

FORM NO. (J)3.

HEADING OF JUDGEMENT ON APPEAL
DISTRICT : **MORIGAON**

In the First **Appellate** Court of the **CIVIL JUDGE** at Morigaon.

PRESENT : **Mrs. MILI HUSSAIN**, LL.M., A.J.S.
Civil Judge, **Morigaon**.

Tuesday, the **23rd** day of **July**, 2019.

Misc. Appeal No. 1 of 2019

1. **Shri Gopal Bora**,
s/o Late Dhatu Bora,,
r/o Doloichuba (Bishayabori),
Mouza – Dandua,
Morigaon. ... Appellant

-Versus –

1. **Shri Santanu Medhi Baruah**,
s/o Shri Premeswar Medhi,
r/o Gashbari,
Mouza – Morigaon,
Morigaon.
... Respondent.

This appeal coming on for final hearing on **30.05.2019** in the presence of –

Mrs. R. Devi, Learned Advocate for the Appellant.

Mr. P. R. Bora, Learned Advocate for the Respondent.

AND having stood for consideration to this day, the Court delivered the following judgment.

JUDGMENT

1. This first appeal has been projected against the order dated 4.12.18 passed by learned Munsiff No.1, Morigaon in M. S. No. 22/14 (M.J. No.55/16). The appellant prayed for setting aside the order dated 4.12.18 in M.J. Case No.55/16 and also for setting aside the

impugned ex-parte order dated 17.06.15 in M.S.No.22/14. Inter-alia appellant also prayed for restoration of suit given him a chance to file written statement.

2. The grounds undertaken by appellant are as follows :

i. That learned Court below did not pay heed to the fact that appellant/defendant did not receive summon in the suit which is evident from deposition of PW-1 and PW-2.

ii. That learned Court below counted the time from date of decree. That appellant/defendant obtained notice of execution on 18.10.16 and accordingly well within time of limitation approached learned Court below.

iii. That learned Court below did not pay heed to the fact that appellant is a resident of Guwahati and doing his service and summons ought to have been served in Guwahati address, but for wrongful gain, respondent/plaintiff kept under hide the official address of the appellant at the time of institution of the suit.

3. The respondent did not file any written objection.

4. Upon registration of this Misc. appeal, LCR of M.S.No.22/14 (M.J.No.55/16) was called for. Also called for case record of T.Ex:1/16

5. Both sides participated in argument. Learned engaged counsel for appellant at the time of hearing submitted Hon'ble Apex Court judgment in *Bhagmal & Ors. Vs. Kunwar Lal & Ors* dated 27th July, 2010 and 2017 AIAR (Civil) 835 in *LALDHARI MISTRI (DEAD) THR. LRS & ANR. VS. VIJAY KUMAR*.

6. I have perused the materials in case record including the LCR and T.Ex 1/16 and judgment so submitted.

POINT FOR DETERMINATION

6A. The sole point for decision in this appeal is whether learned Court below was justified in passing order dated 17.6.15 in M.J : 55/16 (M.S/22/4) in rejecting prayer for setting aside ex-parte order. Whether same needs interference in this appeal?

DISCUSSION, DECISION AND REASONS THEREFOR:

7. Close scrutiny of case record of M.J. No.55/16 shows that PW-1 Gopal Bora (petitioner/defendant/appellant) deposed that he is a peon in Welfare Department and is in service since 1984 at Guwahati. He deposed that Exhibit-Ka (dated 6.05.16 summon in M.S.No.22/14) handed over to him by Dy. Director, WPT & BC, Assam, Guwahati, address to Shri Gopal Bora (office peon, O/O Directorate of WPT & BC, Assam). But he did not come to Court, nor made any inquiry. He denied that the signature in Exhibit-Kha, belongs to his wife. PW-2, Smti. Rina Bora, (wife of Gopal Bora, office peon, O/O Directorate of WPT & BC,

Assam) deposed that in service report the signature in support of writing, showing that she received summon on 5.11.14 on behalf of her husband (Gopal Bora) was not her. She further deposed that when on 18.10.16 she received notice from Court, she came to know that on 17.06.15 the case proceeded ex-parte as against her husband.

8. Learned Court held *in order dated 04.12.18 that petitioner came to know about the judgment and decree on 06.6.16 but approached said learned Court only on 19.11.16*. Exhibit Ka dated 06.5.16 is the intimation from Sri Manas Das, the superior officer of Defendant in reference to subject : M.S 22/14 ,showing that Defendant has been directed by learned Munsiff no. 1 to deposit in said Court Rs.7000/- per month within first week of each month till recovery of Rs.2,22,581.30/- w.e.f. May, 16. It is the appellant's case that he came to know about the decree in M.S 22/14 only 19.10.16. So, his approaching learned Court below on 19.11.16 with prayer to condone delay u/s 5 Limitation Act is well within Limitation.

