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R. Seshaiah Vs. E. Ramathulasama

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Court : Andhra Pradesh

Decided On : Dec-24-1999

Reported in : 2000(1)ALD405; 2000(1)ALT121

Judge : Bilal Nazki, J.

Acts : Code of Civil Procedure (CPC), 1908 - Orders 9 and 17, Rules 3, 8 and 9

Appeal No. : CRP No. 5626 of 1999

Appellant : R. Seshaiah

Respondent : E. Ramathulasama

Advocate for Pet/Ap. : Mr. A. Jayasankar Reddy, Adv.

Judgement :
ORDER

1. Heard the learned Counsel for the petitioner. The petitioner is a defendant in a suit for recovery of amount. The suit was dismissed on 2-12-1998 in default. The plaintiff had to lead evidence in the suit and the suit had been posted for 19-11-1998 for recording of plaintiffs evidence. The plaintiff could not produce the evidence on that day and as a last chance the suit was adjourned to 2-12-1998. On 2-12-1998 the plaintiff did not appear in the trial Court at all, whereas the defendant was present. Therefore, the suit was dismissed in default by the trial Court. Thereafter an application came to be filed under Order 9, Rule 9 of the

Code of Civil Procedure (for short 'the Code') for restoration of the suit, which has been allowed by the trial Court. Against this order, this revision has been filed.

2. The contention of the learned Counsel for the petitioner-defendant is that an application for restoration of the suit under Order 9, Rule 9 of the Code was notat all maintainable in the facts and circumstances of the case as the suit had not been dismissed in terms of Rule 8 of Order 9 of the Code, but had been dismissed in terms of Rule 3 of Order 17 of the Code. Rule 3 of Order 17 of the Code lays down :

'Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,--

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent proceed under Rule 2.

On the other hand, Rule 8 of Order 9 of the Code lays down :

'Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far it relates to the remainder.'

3. When the provisions are read together, it becomes abundantly clear that they operate in two different affairs, and there is no overlapping between the Rule 3 of Order 17 of the Code and Rule 8 of Order 9 of the Code. If a suit is dismissed in default of an appearance of the plaintiff in terms of Rule 8 of Order 9 of the Code which the Court is bound to do if the plaintiff fails to appear, then the only remedy open to such a plaintiff is an application for restoration of the suit under Order 9, Rule 9 of the Code. On the other hand, if theplaintiff is very much physically present in the Court, but does not fulfil the conditions laid down by a previous order of the Court, the Court can proceed to decide the case. A situation can be

visualised in a case in which the plaintiff is leading evidence. Some of the evidence has been led and some of the evidence is not led in accordance with the order of the Court, in such a situation the Court cannot dismiss the suit outright, but it can proceed to decide the case and the Court would have to take the evidence on record which is already before it.

4. The learned Counsel for the petitioner refers to the decision of a Division Bench of this Court reported in Kalagara Hari Babu v. Edupuganti Krishna Rao (died) and another. This judgment also lays down the same proposition of law which has been enunciated herein above. In that case the party had refused to open his evidence although he had been asked to do so by the Court and dismissal in such a suit was held to be a judgment on merits and remedy by way of an application under Order 9, Rule 9 of the Code was held to be inappropriate.

5. For these reasons, I do not find any merit in this revision which isaccordingly dismissed.

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