

GAHC010012302015



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

Case No. : RFA/23/2015

M/S JAIN and ASSOCIATES and 5 ORS
HAVING ITS REGISTERED OFFICE AT 9, OLD COURT HOUSE STREET,
CALCUTTA 700001

2: MS. RACHANA JAIN

D/O LATE SHRI JOGINDER KUMAR JAIN RESIDING AT ASHA APARTMENT
FLAT 3C2
93 DESHPRAN SHASHMAL ROAD
KOLKATA 700033

3: MS. PARUL JAIN

D/O LATE SHRI JOGINDER KUMAR JAIN R/O BRINDAVAN FARDENS
BUILDING NO. B3
FLAT 4
SECOND FLOOR
98 CHRISTOPHER ROAD
KOLKATA 700046

4: MS. NEHA JAIN

D/O LATE SHRI JOGINDER KUMAR JAIN R/O FLAT 417
A BLOCK
OBAIDULLAH APARTMENT
NEAR BURJUMAN
BURDUBAI
U.A.E.

5: MR. RAJAT KR. JAIN

S/O LATE SHRI JOGINDER KUMAR JAIN RESIDING AT 8A
ALIPORE ROAD
JINDAL HOUSE

FLAT 34
10TH FLOOR
KOLKATA 700027

6: SMT. ANURADHA JAIN

W/O LATE SHRI JOGINDER KUMAR JAIN R/O AT 8A
ALIPORE ROAD
JINDAL HOUSE
FLAT 34
10TH FLOOR
KOLKATA 70002

VERSUS

MRS NANDITA ACHARJEE
W/O MR. PARIMAL ACHARJEE, PROPRIETRESS, HINDUSTAN MORTGAGE
INSTITUTION, LUMDING, DIST. NOGAON, ASSAM, REPRESENTED BY HER
LEGALLY APPOINTED ATTORNEY, SRI PARIMAL ACHARJEE, S/O LATE
BIJOY ACHARJEE, RESIDING AT LUMDING TOWN, MOUZA LUMDING,
DIST. NAGAON, ASSAM.

Advocate for the Petitioner : MS.P HUJURI

Advocate for the Respondent : MR.R C PAUL

**BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

Date : 07-11-2023

JUDGMENT & ORDER (ORAL)

Heard Mr. D Mozumdar, learned senior counsel assisted by Mr. RK Bhatra, learned counsel for the appellants. Also heard Mr. AK Purkayastha, learned counsel for the respondent.

2. The respondent instituted Money Suit No.6/1996 before the Civil Judge Nagaon raising money claim of Rs.48,88,222/-. The said money suit in course of its proceeding was kept in abeyance by the learned trial court by the order dated 11.09.2006 for enabling the plaintiff to procure certain original documents and accordingly by a later order dated 22.01.2008, the suit was reopened. Once the suit was reopened notice was issued to the defendants for their further appearance in the money suit. The order dated 21.12.2009 reflects that the plaintiff instituted Petition No.4000/2009 praying for necessary orders for taking steps under Order 5 Rule 9 of the CPC through publication of notice in a national newspaper. By the order dated 22.10.2010, the learned trial court accepted the substituted service of notice by plaintiff and accordingly proceeded in the matter, although the appellants/defendants did not further appear and participated in the proceeding. Accordingly, the judgment and decree dated 19.05.2010 was passed decreeing the money suit in favour of the respondent/plaintiff. Being aggrieved, an application under Order 9 Rule 13 was instituted by the appellants for setting aside the ex-parte decree which was rejected by the order dated 11.06.2014.

3. Being aggrieved by the rejection of the application under Order 9 Rule 13, MFA No.51/2014 was instituted by the appellants which was again dismissed by the order dated 15.10.2014. Thereupon, the present appeal being RFA No.23/2015 has been instituted by the appellants assailing the judgment and decree dated 19.05.2010 on its own merit and not on the ground of it being an ex-parte decree.

4. Mr. D Mozumdar, learned senior counsel for the appellants has referred to

the penultimate paragraph of the judgment and decree dated 19.05.2010 which is extracted as below:

The plaintiff has adduced evidence under Order 18 Rule 4 of CPC and also produced and exhibited some documents relied upon in support of his case. The plaintiff in his evidence has supported the entire case. The record reveals that the plaintiff has instituted the suit within the period of limitation and accordingly I find a prima facie case in his favour. As such, I am of the opinion that the plaintiff is entitled to a decree as prayed for.

5. By referring to the afore-extracted conclusion of the learned trial court, it is the submission of Mr. D Mozumdar, learned senior counsel that it is apparent on the face of the record that neither any reason nor any decision had been rendered by the learned trial court, while decreeing the money suit in favour of the respondent/plaintiff.

