

Savitri Devi Vs. Puranchand

Savitri Devi Vs. Puranchand

SooperKanoon Citation : sooperkanoon.com/681863

Court : Delhi

Decided On : Jul-11-1977

Reported in : 1978RLR350

Judge : D.K. Kapur, J.

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

Appeal No. : Civil R. Appeal No. 217 of 1977

Appellant : Savitri Devi

Respondent : Puranchand

Advocate for Pet/Ap. : R.M. Aggarwal and; J.C. Mighlani, Advs

Judgement :

D.K. Kapur, J.

(1) The petitioners are defendants in a suit pending before Shri M.S. Rohilla, Subordinate Judge 1st Class, Delhi. The present Revision Petition is directed against an order passed on 12th February, 1977, whereby an application under Order 9, Rule 7 & S. 151, Civil Procedure Code . was dismissed on the ground that there/was no cause to set aside the ex-parte order passed in the suit.

(2) The facts of the case as revealed from the record are such that respondents have instituted a suit claiming a mandatory injunction to restore a bath and latrine which have been demolished by Delhi Municipal Corporation. The suit came before the court on 24.8.76, when the petitioners who are defendants Nos. 1 and 2 were present, but the Delhi Municipal Corporation which was defendant No. 3. was not present. The suit was adjourned to 20.9.76 for filing the written statement which was filed and defendant No. 3. was ex-parte. The case, was adjourned for filing replication and documents to 1.11.76. On 1.11.76, the Presiding Officer was on leave, so the Reader passed an order 'P.O. is on leave to-day. To come up on 10.11.76 P.O.' On 10.11.76 the counsel for the plaintiff was present but no one appeared for the defendants No. 1 and 2. At that time early in the day, the replication was taken on the record and the case was adjourned for ex-parte evidence to 17-12-76. On that very date, an application was filed under Order 9, Rule 7 and Section 151 of Civil Procedure Code . stating that the counsel of the applicants was busy before the District Judge in the beginning of the day and came to the Subordinate Judge's court at 10.10 A.M., when he learnt that an ex-parte order had already been passed. It was also stated that 10-11-76 was not date of hearing and hence no adverse order could be passed. This application was directed to be listed on 17-12-76 which was already the date fixed for ex-parte evidence.

(3) On 17-12-76, the counsel for the defendants was again absent and hence this application under Order 9, Rule 7 of the Code was dismissed in default, No witness was present, hence the case was adjourned for ex-parte evidence on to 17-2-77.

(4) Again on that very date, 17-12-76 another application under Order 9, Rule 7 and Section 151 of the Code was filed in which it was stated that a request had been made for passing over the case as the counsel for the defendants was busy in another court. The case was passed over. but then at 12.15 P.M. the application was dismissed in default. It was stated in this application that the order dismissing the first application as well as the order directing ex-parte proceedings were liable to be set aside.

(5) This application was directed to be heard on 17-2-77 when the order sought to be revised was passed. It is stated in the order that the Explanation for the absence of the party or the lawyer on other business was not a ground for an adjournment. It was also said that in case the counsel does not appear, there is no alternative but to proceed ex-parte. It is observed that the presence of the clerk is no presence at all as he is neither a counsel nor a proxy for a counsel. On this ground the application was dismissed.

(6) The main ground of attack in this Revision Petition is the fact that no ex-parte order could be passed on 10-11-76. The contention is based on the fact that 10-11-76, was a date fixed by the Reader and not a date fixed by the court. It can hardly be doubted that an order adjourning a case can only be passed by the court under order 17, Rule 1 of the Code. However, when the Presiding Officer is absent for some reason, then it is the practice in the Subordinate courts for the Reader or other official of the court to give a date. The question for consideration is whether on such an adjourned date the suit can be dismissed in default or an ex-parte order can be passed. Two judgments of the Lahore High Court have been brought to my notice wherein it has been held that these are not dates on which an adverse order can be passed to a party in default. Indeed, in the judgment of Jai Lal J. in *Jowala Snhai v. Maya Das*. (1932) 33, P.L.R. 804 it was held that even if the order is signed by some other Judges, it would not be open to the court to dismiss the suit in default. The observation of the learned Judge is : 'The date on which the suit was dismissed for default, was not fixed by the Judge but by his Reader and that therefore the plaintiff was not bound to appear on that date. There appears to be force in this ground. The Reader of the Senior Subordinate Judge was not competent to pass any orders which could be held binding on the parties. Though it appears that the order written by the Reader was signed by another Subordinate Judge, still it was not binding as that Subordinate Judge was not seized of the case. It is the orders passed by the Judge himself in whose Court the suit is pending that the parties are bound to obey and therefore under the circumstances on the non- appearance of the plaintiff on the date fixed the senior Sub-ordinate Judge should have fixed a fresh date for his appearance in Court and should have duly notified him of such date. This was not done and therefore on this ground alone this petition must succeed.' This view was accepted by Hilton

J. in *HuJam Chand v. Mni Shibrat Dass*, A.I.R. 1934 Lah 984 Here again, the learned Judge observed that Clerk of the Court was not competent to pass an order of adjournment and hence on such an adjourned date no adverse order could be passed. In view of these two decisions, I come to the conclusion that the order directing ex-parte proceedings passed on 10th November, 1976, was passed without jurisdiction.

