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Court : Allahabad

Decided On : May-17-2004

Reported in : 2004(3)AWC2801

Judge : Arun Tandon, J.

**Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13 - Order 17, Rule 2
- Order 43, Rule 1**

Appeal No. : C.M.W.P. No. 6016 of 1985

Appellant : Chaman and ors.

Respondent : ist Additional Civil Judge and ors.

Advocate for Def. : A.C. Tripathi, Adv. and ;Piyush Shukla, S.C.

Advocate for Pet/Ap. : Ajay Kumar Singh, Adv.

Disposition : Petition allowed

Judgement :

Arun Tandon, J.

1. Heard Sri Ajay Kumar Singh, learned counsel for the petitioner, Sri Piyush Shukla, learned standing counsel for the respondent Nos. 1 and 2 and Sri A.C. Tripathi, learned counsel for the respondent Nos. 3 and 4.

2. This writ petition is directed against the order dated 13th August, 1984 in Case No. 218 of 1973, Baya v. Kanhaiya, passed by the IXth Additional Munsif, Varanasi, as also against the order dated 24th January, 1985, passed by the 1st Additional Civil Judge, Varanasi in Misc. Appeal No. 381 of 1984, Lakhan and Ors. v. Baya. and Ors., whereby the learned Additional Civil Judge has dismissed the said appeal and upheld the order dated 13th August, 1984 passed by the learned Additional Munsif.

3. Original Suit No. 218 of 1973 was filed by respondent No. 3, namely, Baya for partition of one third share in respect of the house being property No. D-62-1, situate in Mohalla Sonia City, Varanasi, The said suit was decreed ex parte under the judgment and order dated 6th July, 1982. In the said suit, the father of the petitioners Sri Kanhaiya was one of the defendants. During the said proceedings, Sri Kanhaiya expired, the plaintiffs-petitioners, who were legal heirs filed an application for recall of the ex parte judgment and decree, which was number as Misc. Case No. 59 of 1983. The said application for recall of the ex parte order was filed only after five days from the date of the ex pane decree on 11th July, 1983. The application so filed, was allowed and the suit was restored to its original number after recall of the ex parte decree.

4. An application, being Paper No. 10/11-C was filed on behalf of the respondent No. 3, Sri Baya for recall of the order dated 13th January, 1984, whereby the ex parte decree was recalled. The said application was allowed vide order dated 11th May, 1984, on the ground that the application filed to set aside the ex parte decree, was decided without service of notice upon decree holder.

5. Thereafter the trial court restored the application for setting aside the ex parte decree and vide order dated 13th July, 1984, rejected the said application of the defendants-petitioners.

6. Feeling aggrieved by the aforesaid order, . the petitioner-defendants filed an appeal, which was numbered as Misc. Civil Appeal No. 381 of 1984. The appeal has also been dismissed by the 1st Additional Civil Judge by means of the order dated 24th January, 1985. Hence the present writ petition.

7. I have heard learned counsel for the parties and have gone through the records of the writ petition.
8. Learned trial court has rejected the application for setting aside the ex parte decree on the ground that the suit had been decided on merits under Order XVII Rule 3 of the Code of Civil Procedure. The application for recall of the ex parte decree was not maintainable. The defendants should have filed an appeal against the said judgment and decree. After recording the said findings, the trial court has proceeded to make certain remarks to the absence of the defendants on the relevant date.
9. Feeling aggrieved by the order of the trial court, the petitioner filed an appeal under Order XLII Rule 1 (d) of the Code of Civil Procedure. The said appeal was registered as Civil Misc. Appeal No, 381 of 1984. The appeal has also been rejected on the ground that the application filed on behalf of the defendants under Order IX Rule 13 of the Code of Civil Procedure, was not maintainable in view of the fact that the Court had decided the suit on merits under Order XVII Rule 3. Hence the present writ petition.
10. In the order dated 6th July, 1983, which has been enclosed as Annexure-8 to the writ petition, it has been specifically recorded that the defendants-petitioners as well as his counsel were not present and in such circumstances, the Court proceeded to close the evidence of the defendants and after hearing the arguments of the petitioner's counsel, delivered the judgment on the same day.
11. From the recital of the facts as mentioned hereinabove under the order whereby the ex parte decree was passed, it is established beyond doubt that neither petitioners-defendants were present nor their counsel was present before the trial court on the date ex parte hearing was done and the judgment was passed.
12. In such circumstances, the order passed by the trial court is necessarily referable to the provisions of Order XVII Rule 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code'), the legal position in that regard has been explained by the Full Bench judgment of this Court in Seth Munnalal v. Seth Jai

Prakash, AIR 1970 All 257.

