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Court : Allahabad

Decided On : May-25-1998

Reported in : 1998(3)AWC2086

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule 13 - Order 38, Rule 5

Appeal No. : C.M.W.P. No. 16985 of 1998 and 17643 of 1998

Appellant : Jagdamba General Store and Another

Respondent : liird Additional District Judge, Dehradun and Others

Advocate for Def. : R.B. Sahai, ;H. Upadhyay, Advs. and ;S.C.

Advocate for Pet/Ap. : K.K. Arora and ;R.C. Gupta, Advs.

Judgement :

D.K. Seth, J.

1. In the present case, an application under Order IX. Rule 13 was allowed by setting aside ex parte decree passed in Suit No. 634 of 1988. Against the said order dated 30.9.1995 passed by learned Additional Civil Judge (S.D.), 1st Court,

Dehradun in Misc. Case No. 93 of 1991 arising out of the said suit, a revision being Civil Revision No. 140 of 1995 was preferred. The revisional court had allowed the revision while modifying the order dated 30.9.1995 and directed for furnishing bank guarantee in respect of half of the decretal amount to the satisfaction of the learned trial court, a condition precedent for allowing the application under Order IX, Rule 13.

2. This order has been challenged by Mr. K.K. Arora, learned counsel for the petitioner, on the ground that Order IX, Rule 13 though contemplates of terms as regards to cost or payment into Court or otherwise, but it never contemplates of furnishing security to secure the decretal amount. According to him, the term qualifies cost only. Payment into Court or otherwise qualifies the cost indicating as to whether the cost shall be paid to the Court or otherwise. Therefore, when the said provision has not referred to furnishing security or depositing decretal amount, in that event, it cannot be said that the Court has jurisdiction to give any such direction.

3. Mr. Arora, had relied on a decision rendered by learned single Judge of this Court in *Raj Kumar Soni v. M/s. Mohan Meakin Breweries Ltd.* : AIR1979 All370 , where it has been held that the direction for depositing 1/5th of the decretal amount while setting aside ex parte decree was not justified though the Court could have asked for deposit of cost if the defendant was found to be at fault. This judgment was also referred to in the decision in the case of *M/s. Modern Fuel Industry, Saharanpur and others v. Indian Bank, Saharanpur*, 1991 (1) ALR 587, and has been distinguished to the extent that even decretal amount can be directed to be deposited while setting aside ex parte decree, on the analogy that the term related to the cost as well as payment into the Court or otherwise. Payment into Court or otherwise did not qualify the cost. On the other hand both cost, payment into Court or otherwise qualifies the term. Thus, it apparently appears that the two learned single Judges have taken two different views. Mr. Arora relying on these two, decisions contends that since there are two judgments taking two different views, therefore, this matter should be referred to a larger Bench. He also contends that the question is dependent on the merits of the case inasmuch as if the defendant is found to be at fault, then only such cost could be imposed. Even assuming that

the decretal amount could be directed to be deposited, it is only when the Court comes to a finding that the defendant was at fault. Without any such finding, such condition cannot be imposed. He also draws my attention to the facts of the case and submitted that none of the Courts below have come to a finding that the defendant was at fault.

4. Mr. R.C. Gupta, learned counsel for petitioner in Writ Petition No. 17643 of 1998, adopted the submissions of Mr. Arora and had contended that the term 'cost' qualifies cost while 'payment into the Court' or otherwise qualifies the cost as to how cost is to be paid. According to him, the subsequent phrase after the word 'cost' indicates that the cost is to be paid into the Court or it may be paid otherwise. He also contends that on facts there was no finding that the defendant was at fault, and therefore, imposition of cost was bad in law.

5. So far as the Civil Misc. Writ Petition No. 17643 of 1998 is concerned, the facts are different but the point is the same, therefore, both these matters have been heard together and are being disposed of by one and the same order. In the said case, Suit No. 94 of 1992, pending before learned Civil Judge (Senior Division), Muzaffarnagar was decreed ex parte on 25.11.1997. The said ex parte decree was sought to be set aside by an application under Order IX, Rule 13 which was registered as Misc. Case No. 235 of 1997 and was allowed by an order dated 6.2.1998. Against which an appeal being Appeal No. 38 of 1998 was preferred which was decided by an order dated 6.5.1998 dismissing the said appeal and affirming the order passed by the learned Civil Judge (Senior Division) dated 6.2.1998 directing deposit of half of the decretal amount in Court.

6. Mr. H. Upadhyay, learned counsel appears on behalf of opposite party No. 3 in Writ Petition No. 17643 of 1998, whereas Mr. R.B. Sahai assisted by Mr. A. Sahai appears on behalf of opposite parties in Writ Petition No. 16985 of 1998.

