BOGIDHOLA TEA AND TRADING CO. LTD. AND ANR. A

v.

HIRA LAL SOMANI

DECEMBER 7, 2007

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[S.B. SINHA AND G.S. SINGHVI, JJ.]

*Code of Civil Procedure, 1908—O.8 r.10—Invoking of—Suit—Non-appearance of defendant despite service of summons—Prayer for decree under O.8 r.10—Plaintiff declined to examine any witness—***Ex-parte** *decree—Application for setting aside* **ex-parte** *decree on the ground that suit was barred by limitation—Dismissed by Courts below—Correctness of—Held: Not correct—It was duty of Court to consider if suit was barred by limitation even when no such defence raised—In case suit barred by limitation, Court had no jurisdiction to pass decree—Even otherwise, plaintiff was bound to prove his case—Trial Court erred in invoking O.8 r.10—***Ex parte** *decree set aside—Limitation Act, 1963—s.3.*

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The parties were on business terms. The appellants were to supply 'made tea' for the year 1984 and 1985 to the respondent. They supplied lesser quantity of 'made tea' for both years. Respondent filed a suit towards the price of the remaining amount for terminal tea supply. Despite service of summons, the appellants did not appear. The respondent made a prayer before the trial court to pass decree under O.8 r.10 CPC. He declined to examine any witness. The trial court passed *ex-parte* decree stating that *prima facie* case was made out in favour of the respondent-plaintiff. An application was filed for execution of decree in 1997. Summons in the said execution case were served upon the appellants. The execution proceeding were stayed in July, 2000. In September, 2000, the appellants filed an application under O.9 r.13, CPC for setting aside the said *ex-parte* decree. The said application was dismissed on the ground that the appellants could not satisfactorily explain the cause

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A for delay in filing the said application, as also in view of Article 123 of the Schedule appended to the Limitation Act, 1923. The revision thereagainst was also dismissed. Liberty, however, was granted to the appellants to prefer an appeal against the original decree. An appeal thereafter was filed by the appellants along with an B application for condonation of delay. The High Court refused to condone the delay and consequently dismissed the appeal.

In appeal to this Court, the appellants contended that it was obligatory on the part of the trial judge to satisfy itself about the *bona fide* of the claim of the plaintiff-respondent and; that having regard C to the fact that the last advance was purported to have been made on 19.6.1985, the suit which was filed on 2.1.1989 was barred by limitation.

Disposing of the appeal, the Court

D HELD: 1. Ordinarily, this Court would not interfere in such a matter. However, it appears to be a gross case. Appellants had shown that the *ex-parte* decree *ex-facie* suffers from non-application of mind. Had the Judge applied its mind even to the averments made in the plaint, he should have asked himself the question as to whether in E absence of any acknowledgment in writing, as a result whereof the period of limitation would start running afresh, the suit could have been decreed. S.3 of the Limitation Act, 1963 mandates that a Court would not exercise its jurisdiction for any relief in favour of a party if the same is found to be barred by limitation. Although such a F defence was not raised, the statute obligated upon the Court of law to consider as to whether a suit is barred by limitation or not. In the event it was found that the suit was barred by limitation, the Court had no jurisdiction to pass a decree. It was, therefore, essential for the trial judge to pose unto itself the right question, particularly when G without adduction of oral evidence the pleading raised in the plaint could not be said to have been established. It was, therefore, not a case where the Court could have invoked the provisions of O.8 r. 10 CPC. Even otherwise, the suit was set down for *ex-parte* hearing. The trial judge stated that only a *prima-facie* case was found out from H the plaint and other documents which were not sufficient for passing

a decree as therefor the plaintiff was bound to prove his case. A

[Para 11] [1158-F, G; 1159-A, B, C]

2. Having regard to the peculiar facts and circumstances of this case, it is a fit case where the High Court should have condoned the delay. In the interest of justice, the *ex-parte* decree is set aside. This order shall, however, be subject to the condition of deposit of a sum of Rs.1 lakh by the appellant before the Executing Court and a sum of Rs. 25,000/- to the respondent towards costs. B

[Paras 12 and 13] [1159-C, D, E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5771 of C 2007.

