

Bijay Singh and Others Vs. Additional Dist. Judge, lind, Muzaffarnagar and Others

Bijay Singh and Others Vs. Additional Dist. Judge, lind, Muzaffarnagar and Others

SooperKanoon Citation : sooperkanoon.com/448119

Court : Allahabad

Decided On : Aug-17-1992

Reported in : AIR1993All22

Judge : A.K. Banerji, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule 13 - Order 9, Rule 6(1) - Order 17, Rules 1, 2 and 3; [Limitation Act, 1963](#) - Sections 5

Appeal No. : Civil Misc. Writ Petition No. 1031 of 1988

Appellant : Bijay Singh and Others

Respondent : Additional Dist. Judge, lind, Muzaffarnagar and Others

Advocate for Def. : S.C. and ;A.N. Bhargava, Adv.

Advocate for Pet/Ap. : Sri G.C. Bhattacharya, Adv.

Judgement :

ORDER

1. By means of the aforesaid writ petition, the petitioners have challenged the order dated 11-11-1987, passed by the II Additional District Judge, Muzaffarnagar (Respondent No. 1) allowing the application of the defendants-opposite parties

under S. 5 of the Limitation Act for condoning the delay in filing the application under Order 9 Rule 13, CPC for setting aside the ex parte decree dated 28-5-1986. By the connected Civil Revision the revisionists have challenged the subsequent order dated 13-1-1988 by which the respondent No. 1 allowed the application under Order 9 Rule 13, CPC and set aside the ex parte decree. The counsel for the parties are agreed that the writ petition and the Civil Revision should be heard and decided together at the admission stage itself. With the consent of the parties, the aforesaid cases are being decided together at the admission stage under the rules of the Court.

2. Briefly stated the facts so far as they are relevant for the purpose of the present cases are that Suit No. 122 of 1975 was filed by one Ram Saran for cancellation of the three Gift Deeds said to have been executed by him. The said Ram Saran died during the pendency of the suit and was substituted by his daughter Smt. Ilam Kaur. The suit was being contested by the defendant-opposite parties Mahabir and others. This suit was decreed ex parte on 28-5-1986 in the absence of the defendants and their counsel. On 8-7-1986 an application was filed under S. 5 of the Limitation Act (paper No. 3-C) for condoning the delay in filing the application under Order IX Rule XIII C.P.C. and another application was filed under Order IX Rule XIII CPC (paper No. 5-C) for setting aside the ex parte decree dated 28-5-1986. Both these applications were supported by an affidavit. It was averred that the plaintiff had closed evidence and the evidence of the defendants had started. The cross-examination of the defendant D.W. 2 Mahabir had commenced but could not be completed. On 17-4-1986 which was the date fixed for evidence, an application was filed by the plaintiff for adjournment of the case. The said application was allowed by the Court and the case was ordered to be put up on 2-7-1986. It has been further averred that after this date was fixed, the defendant Mahabir who was looking after the pairvi of the case on behalf of the defendants and whose cross-examination was to go on, left for his village, on the bona fide belief that the evidence would now be recorded on 2-7-1986. The defendant, however, came to know on 4-7-1986 that the suit has been decreed against the defendants on 28-5-1986. On enquiry, it was found out that on 17-4-1986 when the defendant had left the Court, at the instance of the counsel for the plaintiff, the date was advanced by the Court from 2-7-1986 to 14-5-1986. This date was not

