Supreme Court of India
Manick Chandra Nandy vs Debdas Nandy And Ors. on 20 December, 1985
Equivalent citations: AIR 1986 SC 446, 1985 (2) SCALE 1478, (1986) 1 SCC 512, 1986 (1) UJ 209 SC
Author: D Madon
Bench: D Madon, G Oza
JUDGMENT D.P. Madon, J.

1. This Appeal by Special Leave granted by this Court is directed against a common judgment and order of the High Court of Calcutta passed on January 28, 1981, allowing two applications Under Section 115 of the CPC, 1908, and setting aside the order of the Additional Subordinate Judge, Bankura, whereby the learned Additional Subordinate Judge in an application Under Rule 13 of Order IX of the CPC had set aside an ex-parte decree passed against the Appellant and Respondent No. 10.

2. The parties are governed by the Dayabhaga School of Hindu law. Gopal Chandra Nandy and Jugal Kishore Nandy were brothers who both died prior to the litigation out of which this Appeal arises. Respondents Nos. 5 to 9 are the sons of Gopal Chandra. The Appellant and Respondent No. 10 are the sons of the 5th Respondent, Narender Nath. Respondent No. 1 is the son, Respondents Nos. 3 and 4 are the daughters and Respondent No. 2 is the widow of Jugal Kishore. On October 14, 1974, Respondents Nos. 5 to 9 filed a suit for partition in the Court of the Subordinate Judge, Bankura, being Title Suit No. 93 of 1974, against the other Respondents and the Appellant for partition. It was averred in the plaint that the Appellant and Respondent No. 10 were the benamidars of Gopal Chandra and Jugal Kishore in respect of some of the properties mentioned in the suit and they had no right or title therein. The plaint concluded by stating, "For the sake of justice they were made the principal defendants". It would thus appear that the suit was really filed against the Appellant and Respondent No. 10 to obtain a declaration that they had no right, title or interest in certain properties which stood in their names. We are concerned in this Appeal with only one of these properties, namely, Bharat Oil Mill. There was a registered deed of partnership dated July 8, 1957, whereby the said Mill was held in partnership by Respondents Nos. 5 to 9 who were the Plaintiffs in the suit, Respondent No. 1 who was Defendant No. 1 in the suit and the Appellant who was Defendant No. 5 in the suit. Under the said deed of partnership, the shares of Respondent Nos. 5 to 9 aggregated to 38 per cent in the capital, profits and losses of the said firm of Bharat Oil Mill. The share of Respondent No. 1 was also 38 per cent while the share of the Appellant was 24 per cent. While in one part of the plaint it was stated that the Appellant and Respondent No. 10 had no right, title or interest in some of the properties, which included the said Mill, in another part of the plaint it was stated that during the life time of Gopal Chandra and Jugal Kishore, Respondent No. 2, the wife of Jugal Kishore, and Tarasundri Dasi, the wife of Respondent No. 5 and the Appellant's mother, had acquired certain properties in which Jugal Kishore and Gopal Chandra had no right or title and their successors had no claim to the said properties for they were the personal properties of Respondent No. 2 and the said Tarasundri Dasi.

3. On December 16, 1974, Respondents Nos. 5 to 9, who were the Plaintiffs to the said suit, and Respondents Nos. 1 to 4, who were Defendants Nos. 1 to 4 in the said suit, filed a petition before the learned Subordinate Judge stating that they had compromised the said suit. The next day the said

compromise was taken on record and a date was fixed for Respondents Nos. 5 to 9, namely, the Plaintiffs, to adduce ex-parte evidence against the Appellant and Respondent No. 10. On February 6, 1975, a compromise decree was passed by the learned Subordinate Judge as between Respondents Nos. 5 to 9 and Respondents Nos. 1 to 4 and an ex parte decree against the Appellant and Respondent No. 10 in terms of the said compromise. Under the terms of the said compromise all the properties in suit were divided amongst Respondents Nos. 1 to 9, the said Mill coming to the share of Respondent No. 1 exclusively. It may be noted that neither the Appellant nor Respondent No. 10 was a party to the said compromise.