7. Mr. Upadhyay submits that the terms as to cost is not confined to cost only. The term used in Order IX, Rule 13 qualifies not only the cost but it also qualifies payment into the Court or otherwise. According to him, the term covers cost, payment into the Court or otherwise. According to him, the conflict that has been pointed out by Mr. Arora, is not a conflict in reality inasmuch as in the said

judgment in the case of Raj Kumar Soni (supra), it has not been laid down that the Court is not empowered to direct deposit of decretal amount or direct furnishing of security. On the other hand, it has been held that the direction for depositing 1/5th of the decretal amount was not justified. According to him, there is no conflict in the said two decisions as has been argued by Mr. Arora. He also relies on few other judgments which supports his contention that the Court has jurisdiction to issue direction either for depositing of decretal amount or for furnishing security as it may think fit. I will refer the decisions cited by Mr. Upadhyay at the appropriate stage. He contends further that from the orders impugned it appears that the Court has come to the finding that the defendant was responsible for the delay and there was some fault on his part. He further contends that it is not a question of fault but it is a question of Court's discretion by reason of the phrase used in the said rule that as 'it thinks fit' which gives wide discretion to the Court to issue any kind of direction as regards the terms that may be imposed by the Court.

8. Mr. Sahai, however, has adopted the arguments of Mr. Upadhyay.

9. I have heard learned counsel for the parties at length.

10. The decision in the case of Raj Kumar Soni (supra), in fact deals with the question if the defendant is at fault, then direction for cost is justified. But so far as deposit of decretal amount since the amount was very large, was not justified. But it has not in fact laid down any ratio as to the question whether the Court is empowered to direct deposit of decretal amount or a part of it or for furnishing security.

11. In the said decision, the ratio decided in the case of B. Madan Mohan v. B. Kanhaiya Lal : AIR1933 All601 , was considered. In the said case, a Division Bench of this Court was considering the question with regard to direction for depositing decretal amount while setting aside ex parte decree by the trial court. In the case, it was held that although there was ample power in the Court to order the payment of money into Court as well as costs as a condition for setting aside the ex parte decree, but set aside the term of deposit into Court imposed by the Court below on the ground that the condition imposed was unreasonable one. Thus, in the decision in the case of Raj Kumar Soni (supra), Court's power with regard to

condition for setting aside ex parte decree that decided in the case of B. Madan Mohan (supra) has been accepted and has not been differed with. Thus, it appears that the decision in the case of Raj Kumar Soni (supra) has not laid down any absolute proposition that while dealing with a matter under Order IX, Rule 13 the Court is not empowered to direct deposit of decretal amount of furnishing security. On the other hand, it had proceeded on the basis that such direction was not justified in the facts and circumstances of the case as being unreasonable. Therefore, the Court had proceeded on the question as to whether such direction is reasonable or not and not on the question whether the Court has power at all to direct furnishing security or deposit of decretal amount while setting aside ex parte decree nor it has laid down any such proposition. On the other hand, the decision in the case of M/s. Modern Fuel Industry (supra), learned single Judge of this Court had considered the decision in the case of Raj Kumar Son (supra) and was of the view that the Court has power to order payment of money in the Court as well as cost as a condition for setting aside the ex parte decree. Therefore, it had upheld the order passed by the trial court while allowing the application under Order IX, Rule 13 for setting aside the ex parte decree with the direction to deposit 50% of the decretal amount. In paragraph 7 of the said judgment, learned single Judge has held that Nanak Chand v. Preetam Lal : AIR1972 All166 , has taken the same view. The Division Bench in the case of Gaya Deen v. Lalia Prasad : AIR1936 All142 , which was relied upon in the case of Nanak Chand (supra), it was held that the Court possesses the power to impose condition for restoring a suit to its original number for depositing the decretal amount or part of the decretal amount or cost or damages which the Court may deem fit depending on circumstances in each case.

12. Another Division Bench decision in the case of Allahabad Development Authority v. Saifuddin and others, had also approved the direction for deposit of decretal amount while setting aside ex parte decree as is found from the said decision in 1997 (2) AWC 2.252 (NOC).

13. Learned single Judge of this Court in the case of M/s. Jayshree Distribution Piplani Katra and others v. Jayshree Tyres and Rubber Products : AIR1989 All158 , has taken the same view that Order IX, Rule 13, C.P.C. gives a power to the

Court to set aside ex parte decree if the Court was satisfied that the summons were not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called for hearing. The Court is further empowered to pass this order on such terms and conditions as to payment of cost into Court or otherwise as it thinks fit. The word 'otherwise' would indicate that it was open to the Court to direct furnishing of security or make any such order. The words 'as it thinks fit' permit the Court to pass any such order as to payment of cost or payment of money into Court or furnishing of security etc. This judgment had considered the decision in the case of Raj Kumar Soni (supra) as well as the decision in the case of Chhagan Raj v. Sukan Mal .

