nakula Swain (supra), taking into consideration a similar facts situation this Court held that there cannot be a straight-jaket formula to construe the meaning of the term 'sufficient cause'. In that respect the facts and circumstances involved in each of the cases has to be appropriately appreciated. In that case too the Hon'ble Judge found the evidence of the petitioner regarding receipt of wrong intimation from the Advocate's Clerk as sufficient to set aside the ex parte decree for providing an opportunity to contest the suit. That ratio being relevant, is followed in this case.

8. Parties should bear in mind that this Court is in seisin of the matter under Section 115, CPC. In the absence of any illegality or perversity in appreciating the evidence by the Court below, this Court is not required to disturb such factual finding. When the Civil Judge isolating the evidence of P.W. No. 1 rejected his application under Order 9, Rule 13, CPC on the ground of non-availability of the corroborating evidence of the advocate who had given him the wrong date, learned Addl. District Judge accepted that evidence of P.W. No. 1 as sufficient to prove existence of sufficient cause. The appellate Court did not search for corroboration on the ground that such evidence of P.W. No. 1 remained unshaken in course of the cross-examination, and apart from that the evidence of P.W. No. 1

finds corroboration relating to filing of the written statement on 19.2.1999 to justify bonafide in the conduct of the defendant. Such factual finding of the appellate Court does not appear to be illegal, unjust or improper. Therefore, when the lower appellate Court has exercised the discretion in furtherance of ends of justice, it is not proper for this Court to interfere with the same. Accordingly, this Court finds no merit in the contention of the petitioner to interfere with the impugned order.

Accordingly the Civil Revision is dismissed.

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