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Court : Delhi

Decided On : Mar-05-1976

Reported in : AIR1977Delhi68; 12(1976)DLT184; ILR1976Delhi867

Judge : B.C. Misra, J.

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

Appeal No. : Civil Revision Appeal No. 629 of 1975

Appellant : Hoshiar Singh

Respondent : Ram Dev and ors.

Advocate for Pet/Ap. : S.K. Gupta,; G.S. Vohra and; M.S. Vohra, Advs

Judgement :

B.C. Misra, J.

(1) This revision petition has been filed by the plaintiff against the order of the Sub-Judge, dated 30th September, 1975, by which he has set aside the ex parte decree passed in favor of the petitioner against the respondents on 10th January, 1975 and has restored the suit to its original number on payment of Rs. 100/ as costs.

(2) The petitioner had instituted the suit for a permanent injunction restraining the respondents from dispossessing the petitioner from the land in dispute and from demolishing the boundary wall of the land in suit. The suit was contested and the evidence of the plaintiff had been closed. Opportunity was given to the defendant-respondents to adduce their evidence and they produced only one witness, but failed to produce the remaining evidence. On 10th January, 1975 the court decided to proceed ex parte against the defendants and answered the issues on the material placed on the file by the petitioner. As a result, it decreed the suit and granted the injunction restraining dispossession of the petitioner from the land in dispute and also awarded costs. On that date the respondents were not present.

(3) Subsequently, the respondent moved an application under Order 9, Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree. This was set down for trial and the court came to the conclusion that sufficient cause had been made out for setting aside the ex parte decree and the absence of the respondents before me was unintentional. The court also heard the allegations and the evidence produced on his behalf to the effect that a witness had been examined by them on 15th November, 1974 but the defendant. Ram Dev, and his counsel were present and they understood the next date to be 30th December instead of 20th December, 1974; and since 30th December had been declared a holiday they expected that a notice of the date of hearing fixed by the court would be issued to the parties, but on learning that the suit had been decreed ex parte, the respondents moved an application for setting it aside very expeditiously. The court also heard the evidence of the clerk of the Advocate to the effect that on the envelope of the brief of the Advocate, the date of hearing next after 15th November was noted as 30th December, 1974. The court accepted the statement that the mistake on the part of the respondents was bona fide and so it allowed the application and set aside the decree on payment of costs. Feeling aggrieved by this order, the plaintiff-petitioner has come up in revision.

(4) The main question contended by the counsel for the petitioner is that the ex parte decree, which had been passed on 10th January, 1975 had been passed under the provisions of Order 17 Rules 3 of the Code of Civil Procedure and so only remedy of the opposite party was to file an appeal against the decree. He has

contended that the decree had not been passed under Order 17 Rule 2 and so the remedy of moving for setting aside the decree in accordance with Order 9 Rule 13 of the Code was without jurisdiction. I had issued a notice to the respondents to show cause why the revision be not admitted. In response to the notice the respondents has appeared. I have heard the counsel for the respondents at great length. I, therefore, admit the revision and proceed to decide it on its merits.

(5) It is common ground between the parties that on 15th November, 1974, one witness of the defendant respondents was examined and the case was adjourned. According to the order sheet of the court, it was adjourned to 20th December, 1974 and the order of that date reads as follows :-

'THE case has been called for several times, since morning. The defendant is not present. It is 3.40 p.m. He is proceeded ex parte. The plaintiff states that his evidence is already closed, not to come up for arguments on 8th January, 1975'.

(6) On 8th January, 1975 arguments were heard and the suit was decreed on 10th January, 1975. A copy of the judgment filed along with the revision also shows that the defendant produced only one witness and did not appear on the next date fixed for evidence and he was proceeded ex parte. Since it was the defendant who was absent, the suit could even ex parte not be decreed against him without the material on record placed by the plaintiff, who had already closed his evidence and so the court legally appraised the evidence and decreed the suit.

(7) The material provisions of law are contained in Order 17 Rules 2 and 3 of the Code of Civil Procedure, which read as follows :-

'2. 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 IX or make such other order as it thinks fit.

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 to decide the suit forthwith.'

Order 17 Rule 2 takes within its ambit provisions of Order 9 of the Code. A reference to it will show that under Rule 6 where the plaintiff appears and the defendant does not appear, then if it is proved that the summons was served, the court may proceed ex parte. Under Rule 13 if a decree has been passed ex parte against the defendant, he has been permitted to apply to the court for an order to set aside the decree. Rule 7 of Order 9 provides that where the court adjourned the case for hearing ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon terms as the court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. These provisions of law would indicate that the scheme of Order 9 is that if neither party appears then the court is entitled to dismiss the suit under Rule 3 and if the defendant appears and the plaintiff does not appear, then the court is bound to dismiss the suit under Rule 8. On the other hand, if the plaintiff appears and the defendant does not appear, then the court is authorised to either postpone the hearing or proceed with the suit ex parte. This is applicable to hearing of the suit before the trial begins.

