

GAHC010053982020



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

Case No. : CRP/34/2020

SANTANU DAS AND 2 ORS.

S/O- LATE DHIRAJ DAS, R/O- H/NO. 5, MONALISHA PATH, ZOO-NARENGI ROAD, GUWAHATI-24, DIST.- KAMRUP(M), ASSAM.

2: SRI RAJARSHI DAS
S/O- LATE DHIRAJ DAS
R/O- H/NO. 5
MONALISHA PATH
ZOO-NARENGI ROAD
GUWAHATI-24
DIST.- KAMRUP(M)
ASSAM.

3: SMTI. ELLORA DEKA
D/O- LATE RAJANI KANTA DEKA
R/O- RAJANI KANTA PATH
GOPINATH NAGAR
KALAPAHAR
GUWAHATI-781016
DIST.- KAMRUP(M)
ASSAM

VERSUS

SMTI. KALPANA HAZARIKA AND 3 ORS.

W/O LATE PRABHAT HAZARIKA, R/O GOPINATH NAGAR, RAJANI KANTA DEKA PATH, KALAPAHAR, GUWAHATI-781016, DIST-KAMRUP(M), ASSAM

2:ON THE DEATH OF SMTI. NIZARA DEKA
HER LEGAL HEIRS

2.1:RUPSEKHAR DEKA
S/O SRI MUNINDRA MOHAN DEKA AND LATE NIZARA DEKA
R/O KANAKLATA PATH

OPPOSITE BURAGOHAIN THAN
KUMARPARA
GUWAHATI-781009
DIST-KAMRUP(M)
ASSAM

2.2:RISHIRUP DEKA
S/O SRI MUNINDRA MOHAN DEKA AND LATE NIZARA DEKA
R/O KANAKLATA PATH
OPPOSITE BURAGOHAIN THAN
KUMARPARA
GUWAHATI-781009
DIST-KAMRUP(M)
ASSAM

2.3:MUNINDRA MOHAN DEKA
S/O LATE AMRIT DEKA AND HUSBAND OF LATE NIZARA DEKA
R/O KANAKLATA PATH
OPPOSITE BURAGOHAIN THAN
KUMARPARA
GUWAHATI-781009
DIST-KAMRUP(M)
ASSA

Advocate for the Petitioner : MR. O P BHATI

Advocate for the Respondent : MR. L K BORAH

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date : 09-05-2024

JUDGMENT & ORDER(ORAL)

This is an application under Section 115 of the Code of Civil Procedure, 1908 (for short, the Code) challenging the order dated 07.02.2020 passed by the learned Civil Judge No.2, Kamrup (M) Guwahati in Misc. Appeal No.09/2014 whereby the order dated 19.03.2014 passed in Misc.(J) Case No.384/2013 by

the learned Munsiff No.3, Kamrup(M) Guwahati was set aside.

2. The brief facts which led to the filing of the instant proceeding is that the petitioners herein had filed a suit being Title Suit No.263/2010 seeking eviction of the defendant from the tenanted premises on the ground that the defendant failed to pay the rent for the tenanted premises from August, 2009. In the said suit, upon summons being issued, the process server went to the address mentioned in the summons, but did not find the defendant. Thereupon the process server met the son of the defendant, but he refused to accept the summons and accordingly the process server affixed the summons at the door of the premises of the defendant in presence of a witness.

3. Pursuant thereto, the process server submitted a report on 23.12.2011 along with an affidavit on 02.01.2012. On the basis of the said process server's report, the Court of the learned Munsiff No.3 Kamrup(M) Guwahati proceeded *ex-parte* against the defendant and passed the judgment and decree on 03.08.2012 in Title Suit No.263/2010. The defendant only coming to learn about the said judgment and decree on account of the Execution Proceedings initiated approached the learned Trial Court by filing an application under Order IX Rule 13 of the Code for setting aside the *ex-parte* judgment and decree on the ground that the summons were not duly served. The said application was registered and numbered as Petition No.2319/2013. Along with the said application, an application was filed under Section 5 of the Limitation Act, 1963 for condoning the delay of 345 days in preferring the application under Order IX Rule 13 of the Code. In respect to both the applications, the plaintiffs submitted

written objections. The learned Trial Court vide order dated 19.03.2014 dismissed both the applications stating that the statements made by the defendant, who was the petitioner to the said applications were not tenable in law and in facts and were not supported by documents or evidence.

4. Being aggrieved, an appeal was preferred by the defendant which was registered and numbered as Misc. Appeal No.09/2014. The learned Court of Civil Judge No.2 Kamrup(M) Guwahati vide order dated 07.07.2018 dismissed the said appeal thereby upholding the order dated 19.03.2014 passed by the learned Trial Court.

