GAHC010015352019

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

Case No. : CRP 26/2019

1:RINAY BRAHMA
S/O- LATE RATNESWAR BRAHMA, R/O- COURT PARA, KOKRAJHAR TOWN, WARD NO. 10, P.O- KOKRAJHAR, DIST- KOKRAJHAR (BTAD), ASSAM, PIN- 783370

VERSUS

1:M/S. ASSAM TRADE AND AGENCIES
BARPETA ROAD, P.O- BARPETA ROAD, DIST- BARPETA, ASSAM, PROP SRI DURGESH CHANDRA CHOUDHURY, S/O- LATE RAM AWTAR CHOUDHURY, R/O- BARPETA ROAD NEAR NAMGHAR, P.O- BARPETA ROAD, PIN- 781315, DIST- BARPETA, ASSAM

Advocate for the Petitioner : MR. J ROY

Advocate for the Respondent : MR. B J GHOSH

BEFORE
HONOURABLE MR. JUSTICE PRASANTA KUMAR DEKA

ORDER

Date : 16-07-2020

Heard Mr. J. Roy, learned counsel for the petitioner and Mr. D. K. Dey, learned counsel for the respondent.

The petitioner is the defendant in Money Suit No. 6/2012 pending in the court of learned Civil Judge, Barpeta. The suit was preferred by the plaintiff respondent. In this revision petition order dated 28.11.2018 passed by the learned Civil Judge, Barpeta in Misc(J) Case No. 26/2015 arising out of Money Suit No. 6/2012 is challenged allowing an application

filed by the plaintiff respondent under Order IX Rule 9 of CPC restoring the suit which was dismissed for default on 6.11.2013.

The plaintiff respondent filed the suit for recovery of Rs.73,02,270/- alongwith 18% interest from the petitioner defendant. The suit was fixed for filing of evidence on affidavit-in-chief of the plaintiff respondent on 6.11.2013. The plaintiff respondent was absent on that day following which the impugned order dated 6.11.2013 was passed dismissing the suit for non prosecution. The plaintiff respondent filed two applications after about 18 months from the date of dismissal of the suit. The petition No. 863/2015 dated 10.7.2015 was filed under Order IX Rule 9 of the CPC for setting aside the dismissal order dated 6.11.2013. The other petition No. 862 dated 10.7.2015 was filed under Section 5 of the Limitation Act, 1963 for condonation of delay of 581 days in filing the restoration petition. The delay condonation petition was registered as Misc(J) Case No. 27/2015 which was allowed by the learned Civil Judge, Barpeta vide order dated 17.6.2016 with a cost of Rs 3,000/-. The petition under Order IX Rule 9 of the CPC was registered as Misc(J) Case No. 26/2015.

The plaintiff respondent in the application under Order IX Rule 9 CPC stated that he engaged one Mr. D. C . Nath as his counsel who resides at Abhayapuri. The said counsel engaged one junior Advocate Mr. Bismoi Das, for taking steps in the suit at Barpeta Court. On 13.6.2015 the plaintiff respondent met the said Advocate Mr. Bismoi Das who informed him about the dismissal of the suit on 6.11.2013. The plaintiff respondent upon enquiry came to know from Mr. Nath the counsel, engaged by him that due to communication gap the suit was dismissed and the said counsel assured that he would take necessary corrective steps. The plaintiff respondent applied for certified copy which was obtained on 26.3.2015 and after appointing another counsel, he filed restoration petition alongwith delay condonation petition. It was submitted further that the suit was dismissed for grounds beyond the control of the plaintiff respondent and there was delay as he was unaware of the dismissal order . Accordingly he prayed for restoration of the suit by recalling the dismissal order. The defendant petitioner filed his written objection against the said petition under Order IX Rule 9 of the CPC denying the grounds stated in the said application. The learned court below vide its impugned order allowed the said petition holding as follows:

‘‘*On perusal of case record it appears that the plaintiff remained absent without any steps on*

05.10.2013 and restoration petition was filed on 15.07.2015 with condonation of delay of filing the petition No. 863/15. Vide order dated 17.6.2016 delay was condone with cost of Rs. 3,000/- with condition precedent accordingly vide order dated 27.7.2016 the petitioner has deposited the cost.

The ground mentioned in the petition have not been substantiated there is only one vakalatnama dated 28.3.2012 appointing D. C. Nath and no iota evidence in the case record that the petitioner plaintiff advocate Bismoi Das. Para 5, Para 6 and Para 7,8 & 9 have also not been proved.

However, since there is a ground for adjudication of the case both facts and law and hence the petition is allowed with cost of Rs. 5,000/- which is a condition precedent along with a direction to the petitioner to lead evidence if any on his part within next date without fail.

With the above Misc(J) case is disposed of today on contest."

I have heard the submissions made by the learned counsel. The suit was dismissed due to non prosecution and as such the plaintiff respondent filed the application for restoration of the suit under Order IX Rule 9 of the CPC. It is provided under the said provision that when the suit is dismissed under Order IX Rule 8 of the CPC the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to cost or otherwise. On perusal of the impugned order the learned Court below came to the finding that the ground mentioned in the petition was not substantiated as there was only one vokalatnama appointing Mr. D. C. Nath and there was no evidence on record that the plaintiff respondent engaged another Advocate Mr. Bismoi Das. Other submissions were also not proved. After the said observation the learned court below allowed the application under Order IX Rule 9 of CPC by holding that there is a ground for adjudication of the case both in respect of facts and law.

In my considered opinion the said finding is not proper as while deciding an application under Order IX Rule 9 CPC a duty is cast upon the court to examine the sufficiency of causes shown by the plaintiff and then only the court must record its satisfaction of the cause/ causes shown for non appearance of the plaintiff respondent when the suit was called for hearing. The learned court below failed to exercise its jurisdiction and only because of the fact that there are issues to be adjudicated allowed the petition by the impugned order. The court below failed to record its satisfaction in respect of sufficiency of the causes shown for

the non appearance of the plaintiff respondent on the date of dismissal of the suit.

Accordingly I am constrained to set aside the impugned order and remand the same to the court below to decide the said petition under Order IX Rule 9 of the CPC afresh and give a finding to the requirements as herein above stated.

Interim order passed earlier stands vacated.

Petitioner shall submit a certified copy of this order after which the learned court below shall notify the date for appearance of the parties and decide the matter afresh.

JUDGE

Comparing Assistant