From the final Judgment and Order dated 3.1.2007 of the Gauhati High Court in MC No. 3398 of 2004 in RFA No. 122 of 2004.

Vijay Hansaria, Sneha Kalita and Shankar Divate for the Appellants. D

Manish Goswami, Ashok Panigrahi (for M/s. Map & Co.) for the Respondent.

The Judgment of the Court was delivered by

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S.B. SINHA, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 3.1.2007 passed by the Gauhati High Court in MC No. 3398/2004 whereby and whereunder the appeal preferred by the appellants herein from a judgment and decree dated 19.4.1990 passed in Suit No. 2/89, F was dismissed on the premise that the appellants had not shown sufficient cause for condonation of 10 months' delay in filing the said appeal.

3. The parties herein were on business terms. Appellants were to supply 22,000 Kgs. of 'made tea' for 1984 season and 50,000 Kgs. of G 'made tea' for 1985 season to the respondent. However, the appellants supplied only 5,547 Kgs. of 'made tea' for 1984 season and 18.245 Kgs. of 'made tea' for 1985 season. Respondent filed a suit for a decree for a sum of Rs. 5,22,69.66 paise together with interest thereon at the rate of 18% per annum. A suit was filed towards the price of the remaining H

A amount for terminal tea supply. In paragraphs 5 of the plaint, the respondent *inter alia* averred:

> "The price for other remaining quantity of made tea of 1985 season made available by the defendants to the plaintiff, could not be finalized as the same were found to have no proper market and
B hence were not saleable at Jorhat. At such as per instruction/ discussion of the defendants, remaining qualities of 14,796 of made tea of 1985 season were sent to the tea action market at Guwahati and in Calcutta. The sale proceeds of the said tea on sale of auction markets were to be adjusted with the advances already made by
C the plaintiff to the deponents. After 18.04.85 the plaintiff had paid a total sum of Rs. 6,22,116 inclusive of Rs. 1,30,000 as shown in schedule 'A' below."

The first Bill referred to in this appeal reads thus:

D "Bill dated 5.6.85 for.....	Rs. 46,595.80
Bill dated 5.6.85 for.....	Rs. 86,225.00
For sale proceeds on 16.8.85	Rs. 79, 824.91
E For sale proceeds on 26.8.85	Rs. 4,608.60
For sale proceeds on 9.9.85	Rs. 9,101.83
For sale proceeds on 19.9.85	Rs. 3766.70
For sale proceeds on 12.11.85	Rs. 2502.54
F For sale proceeds on 9.12.85	Rs. 30, 615.48
For sale proceeds on 23.12.85	Rs. 30, 9119.62
For sale proceeds on 3.1.86	Rs. 5,945.78
G For sale proceeds on 20.1.86	Rs. 9,784.28
	Rs. 3,18,089.54

4. Allegedly, despite service of summons the appellants did not
H appear. The plaintiff-respondent made a prayer before the Trial Court that

a decree be passed under Order 8 Rule 10 of the CPC. He declined to examine any witness. The learned Trial Court by a judgment and order dated 19.4.1990 decreed the suit stating:

> "Learned lawyer of the plaintiff side is present filing his hazira. Defendants side is absent without any step. Seen the previous orders of this Court. The suit is taken up for *ex-parte* hearing. Heard learned counsel for the plaintiff. He submits Court to take action under Order VIII Rule 10 of the C.P.C. and declined to examine any P.W. Hence, perused the plaint and the relevant documents submitted by the plaintiff in support of his plaint. *Prima facie* case is held proved in favour of the plaintiff as per plaint.
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> The suit is decreed on *ex-parte* for realization of Rs. 5,22,669.66 p with costs of the suit and future interest per plaint as prayed for."

5. Appellants contended that they were not aware of passing of the said decree. In the year 1997, an execution case was filed. Summons in the said execution case were served upon the appellants. One Shri Tapan Gogoi was appointed as an Advocate in the said execution case. However, no further steps were taken. The execution proceeding was stayed on 15.7.2000.

6. In the month of September, 2000, the appellants herein filed an application under Order 9 Rule 13 of CPC for setting aside the said *ex-parte* decree. An application for condonation of delay in filing the suit was also filed. The said application was dismissed by an order dated 22.9.2003 as the appellants could not allegedly satisfactorily explain the cause for delay in filing the said application as also in view of Article 123 of the Schedule appended to the Limitation Act, 1923.