5. Being aggrieved, the defendant preferred a second appeal against the order being SAO No.9/2018 before this Court. The said SAO No.9/2018 was withdrawn with liberty to file a revision. Accordingly, the defendant filed a revision being CRP No.33/2019 before this Court and vide order dated 13.03.2019, this Court allowed the revision application by setting aside the order dated 07.07.2018 passed in Misc. Appeal No.9/2014 by the learned First Appellate Court and remanding the same to decide it afresh considering the observations made in the said order. In addition to that, this Court directed the parties to appear before the learned Appellate Court on 25.03.2019 and the learned First Appellate Court was directed to dispose of the appeal within a period of one month from the date of appearance. It is under such circumstances, that the impugned order dated 07.02.2020 was passed thereby setting aside the order dated 19.03.2014 passed in Misc.(J) Case No.384/2013 and with a direction to the parties to appear before the learned Trial Court for a

decision on the Petition No.2319/2013 afresh for a consideration regarding the setting aside of the *ex-parte* judgment and decree in Title Suit No.263/2010. It is against the said order dated 07.02.2020 that the instant proceeding has been initiated.

6. Mr. OP Bhati, the learned counsel appearing on behalf of the petitioners submitted that the learned First Appellate Court erred in law as well as also on the facts in not taking into consideration the report of the process server which was supported by way of an affidavit wherein it has been categorically mentioned that on 23.11.2012, the defendant being absent, the summons were duly handed over to her son, who upon refusing to accept the same had pasted the summons in the premises of the defendant. He submitted that there was no cross examination by the defendant to the process server and, as such, the question of examination of the process server, even after submitting a report on the basis of affidavit was not at all required. He, therefore, submitted that the entire premises on which the learned Appellate Court had decided the appeal was erroneous in which an interference is required to be made by this Court.

7. *Per contra*, Mr. LK Borah, the learned counsel appearing on behalf of the defendant who is the respondent herein submitted that a perusal of the process server's report is not in consonance with the provisions of Order V Rule 17 of the Code as well as Rule 65 of the Civil Rules and Orders framed by this Court and as such, the process server report could not have been made the basis for accepting the service of summons on the defendant. The learned counsel submitted that there is no other material on record to show that the defendant

herein had knowledge about the suit and as such immediately on coming to learn about the decree so passed on 08.08.2013, the defendant approached the Court by filing an application under Order IX Rule 13 along with an application under Section 5 of the Limitation Act. Therefore, the delay was duly explained and as the service of the summons was not duly served, the learned Trial Court ought to have exercised the powers under Order IX Rule 13 for setting aside the *ex-parte* judgment and decree dated 03.08.2012.

8. This Court upon hearing the learned counsels appearing on behalf of the parties and also upon perusal of the impugned order dated 07.02.2020 put a pointed query on the learned counsel appearing on behalf of the parties that the instant case pertains to an application under Order IX Rule 13 of the Code on the basis that the summons were not duly served and the defendant filed an application under Order IX Rule 13 upon coming to learn about the execution proceedings on 08.08.2013. Under such circumstances, after the order being passed by the learned First Appellate Court with the observations made therein can the learned Trial Court again apply its mind on the application under Order IX Rule 13, more so, when the learned First Appellate Court had categorically held that the summons under Order V Rule 17 of the Code was not in accordance with law.

9. The learned counsel appearing on behalf of the parties duly submitted that the observations so made by the learned First Appellate Court render a further adjudication on the application under Order IX Rule 13 ineffective, *inasmuch as*, the learned First Appellate Court had duly held that the acceptance of service

upon the defendant in terms with Order V Rule 17 was not in accordance with law. It is also relevant to mention that when an appeal or an application is dismissed on the ground of limitation, the order or judgment and decree so challenged is deemed to have been confirmed and under such circumstances, the appeal there against has to be understood to be an appeal against the confirmation of the judgment and decree or order as the case may be. Under such circumstances, taking into account the above contentions, this Court is of the opinion, therefore, to decide as to whether the application under Order IX Rule 13 of the Code merits consideration.

10. Therefore, it is the opinion of this Court that the question which requires to be adjudicated is as to whether the service of summons upon the defendant was in accordance with the provisions of Order V Rule 17 of the Code. More so, when there is no other materials on record being produced by the petitioners herein that pursuant to the acceptance of service of summons by the learned Trial Court, the defendant had notice of the pendency of the suit in any other manner. In this regard, this Court finds it very pertinent to reproduce the contents of Order V Rule 17 of the Code, which reads as hereinbelow:

"17. Procedure when defendant refuses to accept service, or cannot be found.- Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer,[after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time], and there is no agent empowered to accept service of the summons on his behalf, nor any

other person on whom service can be made, the serving officer shall affix 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, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

11. Further to that, this Court also finds it relevant to take note of Rule 65 of the Civil Court Rules and Orders of Gauhati High Court which is also quoted hereinbelow:

"65. If the person addressed is absent from his residence at the time of attempted service and there is no likelihood of his returning there within a reasonable time and there is no agent empowered to accept service on his behalf, nor any other person on whom service can be made, service shall be effected in the manner directed in Order 5, Rule 17. The report of the serving officer should state the grounds of his belief that the person was absent from his residence at the time of attempted service and that there was no likelihood of his returning within a reasonable time and that there was no agent empowered to accept service nor any other person on whom service could be made; and in any case that on the door of the outer house or some other conspicuous part of which a copy of the process was affixed, was the ordinary residence or place of business of the person address at the time when it was so affixed."

