

Sunil Kumar Mukherjee Vs. Krishna Kumar Bhattacharya

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Court : Kolkata

Decided On : Jul-29-2011

Judge : Dipankar Datta, J.

Acts : Code Of Civil Procedure (CPC) - Order 9 Rule 4 Section 122, 24; Limitation Act - Section 5

Appeal No. : C.O. 758 of 2006

Appellant : Sunil Kumar Mukherj.

Respondent : Krishna Kumar Bhattacharya

Advocate for Def. : Mr. S.Sen, Adv

Advocate for Pet/Ap. : Mr. S. Chel; Mr. R.N. Pal, Adv

Judgement :

1. This revisional application is directed against order dated 29/8/2005 passed by the learned Judge, 6th Bench, Presidency Small Causes Court at Calcutta in Misc. Case No. 31 of 2004, arising out of Ejectment Suit No. 174 of 2002. By the impugned order, the learned Judge allowed an application under Order IX Rule 4, Civil Procedure Code dated 30/1/2004 (hereafter the said application) filed by the plaintiff/opposite party (hereafter the plaintiff) and thereby, restored the ejectment suit to its original file and number.

2. Perusal of this application reveals that Ejectment Suit No. 529 of 1996 was instituted by the plaintiff against the petitioner (hereafter the defendant) seeking his eviction, in the City Civil Court at Calcutta. The defendant entered appearance and contested the suit by filing written statement. In due course of time, the suit was transferred to the learned Chief Judge, Presidency Small Causes Court at Calcutta by operation of law and was renumbered Ejectment Suit No. 174 of 2002. Ultimately, the learned Chief Judge transferred the suit to the learned Judge of the 6th Bench for disposal.

3. The plaintiff appeared before the learned Judge, 6th Bench on 17/4/2002 and filed his hazira, whereupon for framing of issues 12/6/2002 was fixed as the next date. Issues were framed on 12/06/2002, and 23/7/2002 was fixed for discovery and inspection of documents. On 23/7/2002, the plaintiff did not take any step, whereas the defendant prayed for time. Hearing was adjourned till 2/9/2002. Hearing was again adjourned on 2/9/2002 since the plaintiff did not take any step and on the prayer of the defendant, 14/11/2002 was fixed for discovery and inspection, as last chance.

Since the learned Judge had been transferred, there was no progress on 14/11/2002 except that 16/1/2003 was fixed for discovery and inspection. On 16/1/2003, the plaintiff again did not appear and considering the fact that no step was taken on his behalf, the learned Judge was pleased to call upon him to show cause by 17/3/2003 as to why the suit should not be dismissed. Since neither cause was shown nor the plaintiff appeared on 17/3/2003, the suit was dismissed for default.

4. The plaintiff then filed the said application on 17/6/2004 together with an application under Section 5 of the Limitation Act, giving rise to Misc. Case No. 31 of 2004. It was pleaded in the said application that the plaintiff was not aware of transfer of the suit from the City Civil Court, Calcutta to the Presidency Small Causes Court, Calcutta. Not only that, his lawyer was also not informed regarding such transfer. Due to lack of information about transfer of the suit, none could appear on behalf of the plaintiff to press it, resulting in the same being dismissed for default on 17/3/2003. In so far as the application under Section 5 of the

Limitation Act is concerned, the plaintiff pleaded that only on 19/1/2004, he came to learn of the order dated 17/3/2003 dismissing the suit for default and, accordingly, prayed for condonation of delay in presentation of the said application.

5. The defendant opposed the said application filed by the plaintiff by filing written objection.

6. Upon hearing the parties, the order impugned was passed. The learned Judge was of the view that a liberal view ought to be taken for ends of justice and restored the suit to its original file and number upon condonation of delay.

7. Mr. Chel, learned advocate appearing for the defendant contended that the learned Judge erred in believing the plea of the plaintiff that both he and his advocate were not aware of transfer of the suit from the City Civil Court at Calcutta to the Presidency Small Causes Court. By referring to the records of the trial Court and in particular to a hazira filed on 17/4/2002 on behalf of the plaintiff, it was submitted that the learned advocate for the plaintiff was duly present before the learned Judge and, therefore, the plea that the said learned advocate was not aware of transfer of the suit to the learned Judge of the 6th Bench is concocted and set up only to mislead the Court for overcoming the order of dismissal of the suit for default.

Reference was further made by him to order dated 17/4/2002 wherein the fact of filing of hazira by the plaintiff has been recorded.

Reference was also made to order dated 12/6/2002 wherein the learned Judge recorded filing of haziras by both the parties and directed that the issues framed in separate sheet shall be kept with the record, while fixing 23/7/2002 for discovery and inspection. He, accordingly, submitted that the plaintiff having approached the learned Judge with the prayer to set aside the order of dismissal with unclean hands, the order under challenge ought to be set aside.

