

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

R.F.A. NO. 16 OF 2009

The Managing Director of M/s Ishvakoo (India) Pvt. Ltd.

... **Appellant**

-Versus-

Shri Nakul Paul and another

... **Respondents**

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

Advocates for the appellant: Mr. GP Bhowmick, Sr. Adv.
Mr. GZ Ahmed, Adv

Advocates for the respondents: Mr. AK Purkayastha, for res.No.1
Mr. P. Sundi, for res.No.2

Date of hearing & judgement: **11.12.2017.**

JUDGMENT AND ORDER

Heard Mr. GP Bhowmick, the learned senior counsel, assisted by Mr. GZ Ahmed, the learned counsel for the appellant and Mr. AK Purkayastha, the learned counsel for the respondent No.1 as well as Mr. P. Sundi, the learned counsel for the respondent No.2.

2. The appeal was heard on 09.11.2017 and 04.12.2017 and it has been substantially heard today also. In the proceeding of Money Suit No. 4/2002, the appellant herein is the defendant No.1, the respondent No.1 herein is the plaintiff and the respondent No.2 is the defendant No.2. The said Money Suit No.4/2002 was decreed by judgment dated 21.02.2009, passed by the learned Civil Judge,

Sonitpur, Tezpur. In course of arguments, Mr. P. Sundi, the learned counsel for the respondent No.2 has pointed out that the respondent No.2 has filed his cross objection being C.O. No.13/2010. It is submitted that the ground for filing the cross objection is that no summons of the suit i.e. Money Suit No.4/2002 was ever served on the defendant No.2.

3. The said submission has resulted in thorough scrutiny of the trial court records. In the order dated 25.06.2002, it is recorded that the process on defendant No.2 was returned with a process server's report dated 25.06.2002 that the defendant No.2 could not be traced out on the address furnished by the plaintiff, who left to Delhi after completion of work. By the order dated 20.07.2002, the learned trial court had recorded that summons issued to the defendant No.2 was returned with a report stating that defendant was not found for which summons was required to be served in substituted manner. The learned trial court held that summons was not properly served and, as such, fresh summons were directed to be issued on defendants No.1 & 2. There is no order by the learned trial court that summons was served on defendant No.2. However, by the order dated 04.10.2002, the learned trial court has recorded that by Petition No.1926 supported by an affidavit, the learned counsel had prayed for some time for filing written statement. However, on perusal of the said Petition No.1926 (which is in page-111 of File-D of LCR), it is recorded that by the said petition, the defendant prays for filing vakalatnama. Therefore, as on 04.10.2002, the vakalatnama of defendant No.2 was not on record. On perusal of the trial court records, it does not show that vakalatnama of defendant No.2 was filed on record.

4. Therefore, in the opinion of this Court without a Vakalatnama being on record, the provisions of Order III Rule 1 CPC is not applied. The said provision provides that the appearance of a party may be in person or by recognized person or by pleader.

5. Faced with the contents of order dated 25.06.2002, wherein it is recorded that the defendant No.2 had left the address given in the plaint and he had gone to Delhi, this Court is of the view that it was the duty of the trial court to affect service on the correct address of the defendant No.2. On perusal of the provision of Order VI Rule 14-A CPC, the said provision requires that at the time of filing every pleading, the prescribed form as provided in Rule 14, recording the address of the parties is to be filed. Sub-Rule (2) of Rule 14-A of Order VI provides that such address may, from time to time, be changed by lodging in court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The said provision also provides that unless the address is changed, the said address would be the address in which process of the court must be served. The provisions of Sub-Rule (5) of Rule 14-A of Order VI provides for the penalty when registered address given by the plaintiff or the defendant is found to be incorrectly furnished.

6. Therefore, when it was brought to the notice of the court by way of process server's report that the defendant No.2 has left the place given in the plaint and shifted to Delhi, it was the duty of the learned trial court to take notice of the same and to proceed thereafter in accordance with law. As the summons of the suit was not served and the vakalatnama of defendant No.2 was not on record, it was not open for the learned trial court to accept a petition filed by a counsel and to proceed as if summons was duly served on

the defendant No.2 when such vakalatnama of the defendant No.2 was never filed on record.

