

Calcutta High Court

Chirantan Housing Pvt. Ltd vs Youdhister Kumar Dhanania Alias ... on 12 December, 2022

OD-12

IA No. GA/2/2021

In CS/29/2016

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

CHIRANTAN HOUSING PVT. LTD.

VS.

YOUDHISTER KUMAR DHANANIA ALIAS YOUDHISTER KUMAR AGARWAL

BEFORE :

The Hon'ble JUSTICE KRISHNA RAO

Heard On : 05.12.2022

Order On : 12.12.2022

Appearance:

Mr. Sabyasachi Chowdhury, Adv.

Ms. Reshmi Ghosh, Adv.

Mr. Soumya Sankar Chini, Adv.

...for the plaintiff

Mr. Malay Kr. Ghosh, Sr. Adv.

Mr. Paritosh Sinha, Adv.

Mr. K.K. Pandey, Adv.

Mr. Sukrit Mukherjee, Adv.

Ms. Enakshi Saha, Adv.

...for the defendant

ORDER

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The petitioner being the defendant in CS 29 of 2016 has filed the instant application praying for condoning the delay of 411 days in preferring the instant application and also prayed for recall/setting aside the ex parte decree passed by this Court dt. 07.11.2019 in CS 29 of 2016.

Counsel for the petitioner submits that the Counsel for the plaintiff/respondent vide letter dt. 07.12.2020 had informed the petitioner with regard to the ex parte decree passed by this Court on 07.11.2019 in connection with CS 29 of 2016. Learned Counsel for the petitioner submits that as per order dt. 18.09.2017 passed by this Court, it reveals that the writ of summon issued to the petitioner by post were returned unclaimed and the bailiff also could not cause service upon the petitioner as the petitioner was not available in the address. As per the prayer of the respondent for substituted service by way of paper publication, this Court had allowed for substituted service by way of publication.

Counsel for the petitioner submits that paper publication was made on 06.11.2017 and in the said paper publication appearance of the petitioner is fixed ten (10) days from the date of publication and 21 days time was granted for filing written statement. Learned Counsel for the petitioner submits that vide order dt. 20.11.2017, this Court on the basis of the affidavit of service filed by the respondent has fixed the suit as "undefended suit".

Learned Counsel for the petitioner submits that as per the publication of the notice dt. 06.11.2017, the petitioner was suppose to enter appearance by 16.11.2017 and written statement was supposed to be filed by 27.11.2017 but before expiry of the time fixed in the notice, this Court had fixed the matter as undefended suit on 20.11.2017 i.e. prior to 7 days granted to the petitioner. The Counsel for the petitioner submitted that he had no knowledge about the publication of the notice on 06.11.2017.

Learned Counsel for the petitioner submits that as the petitioner was not having the full cause title of the suit and as such the Counsel for the petitioner was not able to file vakalatnama and as such on 19.09.2019, the petitioner has filed an application being GA 2395 of 2019 in CS 29 of 2016 praying for leave to enter appearance and to defend the suit and also prayed for direction for supply of copy of plicant along with related documents so as to enable the petitioner to file his written statement.

Learned Counsel for the petitioner submits that the respondent had the knowledge with regard to the application filed by the petitioner being GA 2395 of 2019 as the said GA was listed along with CS 29 of 2016 on 07.11.2019. Learned Counsel for the petitioner submits that inspite of having knowledge, the respondent has suppressed the said facts and had obtained an ex parte order. Learned Counsel for the petitioner submits that the GA 2395 of 2019 was again listed on 07.01.2020 but this Court has dismissed the said application as infructuous on the ground the Judgment and Order is already passed.

Learned Counsel for the petitioner submits that this Court vide order dt. 07.11.2019 had passed ex parte decree but has not pass any order in the application being GA 2395 of 2019 and the fact of pendency of the application filed by the petitioner was suppressed by the respondent.