4. On December 2, 1975, the Appellant filed an application Under Rule 13 of Order IX of the CPC, being Miscellaneous Case No. 128 of 1975, to set aside the said ex parte decree. The Appellant contended in the said application that he had not been served with the writ of summons in the said suit and that the said decree had been collusively obtained and that he had come to learn about it only on November 4, 1975. He further averred that he was not a benamidar for anyone, that he had been paying income-tax on the income received by him as his share of profits in the said firm of Bharat Oil Mill and that the Income-tax authorities had investigated the matter and had held that he was carrying on business on his own account and had obtained money from his mother for becoming a partner in the said business of Bharat Oil Mill. The Appellant's said Application was opposed by Respondents Nos. 1 to 9 who contended that the Appellant had been duly served with the writ of summons and the said application was, there- fore, barred by limitation. After taking evidence, the learned Additional Subordinate Judge came to the conclusion that the summons was not duly served upon the Appellant and that the said application was not barred by limitation and he accordingly allowed the said application with costs and set aside the said ex parte decree as against the Appellant and Respondent No. 10. Respondents Nos. 1 to 4 as also some of the other Respondents thereupon filed applications in revision in the Calcutta High Court. The High Court held that there was no formal order issuing process upon the Defendants in the said suit, but process was in fact issued by the office. It further held that there were some irregularities in this regard and that though there was no formal order indicating acceptance of the service as good and proper, this fact alone would not entitle the Appellant to have the decree set aside unless he could show that he was prevented from filing his application within the period of limitation. It was the Appellant's case that he came to learn about the decree only in the first week of November, 1975, first from his uncle who was Plaintiff No. 3 in the suit, namely, Respondent No. 7, and thereafter by making inquiries through an advocate. The High Court referred to the fact that the Appellant had admitted in cross-examination that he was on good terms with his father and uncle. The High Court observed, "There would be no reason for the father and uncle who were parties to the compromise and who are not shown to have any interest adverse to the applicant, to keep the fact of such a decree a closely guarded secret". In view of this, the High Court held that it was not satisfied on the evidence that the Appellant had no knowledge of the decree prior to the first week of November 1975, and held that the Appellant's said application Under Rule 13 of Order IX was barred by limitation. The High Court accordingly allowed the said revision applications and dismissed the Appellant's said application with no order as to costs. It is against this judgment and order of the High Court that the present Appeal has been filed with leave granted by this Court. Only Respondents Nos. 1 to 4, who were Defendants Nos. 1 to 4 in the suit, have appeared at the hearing of this Appeal.

5. We are constrained to observe that the approach adopted by the High Court in dealing with the two revisional applications was one not warranted by law. The High Court treated these two applications as if they were first appeals and not applications invoking its jurisdiction Under Section 115 of the CPC. The nature, quality and extent of appellate jurisdiction being exercised in first appeal and of revisional jurisdiction are very different. The limits of revisional jurisdiction are prescribed and its boundaries defined by Section 115 of the CPC. Under that section revisional jurisdiction is to be exercised by the High Court in a case in which no appeal lies to it from the decision of a subordinate court if it appears to it that the subordinate court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction vested in it by law or has acted in the exercise of its jurisdiction illegally or with material irregularity. The exercise of revisional jurisdiction is thus confined to questions of jurisdiction. While in a first appeal the court is free to decide all questions of law and fact which arise in the case, in the exercise of its revisional jurisdiction the High Court is not entitled to re-examine or re-assess the evidence on record and substitute its own findings on facts for those of the subordinate court. In the instant case, the Respondents had raised a plea that the Appellant's application Under Rule 13 of Order IX was barred by limitation. Now, a plea of limitation concerns the jurisdiction of the court which tries a proceeding, for a finding on this plea in favour of the party raising it would oust the jurisdiction of the court. In determining the correctness of the decision reached by the subordinate court on such a plea, the High Court may at times have to go into a jurisdictional question of law or fact, that is, it may have to decide collateral question upon the ascertainment of which the decision as to jurisdiction depends. For the purpose of ascertaining whether the subordinate court has decided such a collateral question rightly, the High Court cannot, however, function as a court of first appeal so far as the assessment of evidence is concerned and substitute its own findings for those arrived at by the subordinate court unless any such finding is not in anyway borne out by the evidence on the record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand, would result in grave injustice to a party.

