



GAHC010151302020

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(I/O)/125/2020

ANIMA BORO AND ORS.

D/O LT. RUDRA BORA @ RUDRA NARAYAN BASUMATARY, W/O LT. BIJOY BORO, PERMANENT R/O BATAHGHULI, PANJABARI, P.O. AND P.S. SATGAON, PIN-781037, TEMPORARY RESIDING AT JAPARIGOG, , GUWAHATI, P.O. AND P.S. DISPUR, DIST. KAMRUP (MK), ASSAM, DIST. KAMRUP, ASSAM, PIN-781006

2: MAJU BARMAN

D/O LT. RUDRA BORO @ RUDRA NARAYAN BASUMATARY
W/O LT. THANESWAR BARMAN
R/O JAPARIGOG
GUWAHATI
PO. AND P.S. DISPUR
PIN-781005
DIST. KAMRUP (M)
ASSAM

3: PRATIVA BORO

D/O LT. RUDRA BORO @ RUDRA NARAYAN BASUMATARY
R/O BIKRAMPUR
JAPARIGOG
GUWAHATI
P.O. AND PS. DISPUR
DIST. KAMRUP (M)
ASSAM
PIN-78100

VERSUS

HEMANTA SARGAWARI AND 2 ORS.

S/O LT. UPEN DAS, R/O KACHARIBASTI, NEAR DISPUR COLLEGE, PO. AND PS DISPUR, GHY-6, KAMRUP (M), ASSAM



2:GANGU SAHU
S/O UNKONWN
PRESENTLY R/O KACHARIBASTI
NEAR DISPUR COLLEGE
P.O. AND P.S. DISPUR
GHY-6
KAMRUP (M)
ASSAM

3:JAGADISH DAS @ JAGADISH CH. DAS
S/O LT. RAMESWAR DAS
R/O HOUSE NO. 527
G.S. ROAD
GANESHGURI
CHARIALI
NEAR TRIPTI TOWER
GUWAHATI-781005
DIST. KAMRUP (M)
ASSA

Advocate for the Petitioner : MR. B D GOSWAMI

Advocate for the Respondent : FOR CAVEATOR

BEFORE

HON'BLE MR JUSTICE PRASANTA KUMAR DEKA

For the petitioners : Mr. B. D. Goswami
Advocate.

For the respondents : Mr. S. C. Keyal,
Advocate.

Date of hearing/Judgment : 06.01.2021.

JUDGMENT & ORDER

06.01.2021.

Heard Mr. B. D. Goswami, the learned counsel for the petitioners. Also heard Mr. S. C. Keyal, the learned counsel for the respondent No. 3.

2. The petitioners are aggrieved by the impugned order dated 14.10.2020 passed in Misc. (J) Case No. 103/2020 arising out of Title Suit No. 135/2018 by the learned Civil Judge No. 1, Kamrup (M) at Guwahati. By the said impugned order dated 14.10.2020, the ex-parte judgment and decree dated 23.12.2019 and corrected on 02.01.2020 passed in Title Suit No. 135/2018 was set aside restoring the suit back to file.

3. The petitioners as plaintiffs filed Title Suit No. 135/2018 in the Court of learned Civil Judge No. 1, Kamrup (M) at Guwahati for declaration of right, title and interest and for recovery of possession of the suit land measuring about 3 Kathas 1.4 Lechas covered by Dag No. 702 of KP Patta No. 296 of village Dispur under Mouza- Beltola in the district of Kamrup (M). Initially, the present respondent Nos. 1 and 2 were impleaded as the defendant Nos. 1 and 2. However, the said defendant respondent Nos. 1 and 2 denied their possession over the suit land after which the learned court below on the basis of a petition of the petitioners issued an Amin Commission vide order dated 20.05.2019. In the report dated 03.08.2019 of the Amin Commission it was recorded that one Jagadish Ch. Das, the present respondent No. 3 was possessing the suit land. The petitioners as the plaintiffs impleaded the defendant respondent No. 3 and plaint was amended for recovery of khas possession of the entire suit land under possession of the defendant respondent No. 3. Summons was served on 30.10.2019 and received by his own signature. As the respondent No. 3 did not appear, the suit proceeded ex-parte against him vide order dated 11.11.2019. The suit was heard ex-parte against the respondent No. 3 and judgment was delivered on 23.10.2019. The said judgment was corrected by the learned court below on 02.01.2020 on the basis of an application filed under Section 152 of the CPC by the plaintiffs petitioners. The said decree was put to execution in Title Execution Case No. 04/2020 and on 25.02.2020, the Civil Nazir with the assistance of other staff and police personnels executed the decree by handing over possession of 2 Kathas 4 Lechas of land out of the total suit land to the petitioners plaintiffs. Possession of 17.4 Lechas of land could not be recovered on 25.02.2020 as there was a building standing thereon.

