



GAHC010008392023

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

Case No. : CRP/7/2023

TILAK CHANDRA BHUYAN

/O- LATE GOLOK CHANDRA BHUYAN, /O- ASEB COLONY, P.S- NOONMATI,
P.O- NAGANGI, DIST- KAMRUP (M), GUWAHATI, ASSAM, PIN- 781026,
PRESENT R/O- ANGEL APARTMENT, FLAT NO. 6E, NEAR HINDUSTAN
COLLEGE, PATHARQUARY, VIP ROAD, P.O- PATHARQUARY, P.S- SATGAON,
DIST- KAMRUP(M), GHY, PIN- 781171

VERSUS

KHYEMU KUMARI DEVI

W/O- TAPAN DAS, R/O- GOPINAGAR, WARD NO.10, NORTH LAKHIMPUR
TOWN, P.O AND P.S- NORTH LAKHIMPUR, DIST- LAKHIMPUR, ASSAM, PIN-
787001

Advocate for the Petitioner : Mr. U. Dutta, Advocate

Advocate for the Respondent : Mr. S. Dutta, Senior Advocate
Mr. A. Upamanyu, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 06.06.2023

Date of Judgment : 06.06.2023

JUDGMENT AND ORDER (ORAL)

Heard Mr. U. Dutta, the learned counsel for the petitioner and Mr. S. Dutta, the learned senior counsel assisted by Mr. A. Upamanyu, the



learned counsel appearing on behalf of the respondent.

2. The instant petition under Section 115 of the Code of Civil Procedure (for short, 'the Code') has been filed challenging the judgment and order dated 11.11.2022 passed by the learned Civil Judge, Lakhimpur, North Lakhimpur in Misc. Appeal No.02/2022 whereby the appeal filed by the petitioner against the order dated 23.03.2022 passed by the Munsiff No.1 in North Lakhimpur in Misc.(J) Case No.18/2020 dismissing the application under Section 5 of the Limitation Act, 1963 for condoning the delay of 120 days in presenting the petition under Order IX Rule 13 of the Code, was rejected.

3. From a perusal of the materials on record, it transpires that a registered deed of agreement for sale of a plot of land measuring 1 katha 10 lechas covered by Dag No.1338 of Patta No.402 of North Lakhimpur Town (Part I), Mouza-Lakhimpur was entered into by the petitioner with the respondent on 25.06.2016.

4. It is relevant to mention herein that in the said registered deed of agreement, the address of the petitioner was specifically mentioned at A.S.E.B. Colony (Part), P.S.-Noonmati, P.O.-Narengi, Guwahati in the district of Kamrup (M), Assam. The said deed of agreement has been enclosed to the instant revision petition as Annexure-D. On the basis of the agreement for sale and for non-compliance of the same, a suit was filed on 26.04.2018 by the respondent herein against the petitioner before the Court of the Civil Judge, Lakhimpur, North Lakhimpur which was registered and numbered as Title Suit No.9/2018. In the said suit, the address of the petitioner was mentioned as resident of Ward No.14, P.O.-Khelmati, P.S.-North Lakhimpur in the district of Lakhimpur.

5. At this stage, this Court finds it relevant to take note of that the said suit was for specific performance of registered agreement for sale dated 25.04.2016. However, for reasons best known, the plaintiff/respondent herein did not find it relevant to put the address of the petitioner as mentioned in the registered deed of agreement but rather gave an address at North Lakhimpur. The record further reveals that summon was issued by the learned Trial Court and on 13.07.2018, taking into account that the summon was not duly served, an application was filed by the respondent/plaintiff of the suit for effecting service in substituted mode under Order V Rule 20 of the Code. It reveals that the learned Trial Court granted the permission on 13.07.2018 and thereupon on 05.08.2018, summons were duly published in the newspaper 'Asomiya Pratidin'. On the basis of the said summon being served through substituted mode the learned Trial Court vide an order dated 28.08.2018 proceeded with the suit by deeming that the service upon the defendant/petitioner herein was complete. It further appears that on 14.12.2018, the learned Trial Court decreed the suit in favour of the plaintiff/respondent herein thereby directing the defendant/petitioner herein to execute and register a deed of sale in favour of the plaintiff/respondent herein in respect to the suit property on accepting the balance amount of Rs.1,00,000/-. The further materials on record shows that the petitioner herein filed two applications on 03.02.2020, one of such application was an application under Section 5 of the Limitation Act, 1963 for condoning the delay of 386 days for setting aside the ex-parte judgment and decree. The other application so filed was an application under Order IX Rule 13 read with Section 151 of the Code for setting aside the ex-parte judgment and decree on the ground

that the service was not duly effected upon the petitioner.

