

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 98 of 2017
CAN 1 of 2017

JAGADAMBA SINGH
VS.
PAWAN KR. TIWARI & ORS.

For the Appellant	: Mr. Malay Dhar, Adv. Mr. Amarnath Sen, Adv. Mr. Pranab Kr. Ghosh, Adv. Mr. Biswajit Sarkar, Adv.
For the Respondent No. 1	: Mr. Kushal Chatterjee, Adv. Mr. Oishik Chatterjee, Adv.
For the Respondent No. 2	: Mr. M.P. Gupta, Adv. Mr. D.K. Saila, Adv.
Hearing concluded on	: 1 st August, 2023
Judgement on	: 22 nd September, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and decree passed by learned Civil Judge (Senior Division), 1st Court, Howrah in Title Appeal No. 127 of 2010 affirming thereby ex parte judgement and decree passed by learned Civil Judge (Junior Division), 3rd Court, Howrah in Title Suit No. 48 of 2010.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, the plaintiffs and defendant no. 1 entered into a Partnership at Will on 28th August, 1996 for running business to develop

immovable properties under the Style M/s Rishav Builders having its office at 16A Round Tank Lane, Howrah, having share in the ration 40 : 40 : 20 each. The defendant no. 1 being one of the partners having 20% share from time to time had withdrawn a sum of Rs. 9,07,378/- as on 7th April, 2002 against his entitlement of Rs. 2,76,807/-. On and from 7th April, 2002 pursuant to the resolution taken by the partners and declaration given by the defendant no. 1, the said partnership business stood dissolved on and from 7th April, 2002.

4. The defendant however, even thereafter, started claiming the status of one of the partners that led the plaintiffs to file Title Suit No. 193 of 2003 for declaration that the plaintiffs are the partners of the firm Rishav Builders having 50% share each and for further declaration that resolution dated 7th April, 2002 is binding upon the defendant and decree for permanent injunction restraining the defendant no. 1 from claiming any share in the firm.
5. The said suit was contested by the defendant by filing written statement, denying thereby all material allegations made in the plaint. Learned Trial Court after taking into consideration the evidence on record was pleased to pass the judgement and decree in favour of the plaintiffs.
6. It is contended further that with the pronouncement of judgement in Title Suit No. 193 of 2003 and decree in favour of the plaintiffs and consequent upon dismissal of Title Suit No. 79 of 2004 filed by Jagadamba Singh, the defendant no. 1, the plaintiffs filed the suit being Title Suit No. 48 of 2010 for eviction of defendants from the suit property which they have been occupying as licensee under the plaintiff as they failed to deliver peaceful vacant possession after the revocation of license.

7. However, upon the service of summon of the suit the defendants did not appear before the learned Trial Court in terms of the summon and learned Trial Court was pleased to proceed with the ex parte hearing of the suit. 16th April, 2010 was fixed for ex parte argument and 19th April was further posted for order.
8. On 19th April Jagadamba Singh, the defendant no. 1 entered into appearance by filing Vakalatnama and prayed before the Court for an order directing the plaintiff to supply the copy of the plaint. Learned Trial Court posted the suit for order on 29th April, 2010 when the defendant no. 1 filed another application seeking inspection of the suit record and 7th May, 2010 was fixed for hearing of the petitions filed by the defendant no. 1 with a direction to serve copy upon the plaintiff.
9. As the presiding officer was on leave on 7th April, 2010 the matter was posted on 12th May, 2010 under the same hearing. On 12th May, the defendant filed two applications before the learned Trial Court seeking dismissal of the suit for non-compliance of the order of the Court and for adjournment. But defendant no. 1 neither filed any written statement nor any other petition showing good cause for his non-appearance on the date so fixed and for vacating the order by which the suit was posted for ex parte hearing.
10. Therefore, learned Trial Court rejected the petition filed by the defendant no. 1 and posted the suit for order on 17th May, 2010. By the order dated 17th May, 2010 learned Trial Court disposed of the suit. The suit was decreed ex parte against the defendants with cost and with mandate upon defendants to quit and vacate the B schedule property

including B1, B2, B4 and D schedule property within 90 days from the date and to deliver peaceful possession of the same to the Plaintiff.