4. The defendant respondent No. 3 filed a petition under Order IX Rule 13 of the CPC which was registered as Misc. (J) Case No. 103/2020 seeking for setting aside the judgment

and decree dated 02.01.2020 passed in the said Title Suit No. 135/2018. Another application was filed in Execution Case No. 4/2020 with a prayer for stay of further execution of the said ex-parte decree. The said petition was registered as Misc. (J) Case No. 104/2020. The learned executing court stayed further proceeding of the execution and issued notice to the petitioners in Misc. (J) Case No. 103/2020. The petitioners filed their written objections. The learned court below vide the impugned order dated 14.10.2020 set aside the judgment and decree and restored the Title Suit No. 135/2018 for further trial.

5. Mr. Goswami, the learned counsel for the petitioners assailed the impugned order on the following grounds:-

- (i) The defendant respondent No. 3 received the summons duly on 30.10.2019 but willfully did not appear in the court and after the partial completion of the execution of the decree filed a petition under Order IX Rule 13 of the CPC for setting aside the decree. There was delay of 116 days in filing the said petition inasmuch as the petition was filed on 26.02.2020. Though summons was duly served on 30.10.2019 but the learned court below did not consider the said aspect of delay. Without there being any application seeking for condonation of delay by the respondent No. 3, the learned court below passed the impugned order which clearly violates Section 3 of the Limitation Act, 1963 and is an error apparent on the face of the impugned order.
- (ii) The respondent No. 3 while filing the setting aside petition took the plea that he was suffering from dementia and could not remember that the summons was received by him directing his appearance in the court on the date fixed. However, the learned court below failed to appreciate that the respondent No. 3 failed to show before the court that only after recovery from the said disease the respondent No. 3 filed the petition for setting aside the decree. Under such circumstances, a finding ought to have been given by the learned court below *in moreso*, the said issue was raised in the written objection filed by the petitioners.
- (iii) The learned court below instead of considering the necessary ingredients required

for setting aside the ex-parte decree under Order IX Rule 13 of the CPC considered the principle of equity while passing the impugned order which is beyond the jurisdiction of the civil court.

6. It is further submitted by Mr. Goswami that due to the aforesaid grounds which the court below failed to consider the impugned order is liable to be set aside.

7. Mr. Keyal, the learned counsel for the respondent No. 3 referring to the petition under Order IX Rule 13 of the CPC wherein it is stated that on 15.02.2020, the Civil Nazir and other officials/ staff came to the house of the respondent No. 3 and informed his son that they came for execution of the decree as per the order passed in Title Execution Case No. 4/2020. Having come to know about the said case, the son of the respondent No. 3 asked one Advocate's Clerk about the matter and came to know that the said execution proceeding was initiated on the basis of a decree passed in Title Suit No. 135/2018 and eviction order was passed against the respondent No. 3. Thereafter, the certified copy of the plaint, judgment and decree were obtained on 21.02.2020 and only thereafter having come to know that summons was served, the son asked the respondent No. 3 about receipt of the summons. The respondent No. 3 replied that he does not remember if such summons were received. The respondent No. 3 due to old age, his memory and thinking ability was affected just like a patient of dementia and he could not re-collect whether he received the summons. However, after due search, the son of the petitioner came across the summons but without any copy of the plaint nor any documents. Later on, the respondent No. 3 could re-collect about such service of summons.

