

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.973 of 2010

(Against the order dated 01.10.2010 passed by Subordinate Judge-I, Begusarai in Miscellaneous Case No.09 of 2008)

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The Branch Manager, Bank of India

.... Defendant-Applicant-Appellant

Versus

Manna Devi Verma & Ors

.... Plaintiffs-Opposite party 1st set-Respondents

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Appearance :

For the Appellant : Mr. (Dr.) Binay Kumar Singh, Advocate.

For the Respondents : Mr. Ganpati Trivedi, Senior Advocate

Mr. Bijay Anand, Advocate with him.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL JUDGMENT

Date: 29-01-2015

This miscellaneous appeal has been filed by the defendant-appellant against the order dated 01.10.2010 passed by Subordinate Judge-I, Begusarai in Miscellaneous Case No.09 of 2008 whereby the court below dismissed the miscellaneous application filed under Order 9 Rule 13 of the Code of Civil Procedure on the ground of limitation.

2. It appears that Title Suit No.283 of 2007 was filed by the plaintiffs-respondents herein for declaration that there is no outstanding dues of the Bank (the appellant) in Cash Credit Account Nos.03 and 12 and further for declaration that the plaintiffs have liquidated the entire dues in the said account and the sureties and guarantees have already been discharged. The notices were issued and ultimately the court below decreed the suit ex-parte on 03.06.2008 against the appellant by



terms of judgment. Thereafter the appellant filed Miscellaneous Case No.09 of 2008 under Order 9 Rule 13 of the Code of Civil Procedure for setting aside ex-parte judgment and decree dated 03.06.2008 alleging that the notice was not served on the appellant and the appellant came to know about the ex-parte judgment and decree only on 02.09.2008. Thereafter the miscellaneous case was filed on 24.09.2008.

3. The respondents herein filed rejoinder to the miscellaneous application. The court below by the impugned order dismissed the miscellaneous case on the ground that the miscellaneous application filed under Order 9 Rule 13 of the Code of Civil Procedure is hopelessly barred by law of limitation, i.e. it is barred by three months 21 days.

4. The learned counsel Mr. (Dr.) Binay Kumar Singh on behalf of the appellant submitted that the court below gravely erred in deciding the limitation matter after going through the records without giving opportunity to the appellant to prove his case. According to the learned counsel, the appellant came to know about the ex-parte judgment and decree on 02.09.2008, therefore, the miscellaneous case, which was filed on 24.09.2008, was within limitation period. It is the specific case pleaded by the appellant in the miscellaneous application at paragraph 12 that the appellant came to know about ex-parte



judgment and decree on 02.09.2008. It is the case of the appellant that no notice/summon was ever served on the appellant, therefore, this fact has to be proved by the appellant but without giving any opportunity to the appellant the court below on the basis of perusal of the order sheet passed in the title suit dismissed the miscellaneous case on the ground that it is barred by three months 21 days. The learned counsel submitted that the court below while dismissing the application without going through the provisions of Limitation Act held that the miscellaneous case is to be filed within thirty days. On these grounds, the learned counsel submitted that the impugned order be set aside and the miscellaneous case be admitted for final disposal.

5. On the other hand, the learned senior counsel Mr. Ganpati Trivedi appearing on behalf of the respondents submitted that there is no illegality committed by the court below by passing the impugned order. The learned counsel submitted that although the case was made out in the miscellaneous case that the appellant came to know about the ex-parte judgment and decree 02.09.2008 but the court below after perusing the record of title suit found that in fact notice has already been validly served on him and the summons were even published in the newspaper. In such circumstances, the court below found that the appellant had the knowledge about the ex-parte judgment and decree on the date of judgment. Accordingly, the learned counsel

submitted that the miscellaneous appeal be dismissed.

6. Perused the record. Annexure-2 is the application under Order 9 Rule 13 of the Code of Civil Procedure filed by the appellant. At paragraph 3 it is specifically pleaded that in fact no summon was ever served on the applicant at any point of time muchless on 20.12.2007. At paragraph 12 it is specifically pleaded that the appellant was surprised on 02.09.2008 when the opposite 1st party no.2 went to the applicant for return of security and the plaintiffs disclosed on that date that Title Suit No.283 of 2007 was decreed against the Bank.

7. Article 123 of the Limitation Act provides that an application to set aside a decree passed ex-parte should be filed within 30 days from the date of decree or where the summon or notice was not duly served, when the applicant had knowledge of the decree. In the explanation of this Article 123 it is mentioned that for the purpose of this Article, substituted service under Order 5 Rule 20 of the Code of Civil Procedure shall not be deemed to be due service.

8. In view of the provision of the Limitation Act, limitation has been prescribed for 30 days from the date of decree when the summon or notice was duly served and 30 days from the date of knowledge, if notice was not duly served. Therefore, in view of this provision when the applicant specifically pleaded that summon or notice was not duly served, the limitation will start running from the

date of his knowledge. If he will be able to prove this fact by adducing evidence, the miscellaneous case will be allowed and if he will fail to prove this fact then ultimately the miscellaneous application will be dismissed but it cannot be said at this stage that the miscellaneous case is barred by law of limitation. From perusal of the impugned order, it appears that the court below has not at all considered this aspect of the matter. The court below even has not considered the provision as contained in Article 123 of the Limitation Act including the explanation.

9. In view of the settled proposition of law and the provision of Limitation Act, the impugned order passed by the court below is unsustainable in the eye of law. Thus, this miscellaneous appeal is allowed. The impugned order is set aside and the matter is remanded back to the court below for deciding the miscellaneous case on merit. Since the respondents, who are plaintiffs, have already appeared before this Court, the respondents are directed to appear in the aforesaid miscellaneous case. No further notice be issued to them. It is made clear that this order is passed in presence of the plaintiffs-respondents.

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(Mungeshwar Sahoo, J)