9. Secondly; it is held that petition/ appellant failed to show that summons in the suit was not received by his wife. P.W1 (Gopal Bora)/ appellant/defendant denied purported signature of his wife(Rina Bora) in Service report (hereinafter S/R). Said fact fortified by deposition of PW-2(Rina Bora) herself. Even DW-2 process server admitted in cross-examination about absence of identifier at the time of service of summon. Exhibit-Kha, service report, on scrutiny it is seen that service report of Process Server Shri Biren Phukan supported by affidavit clearly shows that on 5.11.14 when he went to give address of addressee Gopal Bora i.e. son of Late Dhatu Bora, R/O Doloichuba (Bishayabori), Mouza-Dandua, District Morigaon ; said addressee was not found at home and when his wife expressed willingness to receive summon on behalf of her husband, he took signature of his wife and caused service. The Process Server Biren Phukan (DW-2) substantiated the contention in service report in his evidence under oath. He also identified his own signature Exhibit-Kha (2). In cross-examination, he deposed that neither he personally knows Gopal Bora, nor Rina Bora. But, Rina Bora herself stated to him that she is the wife of Gopal Bora and that no other person identified Rina Bora as witness. He denied that Exhibit-Kha(1) is not the signature of Rina Bora.

10. Be that as it may, the mandate of Rule 66 Civil Rules and Order under auspices of Hon'ble Gauhati High Court clearly shows that when addressee is absent at the time of attempted service and there was no likelihood of his returning within a reasonable time, having no agent to accept service on his behalf; report must reflect that to whom the

process' was delivered was an adult male member of his family, actually residing with him at the time of such service'. P.W1(Gopal Bora) 's evidence(cross examination) shows that since 1984 till date he is residing at Guwahati in connection of his service. In the present case PW2 his wife denied acknowledging receipt of summon for her husband. She also denied her purported signature as recipient and it appears O.P/ respondent failed to satisfy the onus which shifted to him as it appears in evidence. Exhibit Kha shows that Gopal Bora the addressee's residence is at "Doloichuba (Bishayabori), P.S Morigaon, Mouza Dandua. Dist- Morigaon (Assam). Apparently, it follows from evidence that the addressee was not residing at the address given, at the relevant time. D.W2 Biren Phulan, the process server admitted in cross examination that he did not insisted on showing any identity by alleged recipient nor he knows personally Gopal Bora / Rina Bora. It appears vide Exhibit Kha it cannot be shown that summon stood served on defendant/ appellant under Order V R15 C.P.C.

11. Learned counsel for appellant at this juncture submitted that D.H/ respondent failed to show the court notices, if any, issued to appellant/defendant in the execution proceeding. Exhibit Ka and Exhibit Ga were issued on 06.5.16 and 22.6.16 from office of Dy Director, WPT & BC Assam, Ghy to present appellant. Surprisingly enough,(notice in execution proceeding) Exhibit Ka issued on 6.5.16 and Exhibit Ga issued on 22.6.16 shows Appellant's Superior Officer Deputy Director, Directorate of Welfare of Plain Tribes and Backward Classes, Assam, Satrinivas Path, Rukmini Nagar, Ghy has informed defendant/ appellant to deposit Rs.7000/- in Court to realise the decretal sum. The case record is bereft of any material which show how much was the monthly salary of J.D at that relevant time. From Exhibit Ka and Ga, a bare perusal does not shed light compliance of Order XXI Rule 24/25 C.P.C. and least to say that the two were not issued by learned Munsiff no.1, Morigaon but it was an intimation by appellant's employer i/c with MS 22/14. With respect to Hon'ble Apex Court the judgment submitted by appellant side is distinguishable on facts from this case.

11A. Considering the entire discussions above I am of opinion that learned Court below assumed appellant's knowledge of the suit on 06.5.16 and erroneously held that appellant/ defenddant came to knock its door only on 19.11.6 while there is no proper notice in execution proceeding addressed to J.D/ appellant to respect the decree. Hence, learned Court belows order shows an erroneous assumption who misconceived the law and misconceived the facts projected vide case record by holding that prayer to set aside exparte order not filed within limitation but kept mum regarding prayer filed by appellant/

defendant to condone delay which finds mention in para no.3 of order dated 04.12.18. Compliance in substance is present vide case record on part of appellant. Materials in record shows that at best appellant/ defendant can be attributed with knowledge on 06.5.16 (vide Exhibit Ka where his signature even after cross examination remained uncontroverted) but not before that. Appellant/defendant should not be rendered non suited under above situation. Hyper-technical approach would defeat the very object of the statute of Limitation which is considered to be a statute of repose.

11B. In result, Ex parte order dated 17.6.15 in M.S 22/14 and order dated 04.12.18 in M.J55/16 is found suffering from erroneous exercise of jurisdiction and accordingly stands set aside with a direction to learned Munsiff no.1 to give opportunity to appellant/ defendant to file his W.S on his appearing and that after recording evidence of plaintiff and defendant, upon hearing argument, the suit be disposed off on merits.

12. For all the above reasons, I found that the impugned order lacks merit and needs interference. The point of determination is answered in the negative.

13. This Misc appeal stands allowed on contest. No cost in peculiar facts. Send a copy of this judgment to learned Court below.

Send back LCR of M.S.No.22/14 (M.J.No.55/16) including that of M.Ex.-1/2016.

Defendant shall appear before learned court on 16.08.2019.

GIVEN under my hand and seal of this Court on this 23rd day of July, 2019, in open Court.

(MILI HUSSAIN)
Civil Judge, Morigaon.