

Ram Udai Singh Vs. Hareram Singh

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Court : Patna

Decided On : Mar-20-1998

Judge : Gurusharan Sharma, J.

Appeal No. : Appeal from Original Order No. 322 of 1994

Appellant : Ram Udai Singh

Respondent : Hareram Singh

Disposition : Appeal Allowed

Judgement :

Grusharan Sharma, J.

1. Money Suit No. 21 of 1991 was filed against the defendant-appellant herein for realisation of a sum of Rs. 1,48,225/- with interest, pendentelite and future till realisation, which was decreed without contest on 25.2.1993.

2. Miscellaneous Case No. 4 of 1993, under Order IX, Rule 13 of the Code of Civil Procedure was filed by the defendant to set aside the said ex-parte decree, which has been dismissed by the impugned order dated 5.8.1994.

3. It is not in dispute that although the defendant appeared in the suit on 18.8.1992, but inspite of several adjournments, no written statement was field till 27.1.1993, when obviously the suit was fixed for hearing. On 9.2.1993, under

Order VII, Rule 10 of the Code of Civil Procedure. Thereafter, the suit was transferred from the Court of First Subordinate Judge to Fourth Subordinate Judge. On the defendant's prayer made on 9.2.1993 before the transferee Court, date of hearing of the suit was extended to 18.2.1993. However, on 18.2.1993, the defendant neither appeared nor filed any written statement nor cross-examined P.W. 1, who was examined on the said date. The Court fixed 20.2.1993 for further ex parte hearing. On 20.2.1993. a petition on behalf of the defendant was filed for adjournment on the ground of his illness, which has rejected and hearing of the suit proceeded further. Thereafter the defendant never appeared and the suit was ultimately decreed ex-parte.

4. In the proceeding under Order IX, Rule 13 of the Code, which was taken at the instance of the defendant, the Subordinate Judge held that since no petition was filed on behalf of the defendant to recall the order of hearing passed in the suit, he intentionally and deliberately allowed the suit to be decreed ex-parte and as such it was not fit to be set aside. Accordingly. Miscellaneous Case No. 4 of 1993 was dismissed.

5. In the present case, in my opinion, after the defendant, on appearance, failed to file his written statement, the suit was to proceed to be decided under Order VIII, Rule 10, thereafter even if the defendant was absent the suit was not required to be fixed for ex-parte hearing.

6. In *Govind Ram Agarwalla v. Harsukhrai Doshi and Ors.* 1969 PLJR 65, a Division Bench of this Court had an occasion to consider this aspect of the matter and it was held that there was a distinction between a case proceeding to hearing ex-parte and a case proceeding to hearing in the presence of the parties, but without written statement. Where the defendant appears and files a petition for time to put in a written statement, but time is refused, the suit should be merely put up for hearing and on the date so fixed, the defendant may take part in the hearing of the suit, but he will have to take such part without a written statement, unless and until he could persuade the Court to accept his written statement in accordance with the provision of Order IX, Rule 7. But he can not be debarre from taking part in the hearing of the suit by posting it for ex-parte hearing.

7. In the present case the Court by posting the suit for ex-parte hearing on 20.2.1993 led the defendant to believe that he could not participate in the hearing of the suit. On 18.2.1993, the proper order should have been that on the adjourned date of hearing the suit shall proceed without the written statement of the defendant, but the defendant, if he so wants, may take part at the hearing. The Court having not said so either implidely or expressly, in my opinion, there was sufficient cause for non-appearance of the defendant on 20.2.1993 and onward.

8. In the aforesaid circumstance, the defendant could have appeared on 20.2.1993 and could have prayed for recall of the order posting the case for ex-parte hearing, but the failure on his part to do so does not take away his right to invoke jurisdiction of the Court under Order IX, Rule 13 of the Code of Civil Procedure and ask it to set aside the ex-parte decree on the ground of the wrong order posting the suit for ex-parte hearing.

9. I, therefore, set aside the impugned order dated 5.8.1994 of the Court below made in Miscellaneous Case No. 4 of 1993. allow the said case filed under Order IX, Rule 13 of the Code and set aside the ex-parte decree passed on 25.2.1993, in Money Suit No. 21 of 19191.

10. If the defendant-appellant is so advised, he may move the trial Court for a permission to file a written statement and, in that event, it will be for the said Court to decide as to whether it can or should grant such a permission or not in accordance with law. However, I have not expressed my opinion in this regard.

11. However, since the litigation has been dragged at the instance of the defendant-appellant for such a long period, the impugned ex-parte decree is being set aside, subject to pay of a cost of Rs. 5,000/- by him. which must be deposited by the defendant in the trial Court within two months from today, to the credit of plaintiff and he would be entitled to withdraw the same.

12. In the result, this appeal is allowed.