6. A reading of the afore-extracted portion of the judgment and decree dated 19.05.2010 also makes it discernible and explicit that neither any reasons nor any decision had been rendered by the learned trial court and it was only the satisfaction of the learned Civil Judge that the record reveals that the plaintiff had instituted the suit within the period prescribed by limitation and that the learned Civil Judge found prima facie case in favour of the plaintiff without stating the reason as to why he was of the view that he found a *prima facie* case.

7. Mr. AK Purkayastha, learned counsel has raised an objection that in the event the judgment and decree dated 19.05.2010 is set aside on the aforesaid

reason, it would not be open to the appellants/defendants to reopen the money suit once again by producing any further material. For the purpose, Mr. AK Purkayastha, learned counsel relies upon the pronouncement of the Supreme Court rendered in *Bhanu Kumar Jain v. Archana Kumar*, reported in (2005) 1 SCC 787 wherein in paragraph 17 it has been provided that once an application for setting aside an ex-parte order under Order 9 Rule 13 is dismissed, it would not be permissible for the defendant to reopen the matter once again by adducing further materials or evidences as may be sought for. Paragraphs 16, 17 and 18 of the judgment rendered by the Hon'ble Supreme Court in *Bhanu Kumar Jain (supra)* are extracted as below:

"16. Order 9 Rule 7 of the Code postulates an application for allowing a defendant to be heard in answer to the suit when an order posting a suit for ex parte hearing was passed, only in the event, the suit had not been heard; as in a case where hearing of the suit was complete and the court had adjourned a suit for pronouncing the judgment, an application under Order 9 Rule 7 would not be maintainable. (See Arjun Singh v. Mohindra Kumar [AIR 1964 SC 993 : (1964) 5 SCR 946] .) The purpose and object of Order 9 Rule 7 of the Code has been explained by this Court in Vijay Kumar Madan v. R.N. Gupta Technical Education Society [(2002) 5 SCC 30] and Ramesh Chand Ardawatiya v. Anil Panjwani [(2003) 7 SCC 350]

17. It is true that the suit was not directed to be heard ex parte against Respondent 2 herein but it remains undisputed that both the respondents filed application for setting aside the ex parte decree before the learned trial Judge, preferred appeal against the judgment dismissing the same as also filed a revision application against the order dated 31-10-1985 setting the suit for ex parte hearing. [Ed.: As per para 8 above by the order dated 31-10-1985 related to dismissal of the respondent's application under Order 9 Rule 7.] The said applications and appeal had been dismissed. Even a special leave petition filed was dismissed as withdrawn. In that view of the matter it is not permissible for the respondents now to contend that it was open to Respondent 2 to reagitiate the matter before the High Court. The contention which has been raised by Respondent 2 before the High Court in the first appeal, furthermore, was not raised in the said application under Order 9 Rule 13 of the Code and even in the miscellaneous petition and the revision application filed in the High Court. Such a question having not been raised, in our opinion, the respondents disentitled themselves from raising the said contention yet again before the High Court in the first appeal.

18. It is now well settled that principles of res judicata apply in different stages of the same proceedings."

8. The Hon'ble Supreme Court in the aforesaid pronouncement was explicit enough to arrive at a satisfaction that the prayer for setting aside the ex-parte judgment and decree having been rejected and such rejection has been brought to its finality by the order of the High Court in MFA No.51/2014 the appellant would be entitled to assail the judgment and decree only on its own merit and no longer on the ground of it being an ex-parte judgment and decree in any manner.

9. On the aspect of the impugned judgment and decree being assailed on its own merit, based upon the grounds as indicated above that the penultimate paragraphs of the judgment make it explicit that it is not a reasoned judgment and decree nor a decision has been rendered, and, therefore, it would be appropriate that on the matter being remanded it would be for the learned trial court to pass a fresh judgment and order on the basis of the materials already on record, of course, after allowing both the appellants and the respondent to advance their own argument as may be advised.

10. In view of the above, the judgment and decree dated 19.05.2010 in Money Suit No.6/1996 is set aside on the limited ground as indicated above to the extent that the judgment is neither a reasoned judgment nor any decision had been rendered and accordingly, the same is remanded back to the learned trial court for passing of a fresh judgment based upon the existing materials on record by allowing respective parties to advance their arguments.

11. As it is noticed that it is a money suit of the year 1996, we request the learned trial court to render the judgment within a period of 2(two) months from the date of receipt of a certified copy of this order. As we have set a time limit for delivery of the judgment, we also require the appellants, defendant and respondent plaintiff to enter their appearances before the learned trial court on 11.12.2023.

12. In terms of the above, the appeal stands allowed.

13. The LCR be sent forthwith.

JUDGE

Comparing Assistant