6. In the present case certain facts were undisputed. The order sheet of the Trial Court shows that on October 14, 1974, the plaint was filed, and registered. Along with the plaint a requisition for issue of summons was also filed on the same date. As the value of the agricultural lands which were part of the properties in the suit had not been shown in the statement of valuation filed along with the plaint and there were some blanks in the body of the plaint, the matter was adjourned to November 20, 1974, for passing orders in the presence of the advocate of the Plaintiffs, namely, Respondents Nos. 5 to 9. On November 20, 1974, the Plaintiffs were asked to cure the defects in the plaint by December 6, 1974. On December 6, 1974, the Plaintiffs filed a petition for amendment of the plaint, which petition was allowed and the amended plaint was ordered to be registered. The Plaintiffs also filed a verified statement of valuation and it was made a part of the plaint and the Sheristadar of the court was asked to check the valuation and give his report by December 17, 1974. On the same date Defendants Nos. 1 to 4, that is Respondents Nos. 1 to 4 before us, appeared and asked for time to file the written statement and time for this was allowed until December 17, 1974. The suit thus stood adjourned to December 17, 1974. It is pertinent to note that it was only on December 6, 1974, when Defendants Nos. 1 to 4, who are Respondents Nos. 1 to 4, appeared that the defects in the plaint were removed. Though a requisition for issuing the writ of summons had been filed with the original plaint, no process could have issued prior to the removal of the defects in the plaint. Further, on that date the plaint was allowed to be amended and the amended plaint was registered. It is, therefore,

obvious that Respondents Nos. 1 to 4 appeared of their own accord without any summons being served upon them. Though on December 6, 1974, the suit was adjourned to December 17, 1974, on December 16, 1974, the Plaintiffs, that is, Respondents Nos. 5 to 9, and Respondents Nos. 1 to 4 filed a petition of compromise and it was ordered to be put up on the date fixed for the next hearing of the suit, namely, on December 17. 1974. On that date the said petition of compromise was taken on file and the plaintiffs were directed to produce evidence ex pane, if any, as against the other Defendants, that is, the Appellant and Respondent No. 10, by December 23, 1974. Thereafter, on various dates the Plaintiffs kept on asking for time to adduce their evidence ex pane and ultimately on February 6, 1975, the said compromise was accepted by the court. The order sheet of that date further states, "No steps taken by the Defendants 5 and 6 who are also found absent on repeated calls. So the suit is taken up for ex parte hearing as against them. P. W. 1 Rabindra Nath Nandy (that is Respondent No. 8 who was Plaintiff No. 4 in the suit) is examined for the Plaintiff". The court then passed the order "that the suit be decreed on compromise against Defendants Nos. 1 to 4 and ex parte against the rest without costs as per terms of the petition of compromise which do form part of the decree".

7. A perusal of the order sheet thus establishes the following facts, namely,-

(1) the plaint which was filed on October 14, 1974, was defective inasmuch as the valuation of the agricultural land in suit had not been shown in the valuation statement and there were blanks left in the body of the plaint ;

(2) no writ of summons could have, therefore, been issued on October 14, 1974 ;

(3) the defects in the plaint were directed to be removed only by the order dated November 20, 1974 ; -

(4) a complete valuation statement was filed on December 6, 1974, and further an application for amendment of the plaint was made on that date which was allowed ;

(5) the amended and corrected plaint was registered only on December 6, 1974 ;

(6) the writ of summons could, therefore, have been issued earliest only on December 6, 1974;

(7) Defendants Nos. 1 to 4 (Respondents Nos. 1 to 4 to this Appeal) appeared on December 6, 1974, and time to file a written statement was given to them till December 17, 1974 ;

(8) as no summons had been issued or could have been issued till then, Respondents Nos. 1 to 4 appeared of their own accord ;

(9) the first time that the date December 17, 1974, appeared in the order sheet is in the order dated December 6, 1974 ;

(10) there is no directions given on December 6, 1974, or on any other date for issue of summons to the other Defendants, namely, the Appellant and Respondent No. 10 nor is there any indication of

any date fixed for their appearance ;

(11) there is no mention any where in the order sheet of the writ of summons having been served upon the Appellant or Respondent No. 10.

8. These facts clearly show that the Appellant and Respondent No. 10 had not been served with the writ of summons. Assuming that even after this, there be any lingering doubt as to this fact, the same is completely dispelled by the evidence of the process server Aswini Kumar Man, which was taken at the hearing of the Appellant's said application and the writ of summons arid the return affixed thereto which were produced during the course of the evidence of this witness.

