

S/L 5
29.9.2022
Court No.652
SD

CO 1428 of 2019

Jamsed Ali Mallick
Vs.
Sk Obed Ali & Ors.

Mr. Gautam Das
Ms. Madhumita Patra
Ms. Priyanka Mondal

...for the Petitioner.

Mr. Avirup Mondal
Mr. Ramij Munsî

...for the Opposite Parties.

Being aggrieved and dissatisfied with the impugned order dated 10.12.2018 passed by the learned Civil Judge (Junior Division), Additional Court, Hooghly in Title Suit No.426 of 2017, rejecting the prayer made by the defendant no.2 dated 12.12.2007 for setting aside the order for posting the suit for ex parte hearing against the defendant no.2, present revisional application has been preferred.

The petitioner contended that the plaintiffs/opposite parties filed a suit for declaration of their title and permanent injunction against the petitioner and proforma opposite party no.4 along with a prayer, inter alia, that the sale deeds executed and registered by defendant nos.3 to 7/proforma opposite party nos.5 to 9 herein dated 21.9.2017 and the sale deed being No.06109012 for the year 2017 in favour of the defendant nos.1 and 2 are void, illegal and inoperative. In the said suit, petition for injunction was filed

and the learned court was pleased to grant ad interim injunction.

The petitioner further submits that the matter was taken up on number of occasions and by an order dated December 12, 2017, the trial court held that the notice for suit and injunction has been served upon the defendant nos.1 and 2 and as such, trial court decided to proceed with the suit ex parte against both the defendants fixing 03.2.2018 for filing written statement by defendant nos.3 to 7. The defendant no.2 filed one application under Order 9 Rule 7 of the Code of Civil Procedure praying for setting aside of the order dated December 12, 2017 whereby the learned court observed that the summon has been duly served upon the said defendant and decided to proceed with the suit ex parte, against the petitioner/defendant no.2.

The aforesaid application under Order 9 Rule 7 of the Code of Civil Procedure was taken up for consideration by learned court and learned court dismissed the said application vide impugned order dated 10.12.2018.

Learned counsel for the petitioner submits that the application was rejected without considering the fact that the petitioner was out of station on and from October 1, 2017 to January 4, 2018 and to that effect he has filed certificate issued by his employer.

Learned counsel appearing on behalf of the opposite parties submits that the letter filed by the defendant no.1 is a computer generated print out certificate signed by a Samity

certifying that the defendant no.2 was working at their show room at Lucknow as per their attendance register but such computer generated print out is not admissible in evidence. On the contrary, it is very much apparent from the Bailiff's report, dated 04.12.2017 that the court bailiff went to the house of the defendant in order to serve the summon, but the defendant refused to accept the same and it makes clear that the defendant was present at his house when the court bailiff went to his house to serve the summon. Accordingly, the trial court was justified in rejecting the defendant's prayer for vacating the order and fixing the suit under the heading ex parte hearing.

I have heard the submissions made by both the parties.

It appears that in the present suit, there are seven defendants out of which defendant nos.3 to 7 have already appeared in the suit and contesting the suit. Only the defendant no.2/petitioner herein has filed a petition under Order 9 Rule 7 of the Code of Civil Procedure. In the Bailiff's report dated 04.12.2017 it has not been mentioned which defendants, out of the aforesaid seven defendants were present and who has actually refused to receive the summon. Furthermore, it appears that the present defendant, namely, Jamsed Ali Mallick had filed one certificate which shows that he was at Lucknow from October 1, 2017 to January 4, 2018.

Apart from all these considerations, it appears to me that when defendant no.2 is eager to contest the suit, if the

defendant no.2 is allowed to appear and contest the suit, the highest prejudice that may cause to the plaintiff/opposite parties will be that the suit will be disposed of on merit after contested hearing and nothing more.

In view of the above, the order impugned dated 10.12.2018 is hereby set aside and CO 1428 of 2019 is allowed.

The defendant no.2 is hereby allowed to file his written statement within a period of four weeks from the date of communication of the order. I am told that other contesting defendants have already filed written statement. In the event, such written statement is filed by the defendant no.2 the trial court shall frame issue within a period of 15 days thereafter and the trial court will make every endeavour to dispose of the entire proceeding of the suit preferably within a period of one year from the date of framing of issue. In case defendant no.2 failed to comply the order, the order impugned shall stand affirmed.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)