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Court : Kolkata Appellate

Decided On : Feb-28-2011

Judge : Prasenjit Mandal, J.

Appeal No. : C.O. No. 1111 of 2008

Appellant : Sujit Kumar Paul and ors.

Respondent : Subodh Kumar Paul and anr.

Advocate for Pet/Ap. : Mr. Arun Kumar Maity, Adv

Judgement :

1. This application is at the instance of the plaintiff and is directed against the order no.173 dated July 25, 2007 passed by the learned Civil Judge (Senior Division), First Court at Alipore, District South 24 Parganas in Misc. Case No.4 of 1990 arising out of the Title Suit No.100 of 1984.

2. The short fact is that the predecessor-in-interest of the plaintiffs/petitioners herein instituted a suit being Title Suit No.100 of 1984 praying for a decree of declaration of charge, specific performance of contract and damages. In that suit, the defendant entered appearance on February 27, 1985 by filing vakalatnama and he prayed for time to file a written statement by an appropriate application. Ultimately, the defendant did not file any written statement. As a result, the suit was decreed ex parte on November 18, 1985. Long time thereafter in 1990, the defendant/opposite party herein filed an application under Order 9 Rule 13 of the

C.P.C. and that application was converted into a misc. case being Misc. Case No.4 of 1990. By the impugned order, the misc. case was allowed. Being aggrieved, this application has been preferred.

3. Now, the point for consideration is whether the impugned order should be sustained.

4. Upon hearing the learned counsel for the petitioner and on going through the materials on record, I find that the misc. case was contested by the plaintiffs. Evidence was recorded. Two P.Ws. were examined on behalf of the petitioner of the misc. case.

5. Thereafter, by the impugned order, the learned Trial Judge has allowed the said misc. case thereby setting aside the ex parte decree dated November 18, 1985 in Title Suit No.100 of 1984. Now, the question is whether the defendants/opposite parties have been able to show sufficient cause for non-appearance at the time of call of the suit for ex parte hearing.

6. Both the P.W. Nos.1 & 2 have given concurrent statement that the original defendant did not receive any summons with respect to the said suit. The plaintiffs were not also able to show that the summons was duly served upon the original defendant. During the course of deposition, both the original defendant and the P.W. No. 2 have categorically stated that the original defendant did not file any vakalatnama or any petition for adjournment to file a written statement. They have denied that the signatures appearing on those papers were of the defendant no.1. The learned Magistrate has also compared the signatures appearing on the vakalatnama and the petition with the one appearing in the deposition, that is, admitted signature and observed that signature do not tally. Thus, on perusal of the impugned judgment and the other connected papers, I find that learned Trial Judge has based his findings on the basis of the evidence on record and just a general comparison by the naked eyes which show that signatures vary. If I ignore the fact of comparison by the learned Trial Judge himself, the evidence of the P.W. Nos.1 & 2 clearly indicate that the original defendant did not sign on the vakalatnama as well as the petition for adjournment. Thus, I find that the findings of the learned Trial Judge cannot be said to be perverse at all. It is based on

evidence.

7. In exercising a revisional jurisdiction, Courts should not set aside the findings of the learned Trial Judge based on evidence. This is not an appeal at all. Therefore, I am of the view that there is nothing to interfere with the impugned order. Accordingly, this application fails to succeed. It is, therefore, dismissed.

8. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

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