7. In view of above, it is found that the various provisions of service of notice as provided under Order V CPC had not been complied with by the learned trial court. The effect of improper acceptance of service on defendant No.2 has resulted in a situation where after 15 years of filing of the suit, the defect of non-service of summons on defendant No.2 has been brought to notice of this Court, which has resulted in injustice to the plaintiff, who is waiting for the fruits of the decree passed in his suit to be ripened.

8. Having heard the submissions of the learned counsel for both sides, this Court is faced with a situation where either the court should formulate an issue by which the matter can be remanded under the provisions of Order XLI Rule 23-A CPC, which in the present situation is out of question as it would be unwise to enter into the merit of the case when the cross-objection by the defendant No.2 is found to be have substance because, the decree passed by the learned trial court is required to be set aside the lapse on part of the trial court. It appears that on appearance before the learned trial court, the defendant No.2 would naturally have a right to defend the suit. Under the circumstances, order of remand within the meaning of Order XLI Rule 23 or 23-A would not serve any purpose.

9. Therefore, having arrived at a finding that the summons was not served on defendant No.2, which is evident from the order dated 25.06.2002 and 20.07.2002 in the Money Suit No.4/2002 and the process server's report as indicated in order dated 25.06.2002, this Court is of the view that it could meet the ends of justice to invoke the provisions of Order XLI Rule 33 CPC to pass an order of remand

to enable the learned trial court to accept the appearance of defendant No.2 and then to proceed for a de-novo trial by permitting the defendant No.2 to defend himself in the suit.

10. This Court is of the view that it is well settled that to proceed with the suit without proper service of summons on defendant No.2, as was done in this case, defeats the process of giving an opportunity of hearing to the defendant No.2 before he is condemned with a decree. Therefore, under the circumstances, this Court is of the view that the provision of Order XLI Rule 33 can be invoked by this Court for doing proper and complete justice to the parties so as to enable the defendant No.2 to defend himself in the suit.

11. The learned trial court was required to pass an order for accepting due service of summons on defendant No.2 and then to proceed ex-parte against the defendant No.2. Therefore, having proceeded with the suit without service of notice on defendant No.2, this Court has the power to make an order which ought to have been passed by the learned trial court.

12. Accordingly, this Court holds that the decree passed in the present case is vitiated by non-service of summons on defendant No.2 and therefore, this is a fit case where the suit is liable to be remanded back for de-novo trial before the court of learned Civil Judge, Sonitpur, Tezpur. On receipt of records, the learned trial court shall give an opportunity to the defendant No.2 to file written statement within a period of one month from the date of appearance. As this suit is now 15 years old, an endeavour shall be made by the learned trial court to proceed to hear the matter as expeditiously as possible and if required, shall hear the matter on

day to day basis at the evidence and hearing stage so as to avoid any further delay in the matter.

13. In view of above, the judgment and decree dated 21.02.2009 passed by the learned Civil Judge, Sonitpur, Tezpur in Money Suit No.4/2002, is hereby set aside owing to the defect of non-service of summons on defendant No.2.

14. It is submitted by the learned senior counsel for the appellant that pursuant to the order passed by this Court, the appellant had deposited Rs.5,75,000/- before the learned trial court on 17.08.2009. As the judgment and decree has been set aside, the learned trial court may refund the said deposit back with interest if any accrued thereon to the appellant (defendant No.1 in the suit) on proper application being made by the appellant.

15. The appeal is partly allowed as indicated above.

16. All the parties in the suit, who are duly represented by the learned counsels are directed to appear before the court of learned Civil Judge, Sonitpur, Tezpur on 05.01.2018 without any further notice of appearance, and on such appearance, the parties by producing a certified copy of this order, shall seek further instruction from the said learned court.

17. Let the LCR be urgently sent back so that the suit can be taken up on 05.10.2018.

JUDGE

MKS