12. A perusal of both Rule 17 of Order V of the Code as well as Rule 65 of the Civil Court Rules and Orders shows as to when the process server can affix the copy of the summons on the door of the outer house or some other conspicuous part of the residence or place of business of the person whom the summons had been addressed.

13. The requirement as per the above Rules is that the defendant or the person addressed in the summons is absent from his or her residence, at the time of attempting service and the second requirement is that there is no likelihood of the defendant or the person addressed returning to the premises within a reasonable time and there is no agent empowered to accept the service on his or her behalf. Rule 65 as quoted above, also shows that the report of the serving officer should state the ground of the belief of the process server that the person to whom the summons is addressed was absent from his residence at the time of attempted service and there was no likelihood of his/her return within a reasonable time and there was no agent empowered to accept the report nor any person to whom the service could be made.

14. In the backdrop of the above, let this Court now takes up the service report, which is annexed as Annexure-C to the instant proceeding. The translated portion of the said service report is reproduced hereinunder:

"No.2365 Sri Bakhun Rongpi

19.12.11

Mitali Deka (witness)

W/o. Hemanta Kr. Deka

H.No.44

Rajani Kanta Deka Path

Kalapahar

To,

The Hon'ble Judge,

I Sri Bakhun Rongpi, Process Server do hereby solemnly affirm that on 23.12.11, I went to the address mentioned in the summon and on being searched, I did not meet the addressee at home. I met the son of the addressee at her home and handed over the notice and copy but after going through the same he refused to receive the same. Therefore, by taking back the notice and copy from the son of the addressee, the notice and copy were affixed on the door of the addressee in presence of the aforesaid witness.

The statements made in the report are true to the best of my knowledge and belief.

Sri Bakhun Rongpi

Process

Server dated 23.12.11

"Affidavit"

I, Sri Bakhun Rongpi son of Late Kuri Rongpi, aged about-37 years, process server of Civil Nazarat Branch, Guwahati solemnly affirm and stated

that the service report of summons/notices are true and that no part of it's false. I affirmed before the Sheristadar, Office of the District Judge, Kamrup, Guwahati on the 2.1.2012

Sd/- B Rongpi

Sd/- illegible

Signature

Sheristadar

Process Server

District & Sessions Judge

Kamrup, Guwahati

The report of service is submitted

Dated 2.1.12

Sd/- illegible

Civil Nazir"

15. The counsels for the parties herein duly agree that the translated version of the said service report is a correct translation to the Assamese version of the service report.

16. From a perusal of the said service report, it would be seen that there is nothing mentioned in the process server's report that there was no likelihood of the defendant returning to her residence within a reasonable time. This Court further finds it very pertinent to observe that the words "*who is absent from his residence at the time when the service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a*

reasonable time" was inserted to the provisions of Order V Rule 17 vide the Code of Civil Procedure (Amendment) Act of 1976. Under such circumstances, it is the opinion of this Court that when the legislature has specifically inserted the requirement, the twin conditions that the defendant is absent from his residence at the time when the service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time, the requirements have to be met in the process server's report.

17. The learned Trial Court while accepting the summons on 27.01.2012 failed to take note of the said aspect of the matter. Under such circumstances, as the service upon the defendant was not effected in accordance with law, the same in the opinion of this Court would not come within the meaning of the summons being duly served. Under such circumstances, this Court agrees to the conclusion of the learned First Appellate Court that the service of summons upon the defendant was not effected in accordance with Order V Rule 17 of the Code, but, however, for different reasons.

18. Accordingly, the consequential effect of the summons being not duly served and there being no other materials shown in the objection filed to the Section 5 application for condonation of delay or even the written objection filed to the Order IX Rule 13 application that the defendant had notice about the suit thereafter also, this Court is of the opinion that the delay of 345 days was rightly condoned by the learned First Appellate Court. Taking into consideration that the above adjudication duly decides the aspect of summons being not duly served relegating the parties now to a fresh adjudication of the application

Under Order IX Rule 13 of the Code would be delaying the inevitable. Under such circumstances, in exercise of the powers conferred under Article 227 of the Constitution, this Court sets aside the judgment and decree dated 03.08.2012 passed in Title Suit No.263/2010.

19. Taking into account that both the parties are duly represented, the parties are directed to appear before the learned Trial Court on 03.06.2024, on which date, the defendant is given the liberty to file the written statement, failing to do so, the Court shall proceed in the suit in accordance with law.

20. This Court further makes it clear, taking into account that the litigation had already spanned for 14 years and the suit having been relegated to the stage of pleadings, this Court requests the learned Trial Court to dispose of the suit preferably within 8(eight) months.

21. With the above, the revision petition stands disposed of.

JUDGE

Comparing Assistant