8. Mr. Keyal wanted to project that on 26.02.2020, a petition under Order IX Rule 13 of the CPC was filed and that too within a period of 30 days inasmuch as it is on 15.02.2020 after the visit of the Civil Nazir, the respondent No. 3 through his son came to know about the decree and the execution proceeding thereof. Mr. Keyal referring to various orders passed by the learned court below submitted that after the report from the Circle Officer, Dispur Revenue Circle was obtained, vide order dated 17.08.2019 the court below ordered that the report of the Circle Officer would form part of the case record. On that date, the petitioners filed an application under Order I Rule 10(2) of the CPC for impleading the respondent No. 3

as a defendant. The defendant respondent Nos. 1 and 2 raised no objection as against the impleadment application and vide order dated 12.09.2019, the respondent No. 3 was impleaded as the defendant No. 3 in the suit and the learned court below directed the Bench Assistant to insert the name of the respondent No. 3 in the body of the plaint with a further liberty to the plaintiffs petitioners to file any amended petition fixing 27.09.2019. Vide order dated 12.09.2019, the plaintiffs petitioners were directed to take steps on the newly impleaded defendant respondent No. 3. The summons was served on 30.10.2019 without any copy of the plaint inasmuch as the plaintiffs petitioners filed the amended plaint on 11.11.2019. On the date on which the amended plaint was filed i.e. on 11.11.2019 order was passed that the suit would proceed ex-parte against the respondent No. 3 fixing 07.12.2019 for PWs. On 07.12.2019, the plaintiffs petitioners adduced evidence and after hearing the argument on 16.12.2019 passed the judgment and decree on 23.12.2019 which was shown to be passed on 02.01.2020.

9. It is submitted by Mr. Keyal that the summons was not at all accompanied by the copy of the plaint. Relying the case of **Nahar Enterprises –Vs- Hyderabad Allwyn Ltd. and Another** reported in **(2007) 9 SCC 466** Mr. Keyal submits that under Order V Rule 2 of the CPC when a summons is sent calling upon a defendant to appear in the court and file his written statement, it is mandatory and obligatory on the part of the court to send a copy of the plaint and other documents appended thereto. In the present case in hand, the summons was received on 30.10.2019 and from the records it is found that on 11.11.2019 only the plaintiffs petitioners filed the amended plaint. Under such circumstances, the summons was devoid of copy of the amended plaint. In terms of the ratio laid in **Nahar Enterprises –Vs- Hyderabad Allwyn Ltd. and Another** (supra), the summons was not duly served upon the respondent No. 3 due to non compliance of the order V Rule 2 of the CPC and in that view knowledge of passing of the ex-parte decree would be from 15.02.2020 but not from 30.10.2019. Mr. Keyal relying the case of **Bhagmal and Others –Vs- Kunwar Lal and Others** reported in **(2010) 12 SCC 159** also wanted to project that the filing of the petition under Order IX Rule 13 of the CPC itself justified that the respondent No. 3 had no knowledge about the ex-parte decree which was passed against him. In support of the said contention Mr. Keyal also relies the decision rendered by the Apex Court in the case of **A.**

Murugesan –Vs- Mamuna Rani in **Civil Appeal No. 1545 of 2019 (arising out of S.L.P.(C) No. 36394 of 2014** decided on 07.02.2019 (**downloaded from Supreme Today licensed to R. K. Mour & R. K. Gupta, Associates Advocate, Guwahati**) and submits that when an application is filed for setting aside the ex-parte decree under Order IX Rule 13 of the CPC, the only aspect which is required to be considered whether any sufficient cause is shown for absence in the matter when the matter was called. Sufficient cause for the purpose of Order IX Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. It is the discretion of the court in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. Accordingly it is his contention that the respondent No. 3 explained duly the reasons for why he was not present in the court and as such the court rightly applied its discretion. Finally it is his submission that the learned court below rightly passed the order and there is no scope for interference by this court.