(8) Provisions regarding subsequent stages of the trial are contained in Order 17. Rule 1 of Order 17 directs that the court may grant time to the parties or to any of them, and adjourn hearing of the suit as it thinks fit with respect to the costs occasioned by the adjournment, provided that when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded. Rule 2 provides that where any of the parties do not appear, then the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit. That is to say, if the plaintiff is absent, the court may dismiss the suit without examining the material on record; if the defendant is absent and court does think fit to adjourn the suit, then the court may proceed ex parte, that is to say decide the suit and if necessary grant a decree to the plaintiff on the material already placed on record. Rule 3 provides for failure of the party to take steps necessary for further progress of the

suit and in that event the court is authorised to decide the suit forthwith without giving any further opportunity to the defaulting party. Rule 3 in terms does not apply to a case of a mere absence of a party to which appropriately rule 2 applies. But the question arises, if a party who has not taken steps in furtherance of the suit also fails to appear, then should the order be passed by the court under Rule 2 or Rule 3, Mulla in the Commentary of the Code of Civil Procedure, 13th Edition, edited by T. L. Venkatarama Aiyar, has on page 897 observed as follows :-

'DISTINCTION between rule 2 and rule 3.-The points of distinction between rules 2 and 3 may thus be summed up; (1) Rule 3 applies only when the suit is adjourned on the application of a party and he is in default at the adjourned hearing. But Rule 2 applies when a suit is adjourned either on the application of the party or otherwise. (2) For Rule 3 to apply the party must be present at the adjourned hearing-though according to one view that is not essential, and must have made default in one or more of the modes specified in the rule. But rule 2 will apply whenever there is default of appearance by the party. 'The distinction between the two rules is', it was observed in *Gurusanthayys v. Veerayya*, : AIR1952 Mad825 , 'that in order that O.17 r.2, should apply, a party or his pleader should not be present in court, whereas in the case of O.17, r.3 even if the party or his pleader is present in Court, of there is a failure to produce evidence, to cause the attendance of witnesses or to perform any other act necessary to the further progress of the suit O.17, r. 3 applies'.'

It is also observed in paragraph 6 on page 898, as follows :-

'If the hearing of a suit is adjourned on the application of the plaintiff to enable him to produce his evidence or to perform any other act as mentioned in this rule, and the plaintiff does not appear at the adjourned hearing, should the court proceed under rule 3 or under rule 2 The High Court of Madras has held that the court should in such a case proceed under r. 2 and dismiss the suit for default so that the plaintiff may have an opportunity to apply under O.9, r. 9, to set aside the dismissal. That is also the view of the High Courts of Andhra Pradesh and Kerala. The High Court of Bombay has held that the Court should proceed under rule 2 and dismiss the suit for default, unless the evidence has been closed in which

case it should proceed under rule 3 and deal with the suit on the merits. This High Court of Lahore had held that if there are no sufficient materials on the record, the Court should proceed under r. 2 above, but if there are sufficient materials it should proceed to decide the suit under this rule. In Allahabad, the balance of authority seems to be in favor of the view that the court should proceed under r. 2 and not under this rule. But by an amendment of rules 2 and 3 made by the Allahabad High Court the Court has power to proceed under rule 3 and decide the suit on the merits. The Patna High Court has held that this rule does not apply unless the hearing has commenced. The High Court of Calcutta has held that in order to apply the procedure of rule 3, two elements must be present, viz. (1) the adjournment must have been at the instance of the party and (2) there must be materials on the record for the court to deal with the suit, and that the presence of the one element without the other does not justify the application of rule. 3.'

(9) The counsel for the petitioner has cited a Full Bench decision of the High Court of Madhya Pradesh, *Smt. Shantabai v. Chokhelal.* : AIR 1976 MP21 . The reference to the Full Bench was occasioned by the fact that there was a conflict of decisions in two division Benches of the same court on the question. In *Madan Lal v. Narayan*, Air 1972 M. P. 8, it was held that it was not open to the court to proceed under Order 17 Rule 3 of the Code of Civil Procedure in the absence of a party; while in *Sita Bai v. Vidyawati*, : AIR 1972 MP198 , another Division Bench took the view that it was open to 'the court to proceed under Order 17 Rule 3 of the Code even in the absence of a party. In *Narbada Prasad v. Awadesh Narain*, 0043/1973 : AIR 1973 MP179 , the view in *Sita Bai v. Vidyawati's* case was ignored on the ground that the observations made therein were obiter dicta. The Full Bench of the Madhya Pradesh High Court in *Shantabai's* case held that it was open to the court to proceed under Order 17 Rule 3 in the absence of a party where the conditions laid down in the said rule were fulfilled and it appeared just and proper to do so, and where the court had so proceeded, it was not open to the party aggrieved by the decision to file an application for setting aside the decree under Order 9 of the Code. In *Prativadi Bhayankaram Pichamma v. Kamiseti Sreeramulu*, Air 1918 Mad 143, a Full Bench of the High Court of Madras observed as follows :-

