

GAHC040001242024

2024:GAU-AP:1061



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

Case No. : FAO/1/2024

Dibya Jyoti Neog
Son of Late Loknath Neog, resident of Narikal Basti, 1st Bye Lane, Guwahati, PO Zoo
Road, Guwahati Assam 781024.

VERSUS

Ejum Karbak Son of Late Hoyi Karbak, resident of Gumin Nagar, PO and PS Aalo,
West Siang District, Arunachal Pradesh

Advocate for the Petitioner : Tame Rimi, M Hussain, M Hazarika

Advocate for the Respondent : D Medhi, I P Sarma

:::BEFORE:::

HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR

Date of hearing : 12.03.2024

Date of Judgment & order: 29.11.2024

JUDGMENT & ORDER (CAV)

Heard Ms. M. Hazarika, learned senior counsel, assisted by Ms. S. Newar, learned counsel, appearing on behalf of the appellant. Also heard Mr. B. M. Deka, learned counsel, appearing on behalf of the respondent.

2. The brief facts requisite for the purpose of adjudication of the issues arising in the present proceeding, is noticed as under:

The respondent, herein, as plaintiff, had instituted Money Suit No.

39/2020 before the Court of learned Civil Judge(Senior Division), West Siang District, Aalo, praying for recovery of an amount of Rs. 2,64,02,416/- from the defendants, therein, including the appellant, herein, and one another.

The learned trial Court after having issued notices in the said Money Suit No. 39/2020 to the defendants, therein, and the defendants not having entered appearance; proceeded vide order, dated 17.02.2021, to require the respondent, herein, to publish the notices in any national Newspapers for appearance of the defendants. Accordingly, it is seen that the respondent, herein, had published the notices in 3 Newspapers, namely, "Sentinel" published from Guwahati and Dibrugarh; "Dainik Assam" published from Assam and "Echo of Arunachal" published from Arunachal Pradesh. The notices in the said Newspapers were published on 26.02.2021.

The defendants, including the present appellant, having not appeared in the proceeding of Money Suit No. 39/2020, even after publication of the notices in the aforesaid Newspapers; the learned trial Court proceeded vide order, dated 31.05.2021, to direct that the proceeding of Money Suit No. 39/2020, would proceed ex-parte against the defendants, therein, including the present appellant, under Order IX Rule 6(1)(a) of the Code of Civil Procedure, 1908.

Accordingly, the proceeding in Money Suit No. 39/2020 having proceeded against the appellant, herein, ex-parte, on conclusion; the learned trial Court vide judgment & order, dated 22.10.2021, proceeded to

allow the same directing that the respondent No. 5, herein, is entitled to recover of a sum of Rs. 1,72,07,368.5/- from the defendants, therein, along with an interest of 6% p.a. on the said amount from the date of passing of the decree till final realization of the same.

It is seen that in terms of the said judgment, a decree was also drawn in the matter. The decreed amount having not been recovered; the respondent, herein, proceeded to institute an execution petition being E.P. No. 05/2023 before the Court of learned Civil Judge(Senior Division), West Siang District, Aalo.

The notices in the said execution petition being received by the appellant, herein, he entered appearance in the proceeding and also filed an application registered as Misc. Case No. 12/2023 in Money Suit No. 39/2020 under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908, praying for setting aside of the ex-parte judgment, dated 22.10.2023.

The learned trial Court on consideration of Misc. Case No. 12/2023, was pleased vide order, dated 30.06.2023, to dismiss the said misc. case holding that the appellant, herein, had not brought on record any plausible justification for not appearing and participating in the proceeding of Money Suit No. 39/2020.

3. Being aggrieved, the appellant, herein, has instituted the present proceeding before this Court.

4. Ms. Hazarika, learned senior counsel appearing for the appellant, herein, has, at the outset, submitted that the learned trial Court while considering Misc. Case No. 12/2023, had not dealt with the issues arising therein in accordance with the provisions contained in this connection in the Code of Civil Procedure, 1908.