9. The writ of summons is dated October 14, 1974. As mentioned above, no process could have possibly issued on that date. What is even more strange is that the writ of summons calls upon the defendants to appear either in person or through a duly instructed lawyer on November 27, 1974. There is no order of the date "November 27, 1974" to be found in the order sheet, and if the date fixed for appearance were November 27, 1974, it is difficult to understand how Respondent Nos. 1 to 4 appeared for the first time only on December 6, 1974. According to the return of the process server, he went on October 19, 1974, at 12 noon to Nungola Road, searched for the Defendants, found them, showed them copies of the writ of summons, explained the contents thereof to them and asked them to accept the same by giving receipts but as they refused to do so he hung the copies of the summons on the main doors of their respective residential houses. At the foot of the return, there is an endorsement made by the process server stating that "I have served this summons in the manner written above". Below it the names of two witnesses, namely, Rabi Rochan Sen, Guiram Modak appear with the note that "the two witnesses have not signed their own names". The return does not mention who had accompanied the process server nor who had identified the different Defendants and their respective residential houses. It also does not mention the reason why the two witnesses whose names were mentioned in the summons had not signed the return. In his evidence the process server stated that the witnesses of service were not known to him. While the return mentions that he had hung the summons on the main door of the respective residential houses of the Defendants, his evidence shows that the summons was fixed only on the door of one house and that he could not say how many doors were there in that house. He further deposed that the said house was shown to him by Plaintiff No. 1, namely, Respondent No. 5. This fact is not to be found in the return. We find the evidence of the process server wholly unworthy of any credence. The Appellant in his : evidence stated that he was an anesthetist working in the local Medical College and Hospital and his hours of duty began at 9.30 or 10.00 a.m, and lasted till 1.30 or 2.00 p.m. and that on October 19, 1974, he was on duty at the hospital. He further deposed that in 1974 he was not residing at Nungola Road but had been residing for twenty years at Provincial Road and thereafter at Nityananda Ashram Road. He further deposed that in the first week of November 1975, he learnt about the suit from his uncle, Respondent No. 7 (who was Plaintiff No. 3 in the suit) and thereafter requested a lawyer to find out the details of the suit and that on November 14, 1975, the lawyer informed him that the suit had been decreed ex-parte. In his cross-examination, he stated that the duty card and the attendance register maintained by the Medical College and Hospital would show his hours of duty and the fact that he was at the hospital from morning till about 1.30 or 2.00 p.m. on October 19, 1974. He was not challenged to produce this documentary evidence.

10. Before we turn to the High Court judgment, two other facts require to be mentioned. Under Rule 19 of Order V of the CPC as substituted by the Calcutta High Court when a defendant refuses to accept service and the service is effected by fixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, the court shall, it" the return has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and "shall either declare that the summons has been duly served or order such service as it thinks fit". Under Rule 19A of Order V which was added by the Calcutta High Court in Order V of the CPC, a declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons. Under Rule 6(1) of Order IX of the CPC, prior to its amendment by the CPC (Amendment) Act, 1976 (Act No. 104 of 1976), where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served, the court may proceed ex-parte. There is nothing in the order sheet to show that the Trial Court took any evidence to ascertain whether the summons was duly served or not. It neither examined the process server nor treated the above return of service as sufficient proof. It did not record that the summons had been duly served but merely called out (he names of the Appellant and Respondent No. 10 and thereafter proceeded to pass an ex parte decree against them.

11. Under Article 123 in the Schedule to the Limitation Act, 1963, the period of limitation for making an application to set aside, a decree passed ex parte is thirty days from the date of the decree or when the summons or notice was not duly served, when the applicant had knowledge of the decree. The question of knowledge of the decree by the applicant only arises where the summons or notice has not been duly served. The High Court, however, did not give any categorical finding on the question whether the summons was or was not duly served. It merely held that the process was, in fact, issued by the office but there was irregularity in that regard and then proceeded to consider whether the Appellant had knowledge of the decree. Knowledge of the passing of the decree is a question of fact and would be a collateral fact upon which the determination of the question of jurisdiction of the court would depend. The High Court upset the judgment of the Additional Subordinate Judge on this point on two grounds. It held that the Appellant in his said application had not stated that he was living at a place different from the ancestral house and that he would not have failed to mention this fact had he been really living elsewhere. The evidence of the Appellant on this point was, however, categorical and none of the Respondents had stepped into the witness-box to depose that the Appellant was residing in the ancestral house. Further, assuming that the Appellant was residing in the ancestral house, the evidence of the Appellant was clear that from about 9.00 a.m. to 1.30 or 2.00 p.m. on October 19, 1974, he was at the Medical College and Hospital. This part of his evidence was also not challenged in cross-examination and he was not asked to produce the documents in which he stated that this fact was to be found, namely, the duty card and attendance register of the said hospital. The real ground upon which the High Court held that the Appellant had knowledge of the decree prior to November 1975, was the fact that he had stated in his evidence that he was on good terms with his father and uncle (Respondent No. 7). The inference drawn by the High Court from this was that there was no reason for his father and uncle to keep the decree a closely guarded secret from the Appellant as it was not shown that they had any