(7) As this is a point which is liable to occur frequently, I may point out that the provisions of order 17, Rule 2 of Civil Procedure Code ., support the contention of the petitioners. That Rule states : 'Where, on any day 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 lx or make such other order as it thinks fit.

(8) It may be seen that this provision only applies if there is an adjourned date. As the Reader cannot adjourn a suit, it follows that Order 17, Rule 2 of the Code cannot apply if the date has been fixed by the Reader. In fact, a date given by a Reader in these circumstances can best be described as a date for appearance and cannot be described as an adjourned date. I cannot also help observing that if the learned Sub-ordinate Judge had not passed the order at 10.10 A.M. shortly after the court opened and had waited a short time, all these proceedings would have become redundant. Undoubtedly, the court has the power to dismiss a suit at 10.10 in the morning, or as it has, or at any other time in the day, but the practical difficulties of attending several courts are such that Lawyers cannot always be present first thing in the morning. I doubt if it is conducive to justice to pass these ex-parte orders very early in the morning. The same applies to dismissals in default. In fact, the same situation applies also to the dismissal in default which took place in the case of the first application under Order 9, Rule 7, on 17.12-76.

(9) Having come to the conclusion that there was no proper order passed on 10th November, 1976, it still remains to be seen whether there is a proper application under Order 9, Rule 7 of the Code for restoring the proceeding in view of the fact that the first application was dismissed in default on 17-12-76.

(10) On this aspect of the case, the second application under Order 9, Rule 7 of the Code shows that the counsel was busy in some other court and could not attend in time. The learned Sub-ordinate Judge has not accepted the affidavit of the clerk on the footing that he is not authorised. I think, this also is not a justified view. Undoubtedly, the Subordinate Judge is right to say that the clerk of the counsel is not a counsel nor an agent of the party but, as I have already said, it is not possible for Lawyers to appear in two courts simultaneously and if a request is made that the case may be taken up later in the day, I do not see why the court cannot pass over the matter for some time.

(11) In fact, as the initial order directing ex parte evidence was passed without jurisdiction, the learned Subordinate Judge should have tried to restore the position as early as possible so that the case could proceed further.

(12) As laid down by the Supreme Court in *v.Arjun Singh v. Mohindera Kumar*, : [1964]5SCR946 , even if a party is set ex-parte it can always rejoin the proceedings. In the present case, only the pleadings had been completed and no further steps had taken place in the suit. It was, therefore, an eminently suitable case for allowing the defendants to rejoin the proceedings in which case the defendants could not be stopped from leading their evidence. therefore, there was no point in continuing the ex-parte order. therefore, from all points of view, the court should have set aside the ex-parte order so that the trial could proceed in an ordinary manner.

(13) I have asked the learned counsel for the parties as to what could be the possible effect of the defendants joining the proceedings without the ex-parte order being set aside, and I have been told that this would mean that the trial would have to proceed without the framing of issues. It has been pointed out that under Order 14, Rule 1 (5) of the issues have to be framed at the first hearing of the suit. It would thus appear that the suit would have to continue without the settlement of issues. This would lead to a protraction of the trial because the court would have to try the suit without any issues being framed. Further more, it would mean that the court would have to frame issues under Order 14. Rule 5 of the Code at a later date. In short, the failure to set aside the ex-parte order would lead

to a complication in the trial. From all points of view, the just order in this case was an order setting aside the direction that there should be ex-parte evidence.

(14) It must not be forgotten that the purpose of a judicial proceeding is to give a hearing to both sides. A trial of any matter requires as fair a hearing by a Court as is possible in the circumstances. The provisions of the Code are not intended to penalise parties for being late. The penalty in such cases is provided by passing an order imposing costs. The justification for non-appearance on 10-11-76 as given in the application was the fact that the defendants' counsel was busy elsewhere. Further more, it is obvious that the counsel appeared later in the day because the first application under order 9, Rule 7 was filed on that very day. Added to this circumstances is the fact that the date 10th November, 1976 was not an adjourned date as I have already analysed. Hence, no ex-parte order could be passed. This means that I have no option but to hold that the initial order was passed without jurisdiction and had to be set a side.

--- *** ---