known to the defendant and hence he did not appear on 14-5-1986 and he being absent and his counsel being busy nobody attended to the case when it was called out on 14-5-1986 and the Court passed an order fixing 30-7-1986 for ex parte hearing. On 26-5-1986 the plaintiffs filed an application (paper No. 376-D) pointing out to the Court that under the explanation added to Order 17 Rule 2, CPC the Court should decide the suit on merits and not ex parte as substantial portion of the evidence of the defendant had been recorded and the defendants and their counsel had absented and failed to appear on 14-5-1986. The prayer was made for recalling the order dated 14-5-1986 fixing 30-7-1986 for ex parte hearing and also praying that the matter be heard soon. It is noteworthy that copy of this application was not served on the counsel for the defendants. The said application was heard by the Court on 27-5-1986, after allowing the same the Court heard the case on merits and decreed the suit on 28-5-1986. It was averred that the defendant (Mahabir) had no knowledge about the change of the dates and consequently he did not appear on 14-5-1986. He had come to the Court on 2-7-1986 but on the said date the Presiding Officer was on leave and he was informed by the clerk of the counsel as well as by the Court Reader that 30-7-1986 has been fixed for final hearing. The said defendant went away with this impression that the evidence of the defendants will be recorded on 30-7-1986. However, it was found later that the suit had been decreed on 28-5-1986. The defendants learnt about the ex parte decree in the village only on 4-7-1986 and after inspection of records, filed the application under Order IX Rule 13 C. P.C. along with an application under S. 5 of the Limitation Act for condoning the delay, if any, in filing the application for setting aside the ex parte decree.

3. These applications were contested by the plaintiffs and it was denied that the defendants were not aware of the date 14-5-1986. It was also denied that the defendant (Mahabir) had come to the Court on 2-7-1986 and was informed that the suit was fixed on 30-7-1986, as alleged.

4. The matter was considered by the respondent No. 1 who vide his order dated 11-11-1986 allowed the defendants' application filed under S. 5 of the Limitation Act. The respondent No. 1 was satisfied from the averments made by the defendants that they had no knowledge about the decree prior to 4-7-1986,

accepted the contention of the defendants and allowed the application under S. 5 of the Limitation Act and also vide subsequent order dated 13-1-1988 set aside the ex parte decree by allowing the application filed by the defendants under Order IX Rule 13, CPC. Aggrieved against the aforesaid orders, the plaintiffs challenged the order dated 11-11-1986 by means of the aforesaid writ petition No. 1031 of 1988 and the order dated 13-1-1988 setting aside the ex parte decree by means of the Civil Revision No. 362 of 1988. Both these cases were ordered to be put up together and had been listed before me. In the writ petition the parties have exchanged counter and rejoinder affidavits. The defendant-respondent Mahabir had died in the meantime and was substituted by his heirs.

5. I have heard Shri G. C. Bhattacharya, learned counsel for the petitioners and Shri A. N. Bhargava, learned counsel appearing for the respondents. The first submission of the learned counsel-I for the petitioners is that as the judgment and decree of the Court dated 28-5-1986 shows that the Court had proceeded to decide the suit on merits, consequently the defendants' application under Order IX Rule 13, CPC was not maintainable. The argument of the learned counsel is that on the adjourned date i.e. on 14-5-1986, the defendants or their counsel did not appear. Prior to the said date the evidence of the defendants were going on and the evidence of the D.W. 1 was recorded and the cross-examination of the defendant, Mahabir, who appeared as D.W. 2 was in progress. The Court had fixed 14-5-1986 for completing the evidence of the defendants. As on the adjourned date substantial portion of the evidence had been completed, the case was covered under the Explanation to sub-sec. (2) of Order 17. The Court below, therefore, had rightly proceeded to hear and decide the suit on merits on 28-5-1986. Since the judgment was on merits, no application under Order IX Rule 13, CPC would be maintainable. Consequently, it was urged that the respondent No. 1 could not have allowed the defendants' application under Order IX Rule 13, CPC and the decision is manifestly illegal and without jurisdiction.

6. The question, therefore, is whether in the facts of the present case Order 17 Rule 2 Explanation will apply and whether the application under Order IX Rule 13, CPC will be maintainable. Order 17 Rule 2, CPC as amended reads thus:

'Where on any date to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such order as it thinks fit.'

Explanation -- where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any date to which the hearing of the suit is adjourned, the court may, in its discretion proceed with the case as if such party were present.'

7. From the copy of the order-sheet which has been filed by the petitioners, it would be evident that on 6-2-1985 the plaintiffs had closed their evidence. The case was adjourned on the said date as the defendants' witnesses were not present. On a subsequent date the defendants examined, the Sub-Registrar as D.W. 1 and his statement was recorded. On 23-9-1985, the evidence of Mahabir, the defendant, who appeared as D.W. 2 commenced. The order-sheet shows that on 8-10-1985 the cross-examination of Mahabir was going on but the same could not be completed.