5. Ms. Hazarika, learned senior counsel, by taking this Court through the orders passed in Money Suit No. 39/2020, leading to the issuance of the order, dated 31.05.2021, wherein, the said Money Suit No. 39/2020 was directed to proceed ex-parte against the appellant, herein, has contended that the learned trial Court before proceeding to direct the said Money Suit No. 39/2020, to proceed ex-parte against the present appellant, had not undertaken any examination to determine as to whether the notices issued to the appellant, herein, by way of registered post with A/D were actually served upon the appellant, herein, or, as to whether, he, on receipt of the said service of notice, had refused to accept the said notices.

6. Ms. Hazarikia, learned senior counsel, has further submitted that the learned trial Court without first reaching the satisfaction as mandated under the provisions of Order V Rule 20 that the appellant, herein, was keeping out of the way for the purpose of avoiding service, or, that for any other reason, summons cannot be served in the ordinary way, in the proceeding; proceeded to permit the respondent, herein, in Money Suit No. 39/2020, to proceed to serve notices upon the appellant, herein, through substituted service under the provisions of Order V Rule 20(1A) of the Code of Civil Procedure, 1908.

7. Ms. Hazarika, learned senior counsel, has also submitted that with regard to the notices so issued upon the appellant, herein, in Money Suit No. 39/2020, on 21.12.2020, and 22.02.2021; the learned trial Court failed to arrive at the conclusion as to whether there was effective service of notice upon the appellant, herein. It is further submitted that the learned trial Court also failed to examine the postal tracking details of the said notices.

8. The learned senior counsel for the appellant, has further submitted that that the appellant, herein, had no knowledge of the notices so issued by way of Newspaper publication on 26.02.2021, in-as-much as, during the said period, on account of Covid-19; the subscription to papers by people in general were avoided.

9. Ms. Hazarika, learned senior counsel, has also submitted that in Misc. Case No. 12/2023; the appellant, herein, had brought on record the fact that even before issuance of the notices, in question, the defendant No. 2 in Money Suit No. 39/2020, had expired on 28.01.2020. However, the learned trial Court while passing the impugned order, dated 30.06.2023, ignored to consider the said aspect of the matter. Accordingly, the judgment & decree, passed in Money Suit No. 39/2020, has the effect of the same being passed against a dead person which is a ground sufficient to hold that the said decree to be a nullity.

10. Ms. Hazarika, learned senior counsel, by referring to the order, dated 17.02.2021, passed in Money Suit No. 39/2020, has contended that the order so passed by the learned trial Court had required the respondent,

herein, to publish the notices of the proceeding in any national Newspaper. However, it is contended that the notices was never published in any national Newspaper and the same was published in only local Newspaper circulating in the States of Assam and Arunachal Pradesh. Accordingly, it is submitted that the substituted service as effected by the respondent No. 5, herein, for service of notice upon the respondent, herein, also being so done in clear violation of the directions passed by the learned trial Court in this connection; effective service of notice upon the appellant, herein, in the proceeding of Money Suit No. 39/2020, could not have been presumed by the learned trial Court.

11. Ms. Hazarika, learned senior counsel, has further submitted that the appellant, herein, admittedly having resided in an area outside the jurisdiction of the learned trial Court; the learned trial Court before drawing presumption of service upon the respondent, ought to have taken recourse to the provisions of the Order V Rule 21 of the Code of Civil Procedure, 1908. The learned trial Court not having taken recourse to the provisions of Order V Rule 21 for causing service of notice upon the defendants residing beyond the jurisdiction of the learned trial Court; could not have in a mechanical manner, directed the respondent, herein, to proceed to issue notice upon the appellant, herein, by way of substituted service of notice through Newspaper publication.