10. Countering the submission, Mr. Goswami submits that the fact and circumstances in **Bhagmal and Others –Vs- Kunwar Lal and Others** (supra) was totally on a factual matrix other than the one in hand, inasmuch as there was a discussion between the parties to the suit for compromise and even on such compromise talk the suit proceeded and the aggrieved party belatedly came to know about the said continuation of the proceeding and as such the Apex Court accepted about the knowledge of the ex-parte decree giving the benefit under Article 123 of the Limitation Act, 1963 of the limitation period from date of knowledge. In the present case in hand, the facts are totally different inasmuch as there was no such talk of compromise rather summons was duly served and as such there was clear default on the part of the respondent No. 3 in appearing before the court below. The principles of equity does not come while deciding an application for setting aside the ex-parte decree when there was delay admittedly. The law of limitation as held by the Apex Court in **P. K. Ramachandran –Vs- State of Kerala and Another** reported in **(1997) 7 SCC 556** may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. In view of the said ratio, the impugned order based on the principles of equity is not at all acceptable. Further relying the case of **Pannalal –Vs- Amarlal** reported in **AIR 1967**

SC 1384 it is submitted by Mr. Goswami that under Order IX Rule 13 of the CPC, a decree passed ex-parte against the defendant is liable to be set aside if the summons was not duly served and the defendant suffers an injury and accordingly he is entitled for an order of setting aside the ex-parte decree provided he applies to the court within the prescribed period of limitation. Here in the present case admittedly the summons was duly served on 30.10.2019 and the petition for setting aside was filed after a delay of 116 days, the court below did not even consider the said fact of delay and passed the impugned order which is palpably wrong. Further Mr. Goswami relying the case of **Sneh Gupta –Vs- Dive Sarup and Others** reported in **(2009) 6 SCC 194** submits that in absence of any application for condonation of delay, the court had no jurisdiction in terms of Section 3 of the Limitation Act, 1963 to entertain the application for setting aside the decree. Accordingly, in view of the said submission it is contended by Mr. Goswami that the impugned order is liable to be set aside.

11. I have heard both the learned counsel. Also perused the case records of Title Suit No. 135/2018. The petitioner originally was not a party in Title Suit No. 135/2018 in the court of learned Civil Judge No. 1, Kamrup (M) at Guwahati. The respondent Nos. 1 and 2 i.e. the original impleaded defendant Nos. 1 and 2 took the stand that they were not possessing the suit land. A petition under Order XXVI Rule 9 of the CPC was filed seeking for a commission report by the plaintiffs petitioners and the learned court below vide order dated 20.05.2019 directed the Circle Officer, Dispur Revenue Circle to make a local investigation to determine the following points fixing 10.06.2019 for report:-

“1. Whether Dag No. 702, Patta No. 296 under revenue village Dispur under Beltola Mouza, Kamrup(M) and Dag No. 207/173/674(old) /669(new) of K.P. Patta No. 29/12/274/395(old) /559(new) village Dispur under Beltola Mouza, Kamrup(M) are different and if so who are in possession over the said Dag and Patta land?”

2. Whether the two Dags as afore mentioned are in possession of two different persons and if so their names be furnished along with the report?”

12. Finally as per the records, the learned court below received the report of the Circle Officer, Dispur Revenue Circle on 03.08.2019 and vide order dated 17.08.2019, the court accepted the said report forming part of the case record. On 17.08.2019 as apparent from the

said order, the plaintiffs petitioners filed a petition bearing No. 3981/19 under Order I Rule 10(2) of the CPC for impleading Sri Jagadish Das as a defendant in the suit. It would not be out of place to mention that as per the report dated 02.08.2019 of the Circle Officer, Dispur Revenue Circle, Mr. Jagadish Das the defendant respondent No. 3 was found to be possessing the suit land covered by Dag No. 702 of K.P. Patta No. 296. The learned court below fixed 12.09.2019 for objection/hearing on the petition for impleadment. As per the order dated 12.09.2019, it is seen that the learned court below recorded that there was no objection against the said petition for impleadment and further on the basis of the report of the Circle Officer, Dispur Revenue Circle the respondent No. 3 was impleaded as a defendant in the suit and further directed the Bench Assistant to insert the name of the newly impleaded defendant No. 3 in the body of the plaint. Further liberty was given to the plaintiffs respondents to file amended petition because of impleading the new defendant. Vide order dated 12.09.2019, the plaintiffs were asked to take steps upon the newly impleaded defendant i.e. respondent No. 3 and 27.09.2019 was fixed for service report in respect of the defendant respondent No. 3. Again vide order dated 27.09.2019, the matter was fixed for service report on 11.11.2019 on the said defendant respondent No. 3. In between the plaintiffs petitioners took steps on 24.10.2019 and on that date itself the court issued summons to the defendant respondent No. 3. As per the order sheet dated 11.11.2019, the plaintiffs respondents filed amended plaint on 11.11.2019. It is further recorded in the said order dated 11.11.2019 that summons on the defendant respondent No. 3 was duly served on 30.10.2019 but as the defendant respondent No. 3 did not appear it was directed that the suit would proceed ex-parte against the said defendant respondent No. 3 fixing 07.12.2019 for evidence of the plaintiff side. Vide order dated 07.12.2019 it was recorded that the plaintiff side adduced evidence of three witnesses. 13.12.2019 was fixed for argument but as on 13.12.2019 court works were paralyzed due to agitation, on 16.12.2019, the learned court below fixed 23.12.2019 for judgment and on that day judgment was passed and prepared the decree. Further vide order dated 02.01.2020, the judgment was shown to be corrected on the basis of a petition under Section 151/152 of the CPC for rectification of judgment. Thereafter as stated in the petition, the decree dated 23.12.2019 corrected on 02.01.2020 was executed partially in Title Execution No. 04/2020.