6. The learned counsel for the petitioner submitted that while preferring the application under Section 5 of the Limitation Act, on account of the wrong advice, it was mentioned that the delay was 386 days rather the delay was only 120 days. To the said application under Section 5 of the Limitation Act, the respondent herein had filed a written objection. In the said written objection, it was mentioned that in respect to the same plot of land, the petitioner had also executed a registered Power of Attorney in favour of the husband of the respondent on 03.12.2016 wherein two addresses were mentioned, one at Guwahati and the other at Lakhimpur, North Lakhimpur. The learned Trial Court vide an order dated 23.03.2022 rejected the application under Section 5 of the Limitation Act on the ground that delay of 386 days was too long a period which cannot be condoned. The learned Trial Court further took into account that as the suit property was situated at Ward No.14, North Lakhimpur, Lakhimpur and issuance of summon by way of paper publication in 'Asomiya Pratidin', Lakhimpur Edition was presumed to be at a proper place for publication of notice upon the defendant/petitioner, the claim of the defendant/petitioner that he was unaware of the paper publication cannot be accepted. The learned Trial Court further disbelieved the medical documents so submitted by the petitioner that he was incapable of filing an application within time. In view of the dismissal of the said application seeking condonation of delay, the application under Order IX Rule 13 of the Code also stood dismissed.

7. The petitioner, being aggrieved and dissatisfied preferred an appeal before the Court of the Civil Judge, Lakhimpur, North Lakhimpur which



was registered and numbered as Misc. Appeal No.2/2022. Vide an order dated 11.11.2022, the First Appellate Court rejected the said appeal by coming to a finding that the substituted service so affected under Order V Rule 20 of the Code was properly done and further disbelieving the medical evidence so produced that the petitioner was not capable of filing the application under Order IX Rule 13 of the Code within the period of limitation. It is under such circumstances, the present revision application was filed by the petitioner.

8. From a perusal of both the orders passed by the learned Trial Court as well as the First Appellate Court, it transpire that both the Courts took into consideration that the delay in approaching the Court for filing the application under Order IX Rule 13 of the Code was 386 days. The said period was taken into account on the basis that the service upon the petitioner was duly effected in terms with Order V Rule 20 of the Code.

9. The learned counsel for the petitioner submitted that as the service was not properly effected, the period of limitation would, therefore, have to be counted from the date of knowledge of the decree which is dated 05.09.2019 and for which delay was only 120 days. This aspect of the matter can be seen from Article 123 of the First Schedule to the Limitation Act, 1963 which stipulates that for the purpose of setting aside a decree passed ex-parte or to rehear an appeal decreed or heard ex-parte, the period of limitation is 30 days from the date of the of the decree or where the summons or notice was not duly served when the applicant had knowledge of the decree.

10. Therefore, the adjudication herein hinges upon what is to reckoned as the relevant date, i.e. whether it would be 14.12.2018 which would be

the date of the decree passed in Title Suit No.9/2018 or 05.09.2019 when the petitioner claims to have come to learn about the judgment and decree dated 14.12.2018.

11. In the backdrop of the above, let this Court first take into consideration as to whether the substituted service was in accordance with the provision of Order V Rule 20 of the Code. There is no denial to the fact that advertisement was made in the Lakhimpur Edition of the Assamese vernacular newspaper 'Asomiya Pratidin' and the said advertisement was not published in 'Guwahati Edition' of the said newspaper. As already stated herein above, the address mentioned in the registered deed of agreement, the petitioner, i.e. the defendant was at Guwahati not at North Lakhimpur. However, in the plaint, the address of the defendant was put at North Lakhimpur.