8. The case was again listed after several dates on 17-4-1986, on which date the plaintiff filed an application for adjournment of the case and the case was directed to be listed for the cross-examination of Mahabir (D.W. 2) on 14-5-1986. The order-sheet shows that on 14-5-1986 the plaintiffs' counsel was present but the defendants and their counsel were absent and the Court passed an order fixing 30-7-1986 for ex parte hearing. On 26-5-1986, an application (paper No. 376-D) was filed by the plaintiff for recalling the order fixing the date for ex parte hearing on the ground that the substantial portion of the defendant's evidence had been recorded and as on 14-5-1986, the defendant or his counsel did not appear, which was the adjourned date, and did not give evidence, consequently, the suit has to be heard on merits and the date for hearing may be advanced. On 27-5-1986 the respondent No. 1 allowed the plaintiffs application (paper No. 376-D) and heard the case on merits on the same day and delivered judgment on 28-5-1986 decreeing the plaintiffs' suit. It has already been noticed that the defendants filed two applications one for setting aside the ex parte decree and the other for condoning the delay, if any, in filing the said application. The defendants had

shown cause for their absence and averred that they learned about the ex parte decree only on 4-7-1986 in the village.

9. On behalf of the defendant it was contended before the respondent No. 1 that the said defendant was not aware of the date 14-5-1986 and that consequently it cannot be taken that he had deliberately failed to appear on the said date. Besides the list of witnesses submitted by the defendants consisted of 7 witnesses and only the statement of one witness had been recorded and even the evidence of the defendant Mahabir who appeared as D.W. 2 had not been completed. Consequently, the defendants did not fail to appear within the meaning of Order 17 Rule 2 CPC nor was substantial portion of the defendants evidence recorded. Thus explanation to Order 17 Rule 2, CPC would not be applicable in the present case.

10. The respondent No. 1 has considered the matter at length and found the explanation given by the defendant -convincing. Respondent No. 1 believed the defendants that they were not aware of the date 14-5-1986 nor of the ex parte decree dated 28-5-1986 and had only come to know of the same on 4-7-1986. The respondent No. 1 further held that in the facts of the case provisions of Order 17 Rule 2 would be applicable, the explanation would not apply and the application under Order IX Rule 13, CPC was maintainable. The learned counsel for the petitioners has assailed the findings of the respondent No. 1 in the aforesaid Civil Revision No. 362 of 1988 before this Court.

11. Having heard the learned counsel for the parties and having perused the record. I am of the view that the order passed by the respondent No. 1 cannot be said to be illegal or erroneous or without jurisdiction. I agree that the application under Order IX Rule 13, CPC was maintainable in the facts of the present case. It has been held by the Supreme Court in the case of Prakash Chandra Manchanda v. Smt. Janki Manchanda, AIR 1987 SC 42 that if on a date fixed, one of the parties to the suit remain absent and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any of the modes prescribed under Order IX of the Code of Civil Procedure. The explanation to Rule 2 gives a

discretion to the Court to proceed under Rule 3 even if a party is absent, but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence.

12. In the same connection the Full Bench decision of this Court in the case of M. S. Khalsa v. Chiranji Lal, reported in 1976 ALJ379 : (AIR 1976 SC 290) may be noticed. It has been held by the majority that in a case for which the defendant obtained an adjournment on the date of final hearing of the suit and fails to appear on the adjourned date is covered by Rule 2 of Order 17 and an application under Order IX Rule 13, CPC will lie, even if the Court professes to act under Rule 3. The Rule 3 applies when a party is present or is deemed to be present and has defaulted in doing the acts mentioned in Rule 3. Speaking for the majority Satish Chandra J. as he then was held as follows :--

'In all cases of failure to appear by a party the case will be governed by Rule 2. This construction of Rule 2 as it stands amended in this court is not only consistent with the language read in the context of Order 17 Rule 2 and Order IX Rule 6(1)(a) but is also in accord with the express purpose for which the Rule was amended in 1953.'