12. Ms. Hazarikia, learned senior counsel, by taking this Court through the order, dated 30.06.2023, has further submitted that the conclusions as drawn by the learned trial Court therein, for the purpose of dismissing Misc. Case No. 12/2023, are clearly perverse. The conclusions of the learned trial

Court that the contention raised before it by the present appellant that the summons were not received by them, to be not reliable in-as-much as the same were issued by the registered postal A/D, in the light of the orders passed by the learned trial Court in the proceeding of Money Suit No. 39/2020; would not stand scrutiny of law in-as-much as the conclusion to proceed ex-parte against the appellant, herein, as arrived at by the learned trial Court vide order, dated 31.05.2021, is not a reasoned order and therein, there is no conclusion drawn that the appellant, herein, was served with the notices and/or had not participated in the proceeding of the said Money Suit No. 39/2020 inspite of having knowledge of institution and continuance thereof, before the learned trial Court.

13. In the above premises, Ms. Hazarika, learned senior counsel, has submitted that order, impugned in this appeal, would require an interference from this Court and the present appeal would be called to be so allowed.

14. In support of her contentions, Ms. Hazarika, learned senior counsel for the appellant, herein, has placed reliance on the following decisions:

(1). *Neerja Realtors Pvt. Ltd. v. Janglu(dead) through legal representative*, reported in (2018) 2 SCC 649;

(2). *Great Punjab Agro Industries Ltd. v. Khushian & ors.*, reported in (2005) 13 SCC 503; and

(3). M/s Paras Ram Milkhi Ram v. Sudarshan Tea Pvt. Ltd. & anr., a decision of the **High Court of Punjab & Haryana** at Chandigarh, in CR-2188-2015(O&M), decided on 23.03.2022.

15. Per contra, Mr. Deka, learned counsel for the respondent; at the outset, has submitted that the contentions raised by the appellant, herein, is clearly not acceptable in-as-much as the notices issued in the execution petition, referred to above, were so issued at the address of the appellant, herein, which was also, so reflected in the notices issued to the appellant, herein, in Money Suit No. 39/2020, by way of registered postal A/D as well as by way of substituted service through Newspaper publication. The address being one and the same, and the notices so issued in the execution petition, having been served upon the appellant; it should be deemed that the notices in the Money Suit, were also received by the appellant.

16. With regard to the exception taken by the appellant, herein, as regards Newspaper publication in which the notices were so issued; it is submitted by Mr. Deka, learned counsel, that the Court had not specified any Newspaper wherein, the said notices were to be published. Accordingly, the respondent, herein, had proceeded to effect the publication of the notice upon the appellant, herein, in the Newspapers having wide circulation in the States of Assam and Arunachal Pradesh.

17. Accordingly, the presumption drawn by the learned trial Court with regard to the service of notice in the said Money Suit No. 39/2020, upon the appellant, herein, to have been effectively done and the decision to proceed against the appellant, herein, ex-parte; would not call for any

interference.

18. As regards the contention of Ms. Hazarika, learned senior counsel, in Money Suit No. 39/2020, that the defendant No. 2 having expired before the passing of the judgment and decree; it was contended by Mr. Deka, learned counsel for the respondent, herein, that in terms of the agreement between the parties, the legal heirs of the original executant of the agreement, are automatically bound by the agreement itself. Accordingly, the decree so passed in Money Suit No. 39/2020, cannot be said to be a nullity.

19. As regards the contention of Ms. Hazarika, learned senior counsel, that the postal tracking records of the notices issued through registered postal with A/D were not placed before the learned trial Court; Mr. Deka, learned counsel, has submitted that the same could not be placed in-as-much as the said tracking report after a period of 3 months from the date of effecting the service; is removed from the portal of the Postal authorities. In the above premises, Mr. Deka, learned counsel for the respondent, herein, has submitted that the order, dated 30.06.2023, would not call for any interference and the execution petition currently underway, be permitted to be taken to its logical conclusion.

