

CIVIL REVISION

Present :

The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on 06.09.2010

C.O. No. 995 of 2009

Sibratan Chowdhury.

Versus

Rathindra Nath Kundu.

Points:

Scope of Revision- Trial court allowed the application for restoration on consideration of the evidence adduced by the defendant whether revisional court can interfere with the order.- Code of Civil Procedure, 1908 S.115

Facts:

Plaintiff instituted a suit for specific performance of contract. The defendant/petitioner entered appearance in the suit. In June, 2005 the mother-in law of the petitioner was ill and bedridden and for that reason the petitioner could not contract his lawyer. Subsequently, the petitioner also became ill and he could not attend court on February 14, 2006. Even he could not intimate his lawyer over telephone for which the suit was decreed ex parte against him. He filed an application under Order 9 Rule 13 of the C.P.C. which was allowed on contest by the impugned order.

Held:

Upon consideration of the evidence, the learned Trial Judge believed in the evidence adduced by the defendant. This is not a Court of appeal but a Court exercising revisional jurisdiction. Revisional Court has limited scope to consider the evidence adduced by the parties. Since, the plaintiff has not

adduced other evidence save and except denial and the defendant adduced positive evidence in support of his contention, the learned Trial Judge has accepted the evidence adduced by the defendant. The finding of the learned Trial Judge cannot be said to be perverse or without any evidence. Learned Trial Judge has believed in the evidence adduced by the defendant and came to the conclusion that the defendant has shown sufficient cause for non-appearance and there is nothing to interfere. Para 8 - 10

For the petitioner: Mr. Bidyut Banerjee,

Mr. Debabrata Acharya,

Ms. Shila Sarkar,

Mr. Prabir Adhya.

For the opposite parties: Mr. Ashish Ch. Bagchi,

Ms. Malyashree Maity.

Prasenjit Mandal, J.: This application is at the instance of the plaintiff and is directed against the order no.106 dated September 23, 2008 passed by the learned Civil Judge (Junior Division), First Court, Krishnagar in Misc. Case No.10 of 2006 thereby allowing the said misc. case under Order 9 Rule 13 of the Code of Civil Procedure.

2. The short fact of the case is that the plaintiff instituted a suit for specific performance of contract and other reliefs. The defendant was contesting the suit. In June, 2005 the mother-in law of the petitioner was ill and bedridden and for that reason the petitioner could not contract his lawyer. Subsequently, the petitioner also became ill and he could not attend court on February 14, 2006. Even he could not intimate his lawyer over telephone for which the suit was decreed ex parte against him. The petitioner was not

negligent in taking appropriate steps in the suit. Even he filed an application before the Hon'ble High court against rejection order dated June 6, 2005. He could not attend the court on February 14, 2006 due to illness of his wife and for that reason, the suit was decreed ex parte against him. Against such order, the defendant/opposite party filed an application under Order 9 Rule 13 of the C.P.C. which was allowed on contest by the impugned order. Being aggrieved, the plaintiff/petitioner has preferred this application.

3. Mr. Banerjee, learned Advocate appearing on behalf of the petitioner, submits that though the petitioner has stated in his application that his mother-in-law was ill. In fact, during deposition he has stated that his mother was ill in June, 2005 and she was bedridden for which he could not contact his lawyer. He has also contended that on February 14, 2006, the opposite party did not attend court on the ground that his wife was ill and as such, he was not able to attend court. But the fact is that on February 14, 2006 the conducting lawyer of the defendant informed the Court that his client is not willing to proceed with the suit. In fact, on that day the defendant attended his office.

4. On the other hand, Mr. Bagchi, learned Advocate appearing on behalf of the opposite party, submits that in this case the question to be looked into is whether the defendant had explained sufficient cause for non-appearance. If the Court believes that there was sufficient cause for non-appearance, Court could well set aside the ex parte decree.

5. Therefore, the point that emerges for decision in this application is whether the impugned order can be sustained.

6. Upon hearing the learned Advocate for the parties and on going through the materials on record, I find that the defendant/opposite party was contesting with the suit filed by the plaintiff for specific performance of

contract. That suit was fixed for peremptory hearing on February 14, 2006 and on that day the learned Advocate for the defendant appeared and submitted that the defendant will not take any further step in the suit. Again, the revisional application filed by the defendant before the Hon'ble High Court has been rejected on August 25, 2005. Under the circumstances, the learned Trial Judge has proceeded with the suit ex parte and passed the ex parte decree on that day.

7. The defendant adduced evidence in support of his contention. The P.W.1 has stated that his mother is suffering from various illness since 2005 and he died in the year 2006 and due to illness of his wife, she was under the treatment of one Dr. Sajal Nandi from February 10, 2006 to February 17, 2006. Here, I find that the Dr. Sajal Nandi has been examined as P.W.2 and he has clearly stated that he had been to the house of the defendant on February 10, 2006 to examine the wife of the defendant and that he had also gone to the house of the defendant on February 14, 2006. Against such positive evidence, the plaintiff examined himself simply denying the statement made by the defendant describing that the ground stated is not true and the medical certificate issued by the doctor was not genuine.

8. Upon consideration of the evidence, the learned Trial Judge believed in the evidence adduced by the defendant. This is not a Court of appeal but a Court exercising revisional jurisdiction. Therefore, I have limited scope to consider the evidence adduced by the parties. Since, the plaintiff has not adduced other evidence save and except denial and the defendant adduced positive evidence in support of his contention, the learned Trial Judge has accepted the evidence adduced by the defendant.

9. This being the position, the finding of the learned Trial Judge cannot be said to be perverse or without any evidence. Whatever may be the reason

stated by the learned lawyer for the defendant that the defendant is not willing to proceed or that the defendant attended office on February 14, 2006, I find that the learned Trial Judge has believed in the evidence adduced by the defendant and came to the conclusion that the defendant has shown sufficient cause for non-appearance on February 14, 2006.

10. This being the position, in exercising the revisional jurisdiction, I hold that there is nothing to interfere with the impugned order.

11. Under the circumstances, this application fails to succeed. It is, therefore, dismissed.

12. Considering the circumstances, there will be no order as to costs.

13. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

(Prasenjit Mandal, J.)