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Court : Allahabad

Decided On : Mar-03-1952

Reported in : AIR1952All749

Judge : Desai, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rules 3, 4 and 8

Appeal No. : Civil Revn. No. 281 of 1952

Appellant : Babu

Respondent : Dewan Singh and ors.

Advocate for Pet/Ap. : Syed Sadiq Ali, Adv.

Disposition : Application dismissed

Judgement :

ORDER

Desai, J.

1. This is an application by a defendant in revision against an order of the courts below dismissing his application for the setting aside of an 'ex parte' decree.
2. The opposite party filed a suit against the applicant. On 15-4-1950, which was the date for the filing of the written statement by the applicant, the applicant was

absent and the court ordered that the suit would proceed 'ex parte' against him' and fixed 3-5-1950 for 'ex parte' evidence. When the suit was called out for hearing on 3-5-1950, neither the opposite party nor the applicant was present and the court dismissed the suit in the absence of the parties.

Later, at the request of the opposite party, the suit was restored but without any notice having been given to the applicant. After restoring the suit, the court again proceeded 'ex parte' against the applicant, gave him no notice of the next date fixed for recording 'ex parte' evidence and on 12-7-1950 passed an 'ex parte' decree against him. The applicant then applied for the setting aside of that decree and that application has been dismissed by the courts below.

3. The first contention of the applicant is that the suit should not have been restored without a notice being given to him. There is no law under which a notice was necessary to be given to him. The suit was dismissed under Order 9, Rule 3, and was restored under Rule 4. That Rule does not lay down that before a suit is restored a notice should be given to the defendant. A defendant is entitled to a notice only when a suit is dismissed in default under Rule 8, in his presence. See 'BRIJ LAL v. BUA RAM', 10 All LJ 399 and 'RAMJI LAL v. KESHEO RAM' AIR 1923 Oudh 55(1) in support of this view. The provision in Rule 14 is of no application at all because that deals with a notice to the plaintiff of an application for the setting aside of an 'ex parte' decree. The trial court committed no illegality or irregularity in restoring the suit without notice to the applicant.

4. The next contention is that after restoring the suit, the trial court should have given to the applicant a notice of the date fixed for recording evidence. He has not been able to cite any provision under which the trial court was bound to give him a notice of the date. The effect of the restoration was same as if there were no dismissal of the suit on 3-5-1950. Only the order of dismissal passed on 3-5-1950 was set aside; all previous proceedings and orders were revived including the order that the suit was to proceed 'ex parte' against the applicant. On restoration the suit was placed in the same position in which it was just before the dismissal, and the trial court was required to proceed 'ex parte' against the applicant. I am supported by 'KARORA SINGH v. BABU RAM' AIR 1952 Pepsu 22.

As the proceedings were 'ex parte', the applicant was not entitled to any notice of the date fixed for the opposite party's evidence. The provision in Rule 7 is directly against his contention. When a suit is proceeding 'ex parte', not only is the defendant not entitled to any notice in future but also it is his duty to appear 'sua motu' in court and apply for the setting aside of the 'ex parte' proceedings if he wishes to be heard in defence of the suit. Unless he satisfies the court that he had good ground for his absence, he has no right to be heard. When he has no right to be heard, it would be inconsistent to say that a notice of the date should be given to him. Consequently the trial court committed no illegality or irregularity in giving no notice to the applicant of the date fixed for recording 'ex parte' evidence.

After the restoration it was for the applicant himself to appear in court and get the 'ex parte' order set aside under Rule 7. If he did not get the 'ex parte' order set aside, he could apply for the setting aside of the 'ex parte' decree, as he did in the instant case. But he could not succeed unless he satisfied the court that there was good ground for his absence on 15-4-1950. This he has failed to do. His application was rightly dismissed.

5. The facts in 'MOOL CHAND v. GANGA SAHAP : AIR1933 All522 and 'RAM CHANDRA RAMAJI v. SAHADEO GOPALA' AIR 1945 Nag 185, are not on all fours with the facts of the present case. There was no order passed by the trial court hearing the suit 'ex parte' as in the present case. There Rule 7 of Order 9 did not come into application as it did in the present case.

6. In the result the application is dismissed.

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