12. Order V Rule 20 (1) (a) of the Code categorically mandates that when the Court acts under Sub-Rule (1) of Order V Rule 20 of the Code and orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. Therefore, the land which is the subject matter of the dispute being situated at North Lakhimpur had no relevance with the advertisement to be made in the newspaper. The newspaper wherein it was to be published had to be a daily newspaper circulated in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. The address mentioned in the registered agreement for sale dated 25.04.2016 in respect to which the specific performance of contract

was sought for duly mentioned the address of the defendant to be at Guwahati. Under such circumstances, as the advertisement was published in the Lakhimpur Edition of the newspaper 'Aomiya Pratidin' and the said advertisement was not published in the Guwahati Edition of the said newspaper, the acceptance of the services by the learned Trial Court on the basis of the said publication through substituted mode was not proper, and accordingly, the acceptance of service being effected upon the petitioner/defendant was not in accordance with law by the learned Trial Court. In fact, in the opinion of this Court, it was an imperative duty of the learned Trial Court to look into and enquire, more particularly, when the suit was for specific performance of a registered agreement for sale wherein the address was mentioned at Guwahati and not at North Lakhimpur. The failure on the part of the learned Trial Court to perform its duty have not only effected the right of the petitioner but had also delayed the adjudication of the suit in accordance with law. Under such circumstances, it is the opinion of this Court that the service was not duly effected.

13. The period of limitation under Article 123 of the First Schedule to the Limitation Act, 1963 has to be therefore reckoned from the date of knowledge of the judgment and decree. Accordingly, as it is the specific stand of the petitioner that he had only come to know on 05.09.2019 about the said judgment and decree passed ex-parte against him and there is no specific denial to the same, it has to be therefore reckoned that it is on 05.09.2019, the petitioner had the knowledge of the judgment and decree dated 14.12.2018 passed in Title Suit No.9/2018. In that view of the matter, the delay was only 120 days.

14. Now coming to the question as to whether the learned Courts below had rightly exercised their discretion not to condone the delay it is relevant to take note that Section 5 of the Limitation Act is discretionary jurisdiction of the Court. This Court is of the opinion that the basis on which the learned Trial Court as well as the learned First Appellate Court had decided was on the basis that the delay was 386 days and on the basis thereof had decided that the delay was too long. In that view of the matter, this Court taking into account that both the Courts below had decided the question of limitation on the basis of the service being effected and on that premises had decided the Section 5 application, the entire exercise for exercising the discretionary jurisdiction has been rendered faulty.

15. Now coming to the facts involved in the instant case, it would be seen that the delay in filing the said application under Order IX Rule 13 would be 120 days as stated by the petitioner taking into account from the date of knowledge of the judgment and decree dated 14.12.2018 passed in Title Suit No.9/2018. The above facts would also show that the petitioner herein had submitted medical documents as regards his ailment. It would be seen that the petitioner is a retired employee and further to that the suit having been filed against the petitioner indicating an address which was not an address mentioned in the registered deed of agreement for sale dated 25.04.2016, this Court is of the opinion that the consideration for condoning the delay has to be liberally construed.

16. Under such circumstances, this Court, therefore, condones the delay thereby allowing the application under Section 5 of the Limitation Act, 1963 so filed by the petitioner. Further to that as already observed herein



above, the order dated 28.08.2018 whereby the learned Trial Court had deemed service being effected upon the petitioner on the basis of an advertisement contained in a newspaper 'Asomiya Pratidin', Lakhimpur Edition published on 05.08.2018 to be not in accordance with the provision of the Order V Rule 20 of the Code, this Court allows the application under Order IX Rule 13 thereby setting aside the judgment and decree dated 14.12.2018 passed in Title Suit No.9/2018. The revision petition, therefore, stands allowed.

17. This Court grants the petitioner 30 days' time from today to submit the written statement before the Court of the Munsiff at North Lakhimpur, Lakhimpur within a period of 30 days from today and thereupon the learned Trial Court shall proceed and adjudicate the said dispute as expeditiously as possible in accordance with law.

18. With the above observation and direction, the instant revision petition stands disposed of.

JUDGE

Comparing Assistant