7. A civil revision application was preferred thereagainst which was also dismissed by the High Court by its order dated 2.1.2004. Liberty, however was granted to the appellants to prefer an appeal against the original decree. An appeal thereafter was filed by the appellants along with an application for condonation of delay. The High Court by reason of the impugned judgment refused to condone the delay and consequently

A dismissed the appeal.

8. Mr. Hansaria, learned Senior counsel appearing on behalf of the appellants, *inter alia,* would submit that the High Court committed a serious error in passing the impugned judgment in so far as it failed to take into consideration that assuming that the defendant-appellants had B not filed written statement, it was obligatory on the part of the Trial Judge to satisy itself about the *bona fide* of the claim of the plaintiff-respondent. Learned counsel urged that having regard to the fact that the last advance was purported to have been made on 19.6.1985, the suit which was filed on 2.1.1989 was barred by limitation.

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9. Learned counsel appearing on behalf of the respondent, on the other hand, submitted that assuming that the learned Trial Judge should not have granted a decree in terms of Order 8 Rule 10 of the CPC. the appellants were obligated to explain the delay in preferring an appeal. The D appeal being continuation of the suit, the learned counsel would submit that if the same could not have been entertained on the ground of being barred by limitation, the question of setting aside the decree by the High Court in exercise of its appellate jurisdiction did not and could arise.

10. While issuing notice in terms of orders dated 16.04.2007, this E Court directed the appellants to deposit a sum of Rs. 2 lakhs before the Executing Court within four weeks from the said date. It is stated before us by learned senior counsel Mr. Hansaria, that the aforementioned sum has been deposited on or about 25.6.2007.

F 11. Ordinarily, we would not have interfered in such matter. However, it appears to be a gross case. Appellants before us have been able to show that the *ex-parte* decree dated 19.4.1990 passed by the learned Additional District & Sessions Judge, Jorhat, *ex-facie* suffers from non-application of mind. Had the learned Judge applied its mind even to the G averments made in the plaint, he should have asked himself the question as to whether in absence of any acknowledgment in writting, as a result whereof the period of limitation would start running afresh, the suit could have been decreed. Section 3 of the Limitation Act, 1963 mandates that a Court would not exercise its jurisdiction for any relief in favour of a party if the same is found to barred by limitation. Although such a defence H

has not been raised, the statute obligated upon the Court of law to consider as to whether a suit is barred by limitation or not. In the event it was found that the suit was barred by limitation, the Court had no jurisdiction to pass a decree. It was, therefore, essential for the learned Trial Judge to pose unto itself the right question, particularly when without adduction of oral evidence the pleading raised in the plaint could not be said to have been estalished. It was, therefore, not a case where the Court could have invoked the provisions of Order 8 Rule 10 of the CPC. Even otherwise, the suit was set down for *ex-parte* hearing. The learned Trial Judge stated that only a *prima-facie* case was found out from the plaint and other documents which were not sufficient for passing a decree as therefor the plaintiff was bound to prove his case.

12. For the reasons aforementioned, having regard to the peculiar facts and circumstances of this case, we think that it is a fit case where the High Court should have condoned the delay. We, therefore, set aside the judgment of the High Court. Ordinarily, we would have remitted the matter back to the High Court for consideration thereof on merit of the appeal, but as we have ourselves looked to the records of the case, we are of the opinion that interest of justice would be subserved if we set aside the ex-parte decree dated 19.4.1990. We direct accordingly.

13. This order shall, however, be subject to the condition that the appellants shall deposit a further sum of Rs. 1 lakh before the Executing Court which shall be subject to the outcome of the suit. Appellants shall further pay a sum of Rs. 25,000/- to the respondent towards costs. The respondent shall be entitled to withdraw the sum deposited by the appellants, upon furnishing security.

14. Appellants may file written statements before the Trial Court within six weeks and the learned Trial Judge may consider the desirability of disposing of the suit within three months from the date of receipt of this order.

15. The appeal is disposed of with the aforementioned observations and direction.

D.G. Appeal disposed of.