Learned Counsel for the petitioner by referring Article 123 of Limitation Act, 1963 submits that as per the explanation of the said Article, for the purpose of this Article, substituted service under Rule 20 of Order 5 of the Code of Civil Procedure, 1908 shall not be deemed to be due service but this Court relied upon the publication had fixed the suit as 'undefended suit'.

Learned Counsel for the petitioner submits that the Counsel who was representing the petitioner in GA 2395 of 2019 has not taken due care to appear in the matter and due to ignorance of the Learned Counsel, the petitioner should not be punished. Learned Counsel for the petitioner has relied upon the judgment reported in (1981) 2 SCC 788 (Rafiq and Anr. Vs. Munsilal & Anr.).

Mr. Chowdhury, Learned Counsel appearing for the respondent submits that from the application filed by the petitioner it reveals that the petitioner had the knowledge about the suit since 29.07.2019 but the petitioner has not taken any step to appear in the suit and to file written statement. The application filed by the petitioner being GA 2395 of 2019 though was listed before this Court on 07.11.2019 but none had moved the said application and as such this Court had no occasion to hear the application filed by the petitioner.

Mr. Chowdhury further submits that in one hand, the petitioner has taken the ground that he has no cause title of the plaint and as such he could not file the vakalatnama but on the other hand, the petitioner has filed an application being GA 2395 of 2019 and even after filing of the said application, the same was not moved before this Court.

Mr. Chowdhury submits that in para 4 of the GA 2395 of 2019, the petitioner had admitted that his brother had informed that the suit was listed in the cause list but in spite of the same, the plaintiff has not taken any step.

Mr. Chowdhury further submits that after filing of the suit the respondent being the plaintiff has taken step for issuance of writ of summons upon the petitioner but the same could not be served either through the postal authorities or through the bailiff which itself reveals that the petitioner had avoided to receive the writ of summon of this Court. In support of his contention, Mr. Chowdhury has pointed out the communication dt. 07.12.2020 wherein the Counsel for the respondent has informed about the judgment and decree to the petitioner and in the said communication, the address is of the same as mentioned in the plaint and the petitioner has received the said communication.

Mr. Chowdhury further submits that the affidavit affirmed by the Attorney of the petitioner has also mentioned the same address as that of the plaint. In one hand, the petitioner has stated that the petitioner had no knowledge of the instant suit as the petitioner was suffering from ailments and was completely bedridden and on the other hand the petitioner has admitted about the existence of the proceeding of CS 29 of 2016 since 29th July, 2019.

Mr. Chowdhury further submits that the respondent has taken appropriate steps for issuance of writ of summons through the postal as well as through bailiff but the same could not be served upon the petitioner and accordingly the respondent has prayed of substituted service and accordingly after

publication, this Court has passed an order for fixing the suit as 'undefended suit' and thus it cannot be said that the service of writ of summon by way of publication is not the proper service.

Mr. Chowdhury further submits that the petitioner had the knowledge with regard to issuance of writ of summon, pendency of suit and had also filed an application to participate in the suit but has not taken appropriate steps to appear in the suit and thus the application filed by the petitioner is required to be rejected.

Heard, the Learned Counsel for the respective parties and perused the materials on record.

Admittedly, the respondent has taken all steps to cause service of writ of summon upon the petitioner but the service could not be affected and subsequently paper publications were made. It is also admitted that as per the paper publication the date of filing of the written statement was of 27.11.2017 but this Court has fixed the suit as undefended suit on 20.11.2017 i.e. prior to seven days for filing of the written statement.

It is also admitted from the pleadings that the petitioner being the defendant had the knowledge about the suit since 29.07.2019 but only on 19.09.2019, the petitioner has filed an application being GA 2395 of 2019 praying for leave to enter appearance and for filing of written statement. Though the petitioner has filed the application and the same was also listed but the petitioner has not appeared before this Court to move the said application and accordingly this Court has no occasion to decide the application filed by the petitioner prior to passing of the ex parte decree. Only after passing of the ex parte decree, the application filed by the petitioner was taken up for hearing and on the said date also the petitioner had not appeared but this Court finds that this Court had already passed an ex parte order and as such the said application was dismissed as infructuous.