13. In the judgment in Vishnu Saran Pandey v. Sunil Kumar Bhalotiya, AIR 1988 All 194, the learned single Judge of this Court has held after relying upon the Full Bench judgment referred to above as follows :

'.....In substance, the decision of the Full Bench is that the Court has to examine facts and circumstances of each case to come to the conclusion whether it is a case which would be covered under Order XII. Rule 3 or 2. If it falls under Rule 3 the application under Order IX, Rule 13, for setting aside the ex parte decree would not lie, but if it falls under Rule 2 it would lie. Thus, in substance, not form of the order, which the Court referred is to be seen from the actual fact existing. It is relevant to refer here to Order IX, C.P.C. which deals with 'appearance of parties and consequence of non-appearance'. Under Rule 6 if the plaintiff appears and defendant does not appear, the Court may proceed ex parte if it is proved that summons have been served, under Rule 8, the defendant appears and the plaintiff does not appear the Court shall dismiss the suit subject to admission by the defendant under Rule 13, the party could make an application for setting aside ex parte decree. Order XVII, Rules 2 and 3 is also relevant in this context. Under Rule 2. where on any day to which the hearing of the suit is adjourned the parties or any one 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 other order as it thinks fit. Under Rule 3, 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 proceed in two ways, firstly, under (a) of the aforesaid rule, 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. This splitting upon under Rule 3 in Sub-clauses (a) and (b) is very significant. It is rather clarificatory to what has been held in the aforesaid Full Bench. It carves out exclusive jurisdiction for the Court to act under Rules 2 and 3 in case of party being present in the Court could proceed to decide the suit under Rule 3 while if the parties are absent the Court could proceed under Rule 2, Now the only thing open for the Court is to test whether the

Court should proceed under Rules 2 and 3 to decide whether on the adjourned date the parties are present or not. If in a case it could be treated that parties are present it would be a case of falling under Rule 3. If the parties or any one of them is absent the Court is to proceed under Rule 2.'

14. To the similar effect are the judgments of this Court in *Bijay Singh and Ors. v. Additional District Judge, IInd Muzaffarnagar and Ors.*, 1993 AWC 300 and *Smt. Surasati v. Bechu Lal and Ors.*, 1997 (2) AWC 2.205 (NOC) ; 1997 ACJ 375, in view of the aforesaid settled legal position and in view of the order of the trial court dated 6th July, 1982, it cannot be disputed that the Court has proceeded to decide the suit under Order XVII Rule 2 of the Code only.

15. In the circumstances, the application filed by the petitioners for setting aside the ex parte decree under Order IX Rule 13 was clearly maintainable as has been held in the aforesaid judgments of this Court. The courts below have failed to appreciate the aforesaid settled legal position. The impugned orders dated 13th August, 1984 and 24th January, 1985, passed by IXth Additional Munsif, Varanasi and 1st Additional Civil Judge, Varanasi respectively, are unsustainable. The appeal filed by the petitioners-defendants under Order XLIII Rule 1 (d), was also legally maintainable and the same has wrongly been rejected by the 1st Additional Civil Judge, Varanasi vide order dated 24th January, 1985.

16. In view of the aforesaid order dated 13th August, 1984, passed by IXth Additional Munsif, Varanasi in Original Suit No. 218 of 1973 as well as the order dated 24th January, 1985, passed by 1st Additional Civil Judge, Varanasi in Misc. Appeal No. 381 of 1984 are hereby set aside. The matter is remanded to the trial court. Varanasi to reconsider the application of the defendant-petitioners for setting aside the ex pane decree dated 6th July, 1984 on merits afresh in accordance with law. Since the suit itself is of the year 1973 the trial court shall proceed to decide the same in accordance with law at the earliest possible within six months from the date a certified copy of this order is produced before it.

17. With above observations, this petition is allowed. There shall be no order as to costs.

