

K. Ravindra Devadiga Vs. Sebastian Britto

K. Ravindra Devadiga Vs. Sebastian Britto

SooperKanoon Citation : sooperkanoon.com/375587

Court : Karnataka

Decided On : Feb-08-1989

Reported in : AIR1989Kant280

Judge : M.P. Chandrakantaraj URS, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule 13 - Order 17, Rules 2 and 3

Appeal No. : Civil Revn. Petn. No. 4162 of 1988

Appellant : K. Ravindra Devadiga

Respondent : Sebastian Britto

Advocate for Def. : K.S. Desai and ;K.I. Bhatta, Advs.

Advocate for Pet/Ap. : B.V. Acharya, Adv.

Judgement :

ORDER

1. This revision petition is directed against the order dt. 19-8-1988 made in Misc. Case No. 10/1985 on the file of the Civil Judge, Mangalore, Dakshina Kannada District. That petition was one made under O. IX, R. 13 of the C. P. C. The prayer therein was to set aside the ex parte decree passed on 28-2-1985 in S.C. No. 376/1983 on the file of that Court. On the pleadings in the said miscellaneous

case, the lower Court formulated the following three points for consideration:

(1) Whether the decree passed in. S. C No. 376/1983 on the file of this Court dt. 282-1985 is an ex parte decree?

(2) Whether the petitioner proves that he was prevented from attending the Court and his advocate's office due to family dispute and illness and he had a sufficient cause in not attending the Court during the month of January and February 1985?

(3) Whether the petition is barred by time? On all the points for consideration, the Court held against the petitioner. Therefore the present revision petition. In this Court, when the matter was heard last time, I recorded the following in the order sheet:

'The short question which falls for consideration in this revision under S. 18 of the Karnataka Small Causes Courts Act is:

'Whether in the absence of a written statement not filed intentionally and in the absence of appearance of defendant on the adjourned date of hearing, if a decree comes to be passed after examining the plaintiff without the counsel for defendant retiring from the case, it amounts to an ex parte decree or a decree on merits in terms of O. 17, Rr. 2 and 3, C. P.C.?

However, after this matter was heard for some time, it is pointed out that the small cause suit was filed for eviction of the defendant from the premises occupied by him as a tenant. Already five years have lapsed since the filing of the suit. Whatever may be ultimate view of this Court on the question which it is required to answer, great injustice will be done to the landlord if proceedings are procrastinated further for whatever reason.

Mr. Bhatta learned counsel for the respondent-plaintiff has no objection to give further reasonable time for the tenant to vacate. Mr. Acharya has also no objection to consult his client in this matter to explore whether there is possibility of settlement out of Court.'

Therefore the matter stood adjourned and has come up for further hearing today.

2. The facts set out are not in dispute. The petitioners were represented on the date the plaintiff was examined in support of his plea even in the absence of there being no written statement. It was however argued by Mr. B. V. Acharva, learned counsel for the petitioner, that mere presence of the advocate cannot be held to be effective representation of the defendant as held by some of the High Courts unless such pleader is duly instructed and able to answer all material questions relating to the suit or by pleader accompanied by some person able to answer all such questions, cannot be said to be an error by a pleader, if the pleader appears on the date of hearing and states that though he has filed his vakalathnama, he has not received instructions in regard to the case and that he is therefore unable to go on with the suit. (See Mulla's C.P.C., 14th Edition, Vol. II, page 1114 under note-3 'Appearance'). The learned author has relied upon some earlier decisions starting from AIR 1889 up to 1942 rendered by the various High Courts in support of the provision founded on O.5, R. 1 of the C.P.C.

3. I do not think that those decisions or those views will be of much assistance to the petitioner in the light of the amendment made to the C. P.C. in 1976 providing R. 10 of O. 8 enabling the Court to pass an order Proceeding to judgment or pass any appropriate order, moment there is failure to file a written statement. Such contingency may arise on the occurrence of two events; when the defendant fails to appear and when there is no written statement filed, even though he may have entered appearance despite chances given. A Division Bench of this Court while construing the amended R. 10 of O. 8 of the C.P.C. in R.F.A. No. 496/1988 disposed of on 30-1-1989 (reported in 1989 (1) Kant LJ 225) has held that the principle underlying R. 10 of O. 8 of the C.P.C. is that the plaint allegations are deemed to have been admitted by non-traverse by failure to file the written statement. It is in that position the Court may proceed to pass judgment or pass any other appropriate order on the failure of the defendant to file the written statement. The Supreme Court in the case of Modula India v. Kamakshya Singh Deo : AIR 1989 SC162 elaborately examined the same question with reference to the striking out of defence under the provisions of the West Bengal Premises Tenancy Act (12 of 1956). That is to say, what is the effect when there is no right of defence. A Full Bench of the Calcutta High Court by a majority of two to one had taken the view that right of defence excluded any further participation by the

defendant in the proceedings before the Court. The Supreme Court disagreed with that view and approved the decision of the dissenting single Judge of the Full Bench of that High Court and laid down that the word 'defence' must be broadly construed and that included the right of cross-examination of the plaintiffs witnesses even though there was no defence to plaintiff's case. In that context, Supreme Court laid down that while there may be cases in which the trial Judge may exercise his choice to proceed to judgment on the basis of the plaintiff allegations or call for proof nevertheless the basic principle of the plaintiff being required to prove his allegations should not be lost sight of.

4. It is in that context, I now examine, whether the presence of the counsel who did not participate in the proceedings in the small cause suit for eviction when the plaintiff was giving evidence would amount to appearance or not. If the counsel had no instructions he had only the choice to retire from the case, but he cannot plead want of instructions and still claim that on that account the defendant should be treated as absent and ex parte. Therefore, his non-participation by cross examining the plaintiff, in defence of defendant's case cannot be an excuse to plead that the decree and judgment passed in the small cause suit was one under O. 17, R. 2 and not under O. 17, R. 3 of the C.P.C. On that date when the plaintiff was examined, the defendant was not required to do anything at all. Therefore, pressing into service sub rule (2) of O. 17 of the C. P.C. is not of any assistance to the petitioner. The petition therefore must fail.

5. Having regard to the facts of the case, the long drawn out struggle between the parties, this Court gives two months' time from today to vacate the suit premises and deliver vacant possession thereof to the respondent-plaintiff.

6. For the above reasons, I do not find any merit in this revision petition and it is rejected.

7. Revision petition rejected.