11. The defendant no. 1 challenged the order of learned Trial Court in Title Appeal No. 127 of 2010. The appeal was accepted by learned 1st Court of Civil Judge (Senior Division) by the judgment and order dated 12th December, 2011 and the suit was remanded to the learned Trial Court with certain direction.
12. Challenging the said order of remand the plaintiffs preferred an appeal being FMA No. 672 of 2012 which was disposed of on 3rd September, 2013 by this Hon'ble Court. The judgement of learned First Appellate Court was set aside and the appeal was remanded to the learned First Appellate Court with a direction to decide the appeal afresh in accordance with law within a period of three months from the date of deposit of an authenticate copy of the order.
13. The said order of learned Single Judge was challenged before the Hon'ble Supreme Court by the defendant no. 1 but the Special Leave Petition was dismissed with liberty to the parties to urge all such questions of law and facts as may be otherwise open to them when the First Appellate Court hears the matter and decides the same.
14. In consonance with the said direction of Hon'ble Apex Court learned First Appellate Court decided Title Appeal No. 127 of 2010, which is the judgement impugned.
15. The second appeal was admitted on the following substantial questions of law :-

1. Whether both the learned courts below were justified either in passing a decree for eviction against the

defendant/appellant by the learned trial court or by affirming the same in appeal by the learned first appellate court in a suit for eviction filed by an unregistered partnership firm in view of the restriction imposed under Section 69(1) of the Indian Partnership Act or not?

2. Whether the learned Judges in both the courts below could have decreed the suit based upon the averment of the plaint at paragraph 10 which emphasizes that the cause of action of the present appeal is based upon the decree passed on 15.12.2009 in Title Suit No. 193 of 2003, which was set aside by the Hon'ble High Court on September 14, 2015 in a second appeal being SAT 259 of 2013 and not interfered with by the Hon'ble Supreme Court in SLP (C) 29103/2015 by an order dated 16.10.2015 or not?

16. Assailing the impugned judgement Mr. Malay Dhar, learned Counsel for the appellant submits that Title Suit No. 48 of 2010 was filed for eviction of the appellant as licensee in respect of the suit property and judgement pronounced in Title Suit No. 193 of 2003 was the foundation of the cause of action for the suit. Though the judgement passed in Title Suit No. 193 of 2003 was challenged in appeal, but the plaintiff of Title Suit No. 48 of 2010 did not disclose the said fact and thus misled the learned Court. The defendant though failed to get the judgement and decree of Title Suit No. 48 of 2010 reversed in the first appeal but in the second appeal being SA 129 of 2015 the judgements of both the learned Courts below were set aside.

17. The judgement of this Hon'ble Court passed in SA 129 of 2015 thereafter was challenged before the Hon'ble Supreme Court and Hon'ble Supreme Court disposed of the Special Leave Application No. 29103 of 2015 in the following manner :-

“We see no reason to interfere with the order impugned. The special leave petition is accordingly dismissed.

Application, if any, also stands disposed off.

This order shall not however prevent the petitioners from seeking such other relief in accordance with law including one by way of dissolution of partnership, if the same still subsists, and for rendition of accounts.”

18. It is submitted by Mr. Dhar that the cause of action for the suit for eviction of the defendant as licensee from the suit premises arose as an aftermath of the judgement and decree pronounced in the Title Suit No. 193 of 2003. Dismissal of the said Title Suit No. 193 of 2003, restored the status of the defendant and he becomes one of the partners of Rishav Builders. Consequent upon dismissal of Title Suit No. 193 of 2003 and thereby revival of the status of the defendant as one of the partners, learned First Appellate Court ought to have dismissed the Title Suit No. 48 of 2010.

19. It is further submitted by Mr. Dhar that the Trial Court committed grave error in not allowing the defendant to participate in the suit for eviction. After the defendant entered into his appearance and by filing application prayed for copy of the plaint, learned Trial Court had no reason to reject such prayer.

20. Refuting such contention Mr. Dhar, learned Counsel for the appellant Mr. Gupta, learned Counsel for the respondent no. 2 submits that the defendant did not enter into appearance on the date fixed by learned Trial Court as directed in the summon. Subsequently, the defendant entered into appearance when the suit was posted for ex parte hearing. The defendant did not however, file any petition under Order IX Rule 7 of the Code of Civil Procedure to show good cause for his non-appearance on the date. Therefore, learned Trial Court was absolutely justified in posting the suit for ex parte hearing.