8. Mr. Sen, learned advocate for the plaintiff opposed the application vehemently. According to him, the hazira dated 17/4/2002 referred to by Mr. Chel would reveal

that although the same purports to be one filed in connection with Ejectment Suit No. 174 of 2002 but the names of the parties do not tally with the names of the plaintiff and defendant of the said ejectment suit. According to him it is the practice of the peshkars to tag the haziras that are filed by the learned advocates for and on behalf of the respective parties looking into the suit number and not on the basis of the cause title of the suit and it is quite likely that since the hazira in question reflected the number of the suit instituted by the plaintiff, the same was tagged with the records and the learned Judge without looking into the cause title of the hazira formed an opinion that indeed the plaintiff had filed his hazira.

9. Turning to the subsequent order dated 12/6/2002, it was contended by Mr. Sen that although the learned Judge recorded filing of haziras by the parties, no hazira filed on behalf of the plaintiff is available on record and, therefore, the Court ought not to proceed on the basis that the plaintiff had notice of transfer of the suit to the Presidency Small Causes Court.

10. Mr. Sen referred to a Bench decision of this Court reported in AIR 1983 Calcutta 124 : Oil & Natural Gas Commission vs. Tridib Nath Sanyal and ors., wherein it was ruled that once transfer of a suit from one Court to the other is effected, it would be prudent to inform at least the lawyers who had represented the parties in the Court from which the suit was transferred. According to him, the trial Court did not follow the law laid down in the said decision resulting in gross miscarriage of justice and by passing the order impugned, it is the cause of justice that has been advanced.

11. He, accordingly, prayed for dismissal of the revisional application.

12. In reply, Mr. Chel contended that it is no longer open to the plaintiff to challenge recording of filing of hazira on his behalf on 12/6/2002 and that any grievance in respect of such recording ought to be voiced before the Court itself, which passed the order. In support of such submission, Mr. Chel referred to an unreported Bench decision of this Court in F.A. No. 84 of 1995 (Sukumar Kar and ors. vs. Sunil Kumar Banerjee), decided on 18/1/2001, wherein law had been laid down supporting the contention raised by him.

13. I have heard the learned advocates for the parties and perused the order impugned together with the records of the suit in question. I also called for the records of F.A. No. 84 of 1995 to look into the decision dated 18/1/2001 for finding out whether the law laid down therein supports the contention of Mr. Chel or not.

14. There is nothing on record to suggest that after transfer of the suit from the City Civil Court at Calcutta to the Presidency Small Causes Court, Calcutta, the learned advocate for the plaintiff was informed of the same. The contention of Mr. Sen, on facts and in the circumstances, appears to be unexceptionable. The hazira, purportedly filed on behalf of the plaintiff on 17/4/2002, does bear the number of the instant ejectment suit but the names of the parties of the suit mentioned therein are different and it is quite likely, as contended by him, that the peshkar might have tagged it with the file considering the number of the suit and overlooking the names of the parties. The hazira dated 17/4/2002, by itself, does not establish that the plaintiff was aware of transfer of the suit. I am also of the view, in the absence of any hazira dated 12/6/2002 in the records of the suit, that mere recording in the order dated 12/6/2002 that both parties had filed haziras would have the effect of clinching the issue raised by Mr. Chel in this application. It would be unreasonable to assume that though hazira had been filed on behalf of the plaintiff on 12/6/2002, the same had been removed from the file subsequently to suit the purposes of the plaintiff for having the order of dismissal set aside.

15. While there can be no dispute that an erroneous recording of fact in an order must be agitated before the concerned Court, as contended by Mr. Chel, it is quite unlikely that the learned Judge who recorded the order dated 12/6/2002 would be in charge of the concerned Bench presently and it would not be in the interest of justice at this distant point of time to relegate the plaintiff to the trial Court to have the order corrected.

16. I have considered the decision in Sukumar Kar (supra). The decision is absolutely on a different point and, therefore, does not assist the petitioner.

17. On consideration of the order impugned, I am of the further considered view that discretion has not been exercised erroneously by the learned judge. A liberal view was warranted once the plaintiff succeeded in establishing that he or his

advocate had no notice of transfer of the suit. I find no reason to interfere with the order under challenge. The revisional application stands dismissed, without costs.

18. Before parting, I also consider it fit and proper to direct the registry to place the matter before the Rules Committee constituted for framing rules in terms of Section 122 of the Code for considering the desirability of effecting amendments in the Civil Rules and Orders so that the course of action proposed in the Bench decision in Oil and Natural Gas Commission (*supra*) is incorporated therein for assisting the Court to expeditiously dispose of cases upon transfer after giving opportunities to the parties and thereby prevent a nonappearing party from later raising a plea that it had been prevented by sufficient cause from appearing at the hearing of the matter.

Though such observation was made in respect of a case which was set down before the Court after remand, there is no reason as to why such course of action may not be adopted in respect of other cases, like the instant suit, which was transferred from one Court to the other by operation of law or even in cases where the District Judge *suo motu* exercises power under Section 24 of the Code.

19. Office is directed to transmit a copy of this judgment and order to the Rules Committee for further action, if considered necessary.

20. The trial Court records shall be transmitted to the Court concerned by special messenger, cost wherefor shall be put in by the plaintiff within a week. Records of F.A. No. 84 of 1995 shall stand detagged and be sent down to the department.

Urgent photostat certified copy of this judgment and order may be furnished, if applied for, to the applicant as expeditiously as possible.

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