14. Similar view was taken by Karnataka High Court in the decision in the case of B. Padmavathi Rai v. Parvathiamma AIR 1976 Kar 97, rendered by the learned single Judge, where it has been held that the Court has power to impose the condition but the only limitation that has been pointed out is that it should not be unreasonable or illegal.

15. In the case of M/s. Northern Carriers Pvt. Ltd. v. M/s. United India Insurance Co. Ltd. , by the learned single Judge it was similarly held that while setting aside ex parte decree under Order IX. Rule 13 the Court is empowered to direct deposit of decretal amount even though such order can be backed by means of an application under Order XXXVIII, Rule 5.

16. In the decision in the case of Life Insurance Corporation of India v. Anjan Kumar Arora and others. : AIR1987 Cal197 . A Division Bench had also accepted in principle the jurisdiction of the Court while setting aside ex parte decree to impose such conditions as it may think fit.

17. From the above discussion, it appears that the Court has jurisdiction to impose condition including direction for payment of cost or for deposit of decretal amount or part of it or to furnish security. The expression 'upon such terms as to costs, payment into Court or otherwise as it thinks fit' in Rule 13 indicates that the Court is empowered to impose terms. Now what are these terms has been specified in the expression 'as to the cost, payment into Court or otherwise. The expression 'as it thinks fit' leaves discretion of the Court quite open. It has not been provided that

the Court is not empowered to use its discretion to the extent of direction for deposit of decretal amount or furnishing of security. The argument that the said rule has not referred to decretal amount or furnishing of security, cannot be sustained in view of decisions cited hereinbefore, some of which were rendered by the Division Bench of this Court. Then again, absence of mention of decretal amount or security, cannot be a ground for excluding the deposit of decretal amount or a part thereof or furnishing security in view of the expression used 'as it thinks fit', which has given the Court discretion with regard to the terms. Such terms, refer to cost, or payment into the Court or otherwise. The word 'otherwise' is wide enough to include terms of deposit of decretal amount or furnishing security. Interpretation has to be made in consonance with the scheme of the said rule. If a restraint meaning is imported, in that event, the expression 'otherwise' and 'as it thinks fit' shall be meaningless and redundant. By use of the phrase 'otherwise' 'it thinks fit' has kept the discretion quite open to the extent that has been laid down in the cases cited hereinbefore.

18. Now, so far as Writ Petition No. 16985 of 1998, is concerned, the revisional court has recorded that the trial court had found that the defendant No. 3 was personally served. This defendant No. 3 was the guarantor. Therefore, the Court might presume that the defendant No. 1, the principal borrower, must have knowledge of the proceedings, on the assumption that the guarantor must have informed the principal borrower, which is a normal human conduct. From the record, it is found that the guarantor was personally served. It has also held that the trial court did not come to the finding that absence of defendant No. 1 was due to sufficient cause. However, the trial court had directed for deposit of half of the decretal amount through bank draft. This was modified to the extent by directing furnishing of bank guarantee covering half of the decretal amount to the satisfaction of the Court below relying on the decision in AIR 1983 NOC 176 (AP).

19. These are findings of fact and I do not find any reason to interfere with the same when the Court has jurisdiction to issue such directions particularly in view of the fact that the suit is of the year 1988, almost ten years' old, therefore. I am not inclined to interfere with this order dated 13.8.1997 passed in Revision No. 140 of 1995 by the learned Additional District Judge. Illrd Court. Dehradun.

20. So far as Writ Petition No. 17643 of 1998 is concerned, the suit is of the year 1992. In this case also, the parties are related to each other and are residing in the same house, therefore, it was found that they must have knowledge of the proceedings since it was served on defendant No. 3 who happens to be the wife of the defendant. The allegation of illness of the defendant was not believed. It has also pointed out that the case was fixed for ex parte hearing on 8.7.1992, 7.4.1994, 9.5.1995 and 20.3.1996, namely for a prolonged period of four years. In such circumstances, the Court had imposed the direction for deposit of 50% of the decretal amount, which in my view cannot be said to be unreasonable.

21. For all these reasons, both the writ petitions fail and are accordingly dismissed. No order as to costs.

22. However, it would be open to the petitioner in Writ Petition No. 17643 of 1998 as well, to furnish bank guarantee instead of 50% of the decretal amount, if so advised, to the satisfaction of the learned trial court.

23. Admittedly, in both the cases the time-limit for furnishing security or depositing decretal amount is to expire, in that view of the matter, the time for furnishing security or depositing decretal amount, as the case may be, is hereby extended for a further period till 15th July, 1998.

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