20. In support of his submissions, Mr. Deka, learned counsel for the respondent, herein, has relied upon the following decisions:

(i). *Sunil Poddar & ors. v. United Bank of India*, reported in (2008) 2 SCC 326;

(ii). ***Parimal v. Veena alias Bharti***, reported in **(2011) 3 SCC 545**; and

(iii). ***Santosh Jain v. Pradeep Kr. Gupta & anr.***, **2015 0 Supreme(Del) 4034**, a decision of the Delhi High Court decided on 29.05.2015.

21. I have heard the learned counsels appearing for the parties and also perused the materials available on record.

22. The facts as noticed hereinabove, leading to the institution of Misc. Case No. 12/2023 under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908, praying for setting aside of the ex-parte judgment & decree, dated 22.10.2021, passed by the learned trial Court in Money Suit No. 39/2020, is not disputed.

23. It is also an admitted position that the appellant, herein, was a resident of an area beyond the jurisdiction of the Court of learned Civil Judge(Senior Division), West Siang District, Aalo.

24. The issue arising, herein, is as to whether the learned trial Court while deciding to proceed ex-parte against the appellant, herein, in the proceeding of Money Suit No. 39/2020; vide order, dated 31.05.2021, had drawn the requisite satisfaction mandated to be so drawn under the provisions of Order IX Rule 6(1)(a) of the Code of Civil Procedure, 1908. In other words, whether the learned trial Court could have in the facts and circumstances involved, drawn a satisfaction of the summons issued in the

said Money Suit No. 39/2020; being effectively served upon the appellant, herein.

25. The provisions of Order IX Rule 6(1)(a) of the Code of Civil Procedure, 1908, mandates that where the defendant does not appear when the suit is called for hearing and it is proved that the summons were duly served; the Court may make an order that the suit be heard, ex-parte.

26. A perusal of the order sheets brought on record of the proceeding of the learned trial Court in Money Suit No. 39/2020, would go to reveal that the notices in the matter were first issued vide order, dated 27.11.2020. The said notices were required to be taken out by the respondent, herein, as plaintiff by way of registered post with acknowledgment card. Thereafter, it is seen that vide order, dated 15.01.2021, the respondent had submitted the steps taken report in the matter. However, the appellant not being present, the Court directed for issuance of fresh summons upon the defendants in Money Suit No. 39/2020, for their appearance and for filing of the written statement.

27. Thereafter, on 17.02.2021, when the matter was so listed and the appellant, herein, being absent and the learned counsel for the respondent, herein, having filed the step taken report; the learned trial Court proceeded to direct the respondent, herein, to publish the notices in any national Newspaper for appearance of the defendants, and issue notice to the defendants.

28. The said order, dated 17.02.2021, being relevant, is extracted hereinbelow:

“17/02/2021

Today the present case is fixed for SR and WS.

The plaintiff is present along with learned counsel Mr. Todak Ado.

The defendants are found absent.

The learned counsel for the plaintiff has submitted the step taken report.

The plaintiff shall publish in any national newspapers for appearance of the defendants and issue notices to the defendants. The plaintiff shall take steps.”

29. A perusal of the order would go to reveal the fact that the learned trial Court before proceeding to direct for substituted notice had not drawn any satisfaction as regards the effective service of the notices issued to the appellant, herein, in the proceeding of Money Suit No. 39/2020, vide order, dated 27.11.2020, and order, dated 15.01.2021. Admittedly, the learned trial Court without drawing any such satisfaction, had proceeded to require the respondent, herein, to publish the summon in any national Newspaper for appearance of the defendants, in Money Suit No. 39/2020.

30. It is also seen that the learned trial Court before proceeding to require the plaintiff to issue summons by way of substituted service of notice vide order, dated 17.02.2021, had not drawn a presumption in respect of service of notice sent under registered cover and there is no indication that the acknowledgment card if so received, was so examined by the learned trial Court before proceeding to issue direction for service of notice by way of substituted service through Newspaper publication.