Now, the question before this Court whether the petitioner has made out a case for condoning delay of 411 days and for setting aside/ recalling of the ex parte judgment and decree dt. 07.11.2019.

As per the record, it is found that petitioner as well as the respondent have not brought to the notice of this Court with regard to the application filed by the petitioner being GA 2395 of 2019 prior to passing ex parte Judgment. The said application was listed on 07.11.2019 along with CS 29 of 2016 being Serial no. 10 in the cause list dt. 07.11.2019. On the same day i.e. 07.11.2019, this Court after hearing the Counsel for the respondent has passed ex parte order. Though the Counsel for the petitioner had not appeared and had not moved the said application but it was also the duty of the respondent to inform this Court about the pendency of the application being No. 2395 of 2019 but the respondent has not brought the same to the notice of this Court.

After the ex parte order was passed on 07.11.2019, the suit was again listed on 14.11.2019 for correction of the ex parte order dt. 07.11.2019 but on the same date also the Counsel for the respondent has not informed the court about the pendency of the application. Only on 07.01.2020, when the application was again listed along with CS 29 of 2016 though the suit was disposed of, as per the submission of the Learned Counsel for the respondent the application was dismissed as infructuous as this Court had already passed the judgment and order on 07.11.2019 before disposal

of GA No. 2395 of 2019.

If, the respondent ought to have brought to the notice of this Court with regard to the pendency of the application filed by the petitioner, this Court ought not to have passed ex parte Judgment and Decree on 07.11.2019.

At first it is to be seen whether the petitioner has explained sufficient cause for condoning delay of 411 days for preferring the instant application.

This Court passed ex parte Judgment and Order dt. 07.11.2019. The respondent has communicated the Judgment to the petitioner on 14.12.2020 and thus the petitioner ought to have filed the instant application on or before 12.01.2021. Petitioner has filed medical documents which established that the petitioner was admitted on 18.05.2019 to 07.06.2019 and is suffering from "Left middle cerebral artery acute infarct, post thrombolysis status and interstitial lung disease." Hon'ble Supreme Court as well as the Special Bench of this Court has also passed orders in connection with delay during pandemic Covid-19 and thus the petitioner is also entitled to get the benefit of the order. I am of the view that the petitioner has shown sufficient cause to condone the delay of 411 days for preferring the instant application accordingly, 411 days delay is condoned.

Now the question whether the petitioner has shown sufficient cause wherein the petitioner was prevented from appearing in the suit.

As per admission made by the petitioner, the petitioner had the knowledge about the suit since 29.07.2019. The petitioner had also admitted that he had knowledge that the suit was listed as "undefended suit". The petitioner had also filed an application being GA No. 2395 of 2019 in CS No. 29 of 2016 on 19.09.2019. The application filed by the petitioner was listed on 07.11.2017 but the petitioner had not appeared on the date fixed and had not moved the said application. The application filed by the petitioner was dismissed as infractous on 07.01.2020 but the petitioner has shown the reason that the petitioner had engaged the Learned Advocate and had given proper instruction but the Learned Advocate has not appeared and moved the application. The only ground taken by the petitioner is that the erstwhile advocate has not taken any steps to move the application as the petitioner was suffering from ailment.

The judgment referred by the petitioner in the case of Rafiq and Another (supra), the Hon'ble Supreme Court held that may be the Learned Advocate absented himself deliberately or intentionally but the Court cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted.

In the present case, this Court finds that when the petitioner came to know about the suit, the petitioner has taken appropriate steps but the Learned Advocate had not appeared and not moved the application, the petitioner should not suffer from ex-parte-decree.

In view of the above, the ex parte Judgment and Decree dt. 07.11.2019 is set aside and CS No. 29 of 2016 is restored in its original file subject to payment of cost of Rs. 10,000/- to the respondent

within a period of one week from date in case of failure to pay the cost, the Judgment and Decree dt. 07.11.2019 will stand.

GA 2 of 2021 is thus disposed of.

(KRISHNA RAO, J.) p.d/