interest adverse to the Appellant. This inference was wholly contrary to all the facts on the record. The father and the uncle were two of the Plaintiffs in the suit and their case was that the Appellant was the benamidar of the Plaintiffs in respect of the properties standing in his name. The father and the uncle both had opposed the Appellant's application Under Rule 13 of Order IX of the CPC. The Appellant had deposed that it was on November 4, 1974, that his uncle had informed him about the suit. Being ranged on the opposite side and opposing the Appellant's said application, it was for his uncle (Respondent No. 7) to step into the witness-box and deny this. He did not do so and, in fact, none of the Respondents stepped into the witness-box to depose that anyone of them had informed the Appellant about either the suit or the said decree. In this connection, the second prayer in the plaint is instructive. It reads as follows :

If the parties fail to settle amicably within the stipulated time of the Court, a Surveyor-Commissioner be appointed for partitioning the suit properties to the market the l/6th share of each of the Plaintiffs as per Plaint and to make separate allotment of the land of each Plaintiff.

It is clear from what has been stated above that the entire object of the suit was to get a compromise decree and under it a declaration that the Appellant and Respondent No. 10 had no right, title or interest in any of the properties standing in their names.

12. What the High Court has done in order to reach the conclusion which it did was to substitute its conjectures for the findings on the evidence given by the learned Additional Subordinate Judge. The High Court would not be entitled to do this even in a first appeal. The evidence discussed above leaves no doubt that the Appellant was not served with the writ of summons and the writ of summons and the return to it are not genuine and the Appellant had no knowledge of the decree or even of the suit until November 4, 1974.

13. As a result of the conclusions reached by us, this Appeal must succeed. The question is as to the order which should be passed in this Appeal. Since the decree purports to distribute all the properties in the suit amongst Respondents Nos. 1 to 9, if the Appellant succeeds in his case that he was a partner in the firm of Bharat Oil Mill in his own right, the allocation of properties would have to take place again in order to equalize the shares of the parties. This necessitates the setting aside of the decree in its entirety and not only so far as the Appellant and Respondent No. 10 are concerned as ordered by the learned Additional Subordinate Judge. The Appellant is, however, concerned with only one property, namely, Bharat Oil Mill, which has gone to the share of Respondent No. 1. Mr. P.K. Chatterjee, learned Counsel for Respondents Nos. 1 to 4, has stated before us that if the Appellant succeeds in the suit in establishing his right in the firm of Bharat Oil Mill, Respondent No. 1 will not claim to be compensated from the other properties in the suit and, therefore, in case this Court allows the Appeal, the entire decree need not be distrubed. So far as Respondent No. 10 is concerned, he has not at any time challenged the ex parte decree. Assuming he had not been served with the writ of summons and had no knowledge of the suit or the decree, he in any event came to know about them when the notice of the Appellant's applications Under Rule 13 of Order IX of the CPC was served upon him. Even thereafter he has not taken any steps to have the ex parte decree set aside and he has not appeared before us. It is, therefore, obvious that he has accepted the decree and

we, therefore, need not trouble ourselves about him.

14. In the result, we allow this Appeal, reverse the impugned judgment of the Calcutta High Court and set aside its order appealed against and dismiss with costs the two revisional applications on which the said order was passed. We confirm the order passed by the learned Subordinate Judge, Bankura, in Miscellaneous Case No. 128 of 1975 in Title Suit No. 93 of 1974 so far as regards the Appellant only. We make it clear that the said suit so far as the Appellant is concerned will be tried on the basis that the compromise entered into between Respondents Nos. 1 to 4 and Respondents Nos. 5 to 9, is not binding upon him.

15. Respondents Nos. 1 to 4 will pay to the Appellant the costs of this Appeal.