31. The notices in the present matter, it is found, were issued only by registered post with A/D. Admittedly, the appellant, herein, was a resident of an area beyond the jurisdiction of the learned trial Court and accordingly; the learned trial Court was called upon to issue the notices so involved by taking recourse to the provisions of Order V Rule 21 of the Code of Civil Procedure, 1908. Admittedly, the provisions of Rule 21 of the Code of Civil Procedure, 1908, were not taken recourse to by the learned trial Court. The substituted service of notice as directed by the learned trial Court vide order, dated 17.02.2021, having so done by invoking the provisions of Order V Rule 20(1A) of the Code of Civil Procedure, 1908, the same being relevant, is extracted hereinbelow:

“20. Substituted service.-(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

[(1A) Where the Court acting under sub-rule (1) 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.]

(2) Effect of substituted service. Service substituted by order of the Court shall be as effectual as if it has been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed.- Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.”

32. The provisions of Order V Rule 20 of the Code of Civil Procedure, 1908, mandates that for issuance of notice by way of substituted service, the Court has to draw a satisfaction that that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service,

or, that for any reason, the summons cannot be served in the ordinary way, and having drawn the said satisfaction, the Court may proceed to order that the summons to be served by affixing a copy thereof in some conspicuous place in the house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner, as the Court thinks fit.

33. The provisions of sub-Rule (1A) of Rule 20 of the Code of Civil Procedure, 1908, mandates that where the Court acting under sub-rule (1) 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. The provisions of Rule 20 Order V of the Code of Civil Procedure, 1908, mandates that before proceeding to take recourse to the procedure as set-out in sub-Rule (1) or sub-Rule (1A), the Court is to draw a satisfaction that the defendant is keeping out of the way for the purpose of avoiding service and/or that for any reasons, the summons cannot be served in the ordinary way.

34. From a perusal of the various orders passed by the learned trial Court in the proceedings, in question; it is clear that no such satisfaction was drawn by the learned trial Court prior to requiring the respondent, herein, to issue summons upon the appellant, herein, by resorting to the procedure as mandated under the provisions of sub-Rule (1A) of Rule 20 Order V of the Code of Civil Procedure, 1908. Accordingly, it is clear that the conclusion with regard to the effective service of summons upon the

appellant, herein, was not drawn by the learned trial Court prior to proceeding for issuance of directions for service of notice upon the appellant, herein, by way of substituted service.

35. As noticed hereinabove, the learned trial Court ought to have taken recourse to the provisions of Rule 21 of Order V of the Code of Civil Procedure, 1908, by acknowledging the fact that the appellant, herein, was not the resident within the jurisdiction of the Court of learned Civil Judge(Senior Division), West Siang District, Aalo. However, no such recourse is seen to have been taken by the learned trial Court in the matter.

36. Another factor which is required to be noted is that the learned trial Court vide order, dated 31.05.2021, while proceeding to direct the Money Suit No. 39/2020, to proceed ex-parte against the appellant, herein, invoking the provisions of Order IX Rule 6(1)(a) of the Code of Civil Procedure, 1908, admittedly, failed to draw a satisfaction to the effect that notices were proved to be so served upon the appellant, herein. A perusal of the order, dated 31.05.2021, does not reveal any such satisfaction being drawn by the appellant, herein, and the decision to proceed ex-parte against the appellant, was so made at the instance of the respondent, herein, before the learned trial Court.

37. While the learned trial Court had observed that the notices were issued upon the appellant, herein, through registered post with A/D and subsequently, by way of Newspaper publication, but it failed to examine as to whether the summons issued vide registered post with A/D were duly

served upon the appellant, herein, and/or whether, it can be deemed that the appellant, herein, was keeping out of the way for the purpose of avoiding service.

38. The Hon'ble Supreme Court in the case of ***Neerja Realtors Pvt. Ltd.*** (supra), had mandated that a Court before proceeding to direct service of summons by way of substituted service, must be satisfied either that there is a reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any reasons, the summons could not be served in the ordinary way. It further held that substituted service is an exception to the normal mode of service and the Court is required to apply its mind to the requirement of Order V Rule 20 of the Code of Civil Procedure, 1908, and its order must indicate its due consideration of the provisions contained therein.

