

A

STATE OF ORISSA AND ORS.

v.

SIBARAM BARAL (SIMARAM BARAI)

MAY 10, 1996

B

[K. RAMASWAMY AND G.B. PATTANAİK, JJ.]

*Code of Civil Procedure, 1908 :*

C

*S.115, Order 9, Rule 13—Revision—Scope of—Application for setting aside ex-parte decree—Trial court setting aside ex-parte decree subject to payment of Rs. 50—In revision High Court setting aside order of trial court and directing judgment-debtor to deposit the decretal amount and also the cost of Rs. 7,500—Held, High Court exceeded its jurisdiction—While deciding the revision, High Court was required to consider whether trial court properly considered the facts to set aside ex parte decree and the case called for interference—Order of High Court set aside and that of trial court restored.*

D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9055 of 1996.

E

From the Judgment and Order dated 8.1.92 of the Orissa High Court in C.R.No. 694 of 1991.

Indrajeet Roy, Adv. Genl., Orissa and P.N. Misra for the Appellants.

The following Order of the Court was delivered :

F

Though the respondent had been served with notice on August 5, 1992, till date neither the unserved cover nor the acknowledgment has been received back. Under these circumstances, notice must be deemed to have been served.

G

Leave granted.

H

The only question is : whether the High Court can direct the appellant to deposit the decretal amount with costs of Rs. 7,500 as a condition to setting aside the ex parte decree? The respondent laid the suit to recover a sum of Rs. 1,46,820 against the appellants. The suit came to be decreed ex parte. The appellant has filed an application under Order 9 Rule 13

CPC to set aside the *ex parte* decree. The trial Court set aside the *ex parte* decree subject to payment of Rs. 50. The High Court in the impugned order dated January 8, 1992 in CR. No. 694/91 allowed the revision and set aside the order of the trial Court and directed the appellants to deposit the decretal amount and the costs. Order 41, Rule 1(3) of CPC provides thus :

"Whether the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think it."

When an appellate power is exercised on an appeal filed against the decree of the trial Court, the Court exercises judicial discretion to grant conditional stay of the execution of the money decree reasonably based on fact situation. In this case, there is no appeal before the High Court against *ex parte* decree of the trial Court. The trial Court itself set aside the *ex parte* decree subject to the payment of the cost. When revision was carried, the High Court was required to consider whether the trial Court properly considered the facts to set aside the *ex-parte* decree and the case called for interference. It cannot exceed its jurisdiction in directing the appellant to deposit the entire decretal amount and also the cost of Rs. 7,500. The explanation given by the State is well justified as no one takes responsibility for the lapses. Each would pass the buck on the other. Ultimately, it would be the public justice which would suffer and put to jeopardy. Under these circumstances, the order of the High Court is set aside and that of the trial Court is restored.

The appeal is accordingly allowed. No costs.

R.P.

Appeal allowed.