13. From the records it is seen that on the date on which the summons were issued to the defendant respondent No. 3 i.e. on 24.10.2019, the amended plaint after impleadment of the defendant respondent No. 3 was not filed. It is stated in the petition under Order IX Rule 13 of the CPC filed by the defendant respondent No. 3 that the summons was devoid of any copy of the plaint. It is an admitted fact that summons was served on the defendant respondent No. 3. But due to age, the defendant respondent No. 3 forgot about the said fact of receipt of summons and only on the visit of the court official on 15.02.2020, the son of the respondent No. 3 came to know that the said officials were present for eviction of the respondent No. 3 and his family. Thereafter the petition for setting aside the ex-parte decree was filed on 26.02.2020.

14. It is submitted by Mr. Goswami that admittedly, the summons was served on 30.10.2019 and the petition under Order IX Rule 13 of the CPC was filed on 26.02.2020. So, the date of filing of the said application for setting aside the ex-parte decree was beyond the period of 30 days from the date of decree i.e. 02.01.2020 as per Article 123 of the Limitation Act, 1963. The said 30 days is to be reckoned from the date of decree but when the summons/notices are not duly served when the applicant had knowledge of the decree. As the respondent No. 3 had full knowledge of the pendency of the suit from the summons served on 30.10.2019 as such the learned court below erred in law in not invoking the provision under Section 3 of the Limitation Act, 1963 due to non filing of application for condonation of delay in filing the petition for setting aside the ex-parte decree.

15. In this regard it would be proper to take note of the decision of the Apex Court in ***Pannalal –Vs- Amarlal*** reported in ***AIR 1967 SC 1384*** (supra) wherein it was held that under Order IX Rule 13 of the CPC, a decree passed ex-parte against the defendant is liable to be set aside if the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. If the summons was not **duly served** and the defendant suffers an injury he is entitled for an order ex-debito justitiae to set aside the ex-parte decree provided he applies to the court within the prescribed period of limitation.

16. Under Order V Rule 2 of the CPC it is mandatory that every summons shall be accompanied by a copy of the plaint. From the record it is seen that on 24.10.2019 steps for

service of notice on the defendant respondent No. 3 was issued by the court. As per the order dated 11.11.2019 from the records, it is found that the plaintiffs petitioners filed the amended plaint on 11.11.2019. The steps for service of notice was issued by the court on 24.10.2019 and admittedly the amended plaint impleading the defendant respondent No. 3 was filed on 11.11.2019. Under such circumstances, it is stated in the petition under Order IX Rule 13 of the CPC that the summons was devoid of any plaint which is believable logically. The submission of Mr. Goswami that the summons was duly accompanied by the plaint cannot be accepted as the amended plaint showing the name of the defendant respondent No. 3 was filed on 11.11.2019 much later than 24.10.2019 i.e. the date on which the summons was issued by the Court.