39. Applying the said conclusions of the Hon'ble Supreme Court to the facts of the present case; it is seen that the order, dated 17.02.2021, as well as order, dated 31.05.2021, of the learned trial Court, in Money Suit No. 39/2020, permitting the respondent, herein, to issue summons upon the appellant, herein, by way of substituted service of notice, is a cryptic order and does not reveal that the satisfaction so required to be drawn under the provisions of Rule 20 of Order V of the Code of Civil Procedure, 1908, was so drawn. Further, the order, dated 31.05.2021, also does not indicate that the learned trial Court had drawn due satisfaction as mandated under the provisions of Order IX Rule 6(1)(a) of the Code of Civil Procedure, 1908, to the extent that summons were duly served upon the appellant, herein.

40. The factual position as highlighted, hereinabove, pertaining to the manner of service of notice upon the appellant, herein, in the proceeding of Money Suit No. 39/2020, this Court is of the considered view that the summons, in question, cannot be said to have been effectively served upon the appellant, herein, and accordingly, it is concluded that the conclusions drawn by the Court of learned Civil Judge(Senior Division), West Siang District, Aalo, vide the order, dated 17.02.2021, and order, dated 31.05.2021, were so drawn without drawing the requisite satisfaction as mandated under the relevant provisions of the Code of Civil Procedure, 1908.

41. Having drawn the above conclusions; this Court would now proceed to examine the order, dated 30.06.2023, passed by the learned trial Court in Money Suit No. 39/2020.

42. On a close perusal of the conclusions reached by the learned trial Court in the said order, dated 30.06.2023; it is seen that the conclusions so reached by the learned trial Court are not germane to the issue arising therein. The learned trial Court had only presumed the service of summons upon the appellant, herein, in the proceeding in Money Suit No. 39/2020, whereas, the order sheets of the learned trial Court in Money Suit No. 39/2020, does not reveal drawal of any such satisfaction by the learned trial Court in the matter.

43. As held by the Hon'ble Supreme Court in the case of **Neerja Realtors Pvt. Ltd.**(supra); the satisfaction drawn by the learned trial Court with regard to the reasons for taking resort to substituted service, must be

indicated in the order clearly being absent in the orders passed by the learned trial Court in the proceeding of Money Suit No. 39/2020; this Court is of the considered view that the order, dated 30.06.2023, would call for an interference.

44. The above conclusions having been so drawn by this Court from the materials available on record, further reference to the decisions relied upon by the learned counsels appearing for the parties in the matter, is held to be not called for and accordingly, the same is not being discussed.

45. In view of the conclusions so drawn hereinabove; this Court is of the further considered view that the impugned order, dated 30.06.2023, passed by the learned trial Court in Misc. Case No. 12/2023, is required to be interfered and it is accordingly, set aside.

46. The Misc. Case No. 12/2023, stands restored to the Files of the Court of learned Civil Judge(Senior Division), West Siang District, Aalo.

47. The learned trial Court would now proceed to consider the Misc. Case No. 12/2023, strictly, in accordance with law, keeping the observations made hereinabove.

48. Pending consideration of the Misc. Case No. 12/2023, proceedings in Execution Petition No. 05/2023, shall remain stayed. Further proceedings in the said Execution Petition No. 05/2023, shall be governed by the order that would now be passed by the learned trial Court in Misc. Case No.

12/2023.

49. The parties to the proceeding are directed to appear before the learned trial Court on 18.12.2024, for further proceeding in Misc. Case No. 12/2023, and on appearance of the parties before the Court of learned Civil Judge(Senior Division), West Siang District, Aalo; the learned trial Court shall dispose of the said Misc. Case No. 12/2023, after affording due opportunity of hearing to them.

50. With the above directions and observations, the instant appeal, accordingly, stands allowed.

JUDGE

Comparing Assistant