

Dildar Husaln Vs. Abdul Moid

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Court : Allahabad

Decided On : Sep-07-1956

Reported in : AIR1957All238

Judge : Agarwala and ;Beg, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rules 8 and 9 - Order 17, Rules 2 and 3

Appeal No. : F.A.F.O. No. 227 of 1951

Appellant : Dildar Husain

Respondent : Abdul Moid

Advocate for Def. : Saddiq Ali and ;Ambika Prasad, Adv.

Advocate for Pet/Ap. : B.S. Darbari, Adv.

Disposition : Appeal allowed

Judgement :

Agarwala, J.

1. This is a plaintiff's appeal against an order of the Court below rejecting the appellant's application for setting aside an ex parte order dismissing his suit in the absence of the plaintiff.

2. The facts shortly stated are as follows:

3. The plaintiff Dildar Husain filed a suit' against the defendant-respondent Abdul Moid for possession over a certain property and for accounts. A rival suit was also filed by the defendant Abdul Moid for an injunction restraining the plaintiff-appellant Dildar Husain from interfering with Abdul Mold's possession over the property in dispute. The two suits were consolidated and were being heard together. There was an order of injunction passed against the plaintiffDildar Husain in Abdul Moid's suit. The date fixed for final hearing in the two cases was the 1st February, 1951. Two days earlier, namely, on the 30th January, 1951, in Abdul Moid's suit the order of injunction had been discharged. On that date, Dildar Husain, the present plaintiff-appelant had not appeared and his counsel had stated that he had no instructions. This was in Abdul Moid's suit.

4. On the 1st February, 1951, the suit which has given rise to the present appeal was taken up for hearing, but Dildar Husain did not appear and his counsel made a statement that he had no in-structions. He made no application for adjournment. Abdul Moid was present and a statement was made on his behalf that his suit may be dismissed as it had become infructuous. The Court disposed of both the suits by one order. It dismissed Dildar Husain's suit with costs and also dismissed Abdul Moid's suit, but made no order as to costs.

5. It appears that in Abdul Moid's suit an, application for adjournment had been made and the 1st February, 1951, was an adjourned date. but in Dildar Husain's suit it was the first date of' final hearing.

6. Against the order dismissing his suit, Dil-dar Husain filed an application under Order 9, Rule 9, Civil P. C., for setting aside the order of dismissal. His case was that the order of dismissal was for default of his appearance. The Court rejected this application on the ground that although the date fixed in Dildar Husain's case was not an adjourned date, the date was an adjourned date so far as Abdul Moid's suit was concerned and that since the two suits were consolidated, if the date was adjourned in one suit, it would automatically operate as an adjourned date in the other suit, and that therefore, Order 17, Rule 3, C. P. C. applied to the case. It was also observed that the Court had dismissed the suit on the merits and not for

default of the plaintiff's appearance. For these reasons, the plaintiff's application was dismissed.

7. We are of opinion that the Court below was in error in holding that no application lay under Order 9, Rule 9, C. P. C. to that Court. It is true that where two rival suits are consolidated and an application for adjournment is made in one suit by the plaintiff of that suit, and the suit is adjourned, the second suit is also adjourned because it is connected with the former. But such adjournment of the second suit not having been made at the instance of the plaintiff of that suit, cannot be treated as an adjournment which would call for the application of Rule 3 of Order 17, O. P. C. as against him.

Thus the application by Abdul Moid in his suit for adjournment cannot be taken as an application by Dildar Husain for the adjournment of his own suit. On the 1st February, 1951, Dildar Husain was absent and his counsel stated that he had no instructions. He did not make any application for adjournment. The plaintiff cannot therefore be treated as present and the adjournment, if any, not having been made at Dildar Husain's instance, Order 17, Rule 3, C. P. C. had no application to the case. Order 17, Rule 3, C. P. O., applies only where any party to a suit to whom time has been granted fails to produce his evidence, etc.. etc. Obviously the rule applies when on a date adjourned at the instance .of a party, the party fails to do certain things for which time was allowed to him. Treating 1st February, 1951, as an adjourned date, the case fell within the purview of Rule 2, Order 17, C.P.C. Under that rule, as amended by this Court, the Court has jurisdiction to decide the case on merits in two contingencies only.

The first is where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on such date and the second is where a party is either himself present or is represented in Court by an agent or pleader though engaged only for the purpose of making an application. Where, therefore, a party is absent and his counsel does not make an application for adjournment or other application, but states that he has no instructions, the case does not fall under the second condition and as no evidence was recorded in the present case, the case did not fall under the first condition either.

In no other case can the Court pass an order on the merits. When none of the two conditions is present, the Court has no power to decide the case on the merits. This view has consistently prevailed in this Court (vide *Mt. Phul Kuer v. Hashmatullah Khan*, ILR 37 All 460: (AIR 1915 All 139) (A); *Ramcharan Lal v. Raghu-bir Singh*, ILR 45 All 618: (AIR 1923 All 551) (B); *Ram AdhIn v. Ram Bharose* : AIR1925 All182 and *Gaheshilal Har Narain V. Debi Das* : AIR1925 All267 . A full Bench of the Bombay High Court has expressed the same opinion (vide *Basalin-gappa v. Shiramappa* : AIR1943 Bom321 . The decisions of the Madras High Court reported in *Subramania v Munusamiya Pillai*, AIR 1916 Mad 897 (I) (F); *Kovummal Ammal, In re* : AIR1934 Mad199 and *Krishna Udayar v. Chin- na Pillai*, AIR 1948 Mad 416 (H) and those of the Calcutta High Court in *Mariannissa v. Ramkalpa Gorain*, ILR 34 Cal 235 (I) and *Kadar Khan v. Jageshwar Prasad Singh*, ILR 35 Cal 1023 (J) are not opposed to this view.

It, therefore, follows that even if the 1st February, 1951. was an adjourned date, it was not a case in which a decision could be given, on the merits either under Order 17 Rule 2 or Order 17, Rule 8, C.P.C. The order of dismissal of the suit was, therefore, one under Order 9, Rule 8, C.P.C. As such the application for setting aside the order of dismissal lay to the Court under Order 9, Rule 9. C.P.C. The Court was, therefore, in error in holding that no such application lay to that Court.

8. We, therefore, set aside the order of the Court below and remand the case to that Court for deciding the application for restoration on the merits. Costs here and hitherto shall abide the result.

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