17. Further on 11.11.2019, the learned court below passed order that the proceeding would proceed ex-parte as the summons was duly served on the defendant respondent No. 3. In ***Nahar Enterprises –Vs- Hyderabad Allwyn Ltd. and Another*** reported in **(2007) 9 SCC 466** (supra) it was held that when a summons is sent calling upon a defendant to appear in the court and file his written statement, it is obligatory on the part of the court to send a copy of the plaint and other documents appended thereto in terms of the Order V Rule 2 of the CPC. But in the present case in hand, from the aforesaid discussion it cannot be held that the summons purportedly served on the defendant respondent No. 3 was accompanied by the amended plaint wherein the defendant respondent No. 3 was shown to be impleaded as defendant No. 3 and as such I am of the firm opinion that the summons was not duly served on the defendant respondent No. 3.

18. Mr. Goswami further submits that even if the plaint was not served the defendant respondent No. 3 is supposed to file the petition for setting aside the decree within the prescribed period of limitation as the summons was duly served. The said submission is unacceptable to me. Article 123 of the Limitation Act, 1963 stipulates a period of thirty (30) days for setting aside a decree passed ex-parte from the date of decree or where the summons or notice was not duly served then when the applicant had knowledge of the decree. The word “duly” has its significance in answering the submission of Mr. Goswami. The Apex Court in ***H.L. Trechan –Vs- Union of India*** reported in **AIR 1989 SC 568** approved

the meaning of the word “duly” as per Stroud’s Judicial Dictionary, Fourth Edition which is “done in due course and accordingly to law”. In ***Nahar Enterprises –Vs- Hyderabad Allwyn Ltd. and Another*** (supra) it was held that if the summons had not been duly served due to non compliance of the provisions of Order V Rule 2 of the CPC, as per Article 123 of the Limitation Act, 1963, the period of 30 days could not be counted from the date of decree but when the applicant had knowledge of the decree. The summons as hereinabove held was not duly served on the respondent No. 3.

19. In the present case in hand, it is specifically stated that the knowledge about the ex-parte decree came to the defendant respondent No. 3 through his son on 15.02.2020 when the officials from the Executing court visited the suit premises and thereafter on enquiry having come to know about the execution proceeding and after obtaining the necessary certified copies, the petition for setting aside the ex-parte decree was filed on 26.02.2020 i.e. after 11 days from 15.02.2020. The petition for setting aside the ex-parte decree was filed within the period of limitation stipulated under Article 123 of the Limitation Act, 1963 from the knowledge of the ex-parte decree. There was no violation of Section 3 of the Limitation Act, 1963 by the court below inasmuch as the summons was not duly served on the respondent No. 3.

20. The submission of Mr. Goswami that the court below failed to consider the illness of the respondent No. 3 and subsequent overcoming of the disability is taken note of. I have perused the petition filed under Order IX Rule 13 of the CPC wherein it is stated that due to old age of the respondent No. 3- “his memory is declining and also declines his thinking skill just like a patient of dementia”. In my considered opinion the said statement cannot be presumed to conclude that the respondent No. 3 was suffering from dementia. Accordingly, the submission of Mr. Goswami is unacceptable.

21. The learned court below while passing the impugned order held as follows:-

“Under Order 5 Rule 2, it is obligatory on the part of the court, to send a copy of the plaint and other annexed documents there to, so that the defendant could file his written statement. In this case, when the copy of the plaint itself does not reveal any cause of action against the defendant, the object behind serving the copy under Order 5 Rule 2 does not serve.



In that view of the matter, without anything more, there is reason for absence of the petitioner in the earlier round of the litigation”.

22. The learned court below while passing the impugned order accepted the reason for absence of the petitioner on the ground that the summons was not duly served and the plaint itself doesnot reveal any cause of action against the defendant respondent No. 3. On perusal of the records it is found and held above that on the date of issuing the summons by the court there was no amended plaint filed by the plaintiffs petitioners and as such it can conclusively be held that summons was not duly served on the respondent No. 3 and the petition under Order IX Rule 13 of the C.P.C. was filed within the prescribed period of limitation. In my considered view the learned court below rightly came to the conclusion that object under Order V Rule 2 of the C.P.C. was not served.

23. Accordingly, I do not find any merit in this revision petition and the same stands dismissed. Send back the LCR.

JUDGE

Comparing Assistant