In the same decision it has been further said that Order 17 Rule 2 gives discretion to the Court to decide the suit on merits if the evidence or a substantial portion of the evidence by a party has been recorded and such party fails to appear. It has been found by the Court below (respondent No. 1) that in this case only evidence of one out of 7 witnesses was recorded and the defendant had no knowledge about the date 14-5-86 and, therefore, it cannot be said that the defendants had failed to appear or that substantial portion of evidence had been recorded. There is no escape from the conclusion that in the facts of the present case the Order 17 Rule 2 was applicable and an application under Order IX Rule 13 was maintainable, and the, respondent No. 1 has not committed any error of law or jurisdiction in exercising the discretion in favour of the defendants in recalling the ex parte order dated 28-5-1986, and in holding the application under Order IX Rule 13, CPC maintainable.

13. Learned counsel for the petitioners has further contended that the Court had proceeded to decide the suit on merits and had already passed an order on 27-5-1986 recalling the order dated 14-5-1986 fixing 30-7-1986 for ex parte hearing. The said order has become final as the same has not been challenged. So far as this argument is concerned, it has been held in the Full Bench decision of this Court in the case of Seth Munna Lal v. Seth Jai Prakash AIR 1970 All 257 (1969 All LJ 327) as follows (at page 261) 'of AIR :--

'It is admissible to entertain an application for restoration under Order 9 even when the Court purports to act under Order 17 Rule 3 C.P.C. if the circumstances set out by the court are such that an order under Order 9 read with Order 17 Rule 2 would be legally justified and the actual order passed is one which could be legally passed under Order 9 read with Order 17 Rule 2, CPC.

14. In the facts of the present case even though the Court purported to act under Order 17 Rule 3, CPC the circumstances of the case were such that an order under Order 9 read with Order 17 Rule 2 could be legally justified. Therefore, even if the respondent No. 1 by the order dated 27-5-1986 professed to decide the case on merits that would make no difference if the case was covered under Order 17 Rule 2, CPC. This view is also substantiated by the Full Bench decision in the case of M. S. Khalsa v. Chiranji Lal (supra). It would be worthwhile to notice another decision of this Court in the case of Surya Bali v. VI Additional District Judge, reported in 1989 All CJ 163 : (AIR 1989 All 179). This Court had observed in the said case while interpreting the provisions of Order 17 Rule 3, CPC that it is elementary rule of interpretation that the procedural law has to be interpreted with a view to advance substantial justice. The procedural fairness of the principle of natural justice has been embodied in the provisions of Rules 1, 2 and 3 of Order 17 with a view that justice is done as any order passed by the Court would affect the rights of the parties. These rules have not to be interpreted so that they may exclude the principle of natural justice.

15. It was then urged by the learned counsel for the petitioners that the Court had erred in the facts of the present case in giving benefits of S. 5 of the Limitation Act and in condoning the delay and also in setting aside the decree dated 28-5-1986, I

do not find any reasons to interfere with the findings of the respondent No. 1. The said respondent has recorded a finding based on the record that the date which was originally fixed for evidence of the defendants was changed from 2-7-1986 to 14-5-1986 of which the defendants had no knowledge. In the case of Dalip Kumar Chaurasia v. Ramesh Chandra Sahu (AIR 1991 SC 68) the facts are that the District Judge passed an ex parte order on a date which was not previously set down due to a mistake in listing the case. On the mistake being discovered the ex parte order was stayed by the District Judge. The Supreme Court upheld the order as substantial justice between the parties had been done.

16. I am of the view that in the facts of the present case when once the Court comes to the conclusion that the cause shown was sufficient and restores the case to be heard afresh on merits substantial justice is done which calls for no interference. It may be noticed that the legislature in its wisdom has, therefore, not provided any appeal against such an order. Thus, I see no reason to interfere with the said findings of the respondent No. 1 which is based upon a correct appreciation of the facts of the present case. The order dated 11-11-87 passed by the respondent No. 1 allowing the application under S. 5 of the Limitation Act and the order dated 13-1-1988 allowing the application under Order IX Rule 13, CPC does not suffer from any error of law or any error of jurisdiction.

17. In the result the Writ Petition No. 1031 of 1988 and the Civil Revision No. 362 of 1988 are both dismissed. The Court below is directed to decide the suit as expeditiously as possible. Cost on parties.

18. Order accordingly.