21. According to Mr. Gupta, the order passed by learned Trial Court, allegedly in the breach of the provision of Order V or Order IX of the Code of Civil Procedure since has reached its finality, cannot be reopened in this suit. The ex parte order of eviction passed by learned Trial Court in Title Suit No. 48 of 2010 was challenged by the defendant in Title Appeal No. 127 of 2010 and the order passed by learned First Appellate Court remanding the suit for re-trial was challenged in FMA No. 672 of 2012 and Hon'ble Justice Sanjib Banerjee as His Lordship then was, observed :-

“In the first defendant not having preferred any appeal or cross-objection from the order impugned, the applicable limb of Order XLI Rule 22 of the Code would not permit the first defendant to canvass a ground in course of this appeal which may leave the plaintiffs worse off than if they had not preferred this appeal.”

22. The FMA 672 of 2012 was allowed and judgement and order of learned First Appellate Court was set aside and the appeal was remanded

for fresh trial. It was challenged before the Hon'ble Apex Court and after dismissal of Special Leave Petition, the order in FMA No. 672 of 2012, reached its finality. Therefore, the issue of service of summon or the issue that stems out of a proceeding under Order IX of the Civil Procedure Code was set at rest. The defendant, therefore, cannot agitate those points in the second appeal.

23. According to Mr. Gupta, the suit was filed at a point of time when the plaintiff was not aware of the appeal preferred by the defendant. It is contended by Mr. Gupta that principle of res-judicata under Section 11 of the Code of Civil Procedure is applicable in same proceedings at different stages of the suit. To buttress his point Mr. Gupta places his reliance in the judgement of Hon'ble Supreme Court in the case of **Arjun Singh vs. Mohindra Kumar** reported in **AIR 1964 SC 993**.

24. Mr. Kushal Chatterjee, learned Counsel for the respondent no. 1 submits that with the judgement of Hon'ble Apex Court in SLP No. 29103 of 2015 dated 16th October, 2015 the status of the defendant has been restored to the position of a partner of the firm under the style Rishav Builders. As partner he cannot be allowed to use the property of the firm. Section 69(3) of the Partnership Act does not permit any of the partners to use the property of the firm for the personal benefit of partners.

25. Therefore, the defendant has no other option but to quit and vacate the property in suit and surrender the same for the use of the firm. It is further submitted that invoking the provision of Order XLI Rule 33 of the Code of Civil Procedure, 1908, the Court may mould the relief as prayed for, otherwise it would defeat the provision of law as laid down in the Partnership Act.

26. From the attending facts of the case, it is admitted that the cause of action for the suit by which the plaintiffs obtained the decree for eviction of the defendants was the judgement and decree passed in Title Suit No. 193 of 2003. Though the said decree was affirmed by learned First Appellate Court but ultimately the judgement was set aside by this Hon'ble Court in Second Appeal No. 127 of 2010 and the endeavour of the plaintiff to get the judgement passed in the second appeal reversed by preferring special leave petition application failed to yield desired result as the Hon'ble Apex Court dismissed the special leave petition.
27. In course of hearing it is pointed out and in fact it stands admitted that the defendant has been evicted from part of the suit property during pendency of this appeal. Though Mr. Chatterjee argues that the appeal if is allowed it will create a situation which the Partnership Act, 1932 does not permit. The defendant would seek relief for restoration of his possession and it would complicate the situation further. As partner the defendant does not have any right to use the property of the firm.
28. When the defendant was evicted during pendency of the appeal by virtue of an ex parte decree upon dismissal of such decree in appeal the defendant may seek relief under Section 144 of the Civil Procedure Code before the Competent Court of law. But for that reason the order impugned cannot be sustained in absence of any cause of action to maintain the suit. In fact if the issue was considered in the light of the provision as laid down under Order VII Rule 11 of the Civil Procedure Code, the plaint would have rejected for want of cause of action.
29. Mr. Dhar, learned Counsel assailed the impugned judgement on the ground that learned First Appellate Court ought to have considered that

the ex parte order passed in the breach of order V Rule 19 of the Code of Civil Procedure. Now that impugned judgement is found to be bereft of any vitality to survive, discussion on that point shall be mere academic.

30. But I feel it apt and expedient to say that once defendant appeared before the learned Trial Court expressing mind to contest the suit, learned Trial Court ought to have allowed the defendant to participate in the proceeding, if necessary without accepting or extending opportunity to answer to the plaint by filing written statement, learned Trial Court should have allowed the defendant to join, from the stage he expressed his mind to participate without letting the hand of the clock go backward. In this regard we can revisit with profit the judgement in **SANGRAM SINGH VS. ELECTION TRIBUNAL** reported in **AIR 1955 SC 425**, wherein Hon'ble Apex Court held :-

"25. Now to analyse R. 6 and examine its bearing on the first hearing. When the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if it is proved that the summons was duly served

"(a).....the Court may proceed 'ex-parte' "
The whole question is, what do these words mean? Judicial opinion is sharply divided about this. On the one side is the view propounded by Wallace, J, in 'AIR 1925 Mad 1274 (H), that 'ex parte' merely means in the absence of the other party, and on the other side is the view of O'Sullivan J., in 'AIR 1945 Sind 98 at p. 102 (D), that it means that the Court is at liberty to proceed without the defendant till the termination of the proceedings unless the defendant shows good cause for his non-appearance. The remaining decisions, and there are many of them, take one or the other of those two views.

28. Then comes R. 7 which provides that if at 'an adjourned' hearing the defendant appears and shows good cause for his

"previous non-appearance", he can be heard in answer to the suit "as if he had appeared on the day fixed for his appearance". This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.

29. We turn next to the adjourned hearing That is dealt with in O. 17, R. 1(1) empowers the Court to adjourn the bearing and whenever it does so it must fix a day "for the further hearing of the suit, except that once the hearing of the evidence has begun it must go on from day to day till all the witnesses in attendance have been examined unless the Court considers, for reasons to be recorded in writing, that a further adjournment is necessary. Then follows R. 2-

"Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. 9 or make such other order as it thinks-fit"

30. Now R. 2 only applies when one or both of the parties do not appear on the day fixed' for the adjourned hearing' In that event, the Court is thrown back to O. 9 with the additional power to make "such order as it thinks fit". When it goes back to O. 9 it finds that it is again empowered to proceed 'ex parte' on the adjourned hearing in the same way as it did, or could have done, if one or other of the parties had not appeared at the first hearing, that is to say, the right to proceed 'ex parte is a right which accrues from day to day because at each adjourned hearing the Court is thrown back to O.9, R. 6. (Emphasis is by this Court)

It is not a mortgaging of the future but only applies to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on "the day to which the hearing of the suit is

adjourned", he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing.(Emphasis by this Court)

31. But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock Order 9, R. 7 makes that clear. Therefore, unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in....."

31. But chronology of events suggest that the defendant entered into appearance, after the suit was posted for passing of order upon conclusion of argument. Learned Trial Court could not have entertained any petition, filed by the defendant at that stage. In this regard we can profitably use the judgement of Hon'ble Supreme Court in **APSPDCL & AMP; ANR. VS. HNPCL & AMP; ANR.** reported in **(2022) 5 SCC 484**, wherein it is held :-

"94. In this respect, we will refer to the observations made by this Court in Arjun Singh v. Mohindra Kumarle, Though the issue involved in the said case is distinct than the issue involved in the present case, we find that it will be apposite to seek guidance from the observations made by this Court, while construing the provisions of Order 9 and Order 20 of the Code of Civil Procedure Code, 1908 ("CPC"). The relevant extract reads thus: (AIR p. 1004. para 19)

19.... In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) where the hearing is adjourned, or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order 20 Rule 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore,

follow that after the stage contemplated by Order 9 Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order 9 Rule 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under Order 9 Rule 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order 9 Rule 7. We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated 31-5-1958 purporting to be under Order 9 Rule 7 and that consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petition under Order 9 Rule 13 filed by the appellant.” (emphasis supplied)

32. Mr. Kunal Chatterjee, learned Counsel for the respondent no. 1 submits that when admittedly the property in question is not the exclusive property of either of the parties, it belongs to the firm and ultimately to be sold out, the appellant/defendant may be directed to deliver the possession of the property to the partnership firm invoking the provision of Order 41 Rule 33 of the Civil Procedure Code. A partner does not have any right to enjoy the property to the firm.

33. In course of hearing, this Court is told that a suit is pending for dissolution of partnership between the parties being Title Suit No.58 of 2015. I do not find any reason to imbibe myself with the spectrum of submission of Mr. Chatterjee to mould the relief by directing the defendant to vacate the property, despite setting aside the judgement and

decree passed by the Learned First Appellate Court, in the proceeding for eviction of the defendant. It would amount to travesty of justice.

34. When the cause of action for bringing the suit for eviction arose on the basis of judgement and decree passed in Title Suit no.193 of 2003 and the suit was dismissed in the Second Appeal, even the Special Leave Petition was not accepted, the castle built upon such foundation is bound to cave in.
35. Consequently the appeal succeeds. Pending applications, if any, stand disposed of.
36. The impugned judgement passed by learned First Appellate court passed in Title Appeal no. 127 of 2010 is set aside. Title Suit No. 48 of 2010 stands dismissed.
37. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.
38. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)