'THERE is no conflict between Rr. 2 and 3, O.17. They are independent and mutually exclusive. Where the requisites of R. 2 are satisfied, that rule and not rule 3 should be applied although, in addition to the absence of the party, circumstances exist which would satisfy the requirements of R. 3. Rule 2, of Order 17 deals with cases of absence of parties and R. 3 with failure to do what was ordered. If the party fails to appear, R. 2 applies and the court should not assume that he is guilty of default and apply the stringent provisions of R. 3. R. 3 applies only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done what they were directed to do.'

In this decision, Wallis. C. J. also observed that when a case was called on and the defendant was absent and the court resolved to proceed against him *ex parte*, there was nothing to prevent the court from applying the provisions of O.17, R. 3 and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal would be nonetheless in law and in fact *ex parte*, and the decree would be liable to be set aside by the defendant under O.9 R. 13. In *M. Agaiah v. Mohd. Abdul Kereem*, : AIR 1961 AP201 , the Full Bench observed that where a party who was granted time to perform some act not only failed to do it but was also absent on the date to which the hearing was adjourned, it was rule 2 and not rule 3 that applies and that rule 3 came into operation only where the parties were present and were prepared to proceed with, the further hearing of the case, but default of the kind mentioned in that rule was committed, and that when a suit was dismissed under Order 17 Rule 2, the appropriate remedy of the aggrieved party was an application for restoration of the suit and not for review. This decision of the Full Bench was followed by a single Judge of the High Court of Andhra Pradesh in *Morothu Suryarao v. Paluri Peddiyya*, : AIR 1967 AP152 .

(10) A learned single Judge of this court (V. S. Deshpande J.) in *Dayal Chand v. Sham Mohan*, : AIR1971 Delhi183 , has observed as follows in paragraph 5 :

'A perusal of Order 9 shows that it is applicable either to the first hearing or to such earlier stage of the hearing of the case before the trial of the case begins. Rules I

to 3 of O.9 apply to a hearing held immediately after the summons have been served. Rules 4 and 5 provide the remedies the plaintiff against the summary dismissal of the suit, such dismissal not being on merits. Under Rule 6 where only the plaintiff appears and the defendant does not appear an ex parte decree or order can be passed by the court after hearing the plaintiff alone and giving him an opportunity to prove his case ex parte against the defendant. The defendant has no opportunity to be heard at all and therefore the decision is based on the merits of the plaintiff's case alone but not on the merits of the defendant's case which has not been heard at all. therefore, the defendant can get an ex parte order under Rule 7 or an ex parte decree set aside under Rule 13 of Order 9. To sum up, the orders under the provisions of Order 9 are passed either on merits of the plaintiff's case alone, or not on the merits of the case of either party. Under O.9 an order is never passed against the plaintiff on the merits of the defendant's case.'

In paragraph 10 his Lordship observed as follows :-

'IT is significant that while Rule 2 of Order 17 is invoked when a party or parties are absent. Rule 3 of Order 17 is silent as to the presence or absence of the parties. The emphasis of Rule 3 is on the default on the part of a party to do something for the progress of the suit for which time had been granted by the court. If this default is committed by such a party, the consequence of the decision on merits by the court has to follow. Such a default can be committed by a party whether he is present or absent.'

In paragraph 12 his Lordship observed as follows :

'THE difference between O.9 and O.17 is further brought out by Order 20 Rule 1 under which a judgment on merits can be pronounced by the court 'after the case has been heard; Order 9 and the first part of Rule 2 of Order 17 apply when the case has not been heard on merits while the second part of Rule 2 and the whole of Rule 3 of Order 17 apply when the case is heard on merits. therefore, under the former set of provisions a judgment on merits is not passed except when the plaintiff gets an ex parte judgment against the defendant while under the later set of provisions a judgment on merits has to be passed and the court cannot revert to the former set of provisions to avoid passing of judgments on merits.'

The Supreme Court in Arjun Singh v. Mohindra Kumar, : [1964]5SCR946 , observed in para 19 on page 1004 as follows :-

'RULE6 contemplates two cases : (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the tearing which is fixed is for the disposal of the suit and the defendant is not present on such a .day. The effect of proceeding ex parte in the two sets of cases would obviously mean a great difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date to defend the suit. In the second type of cases, however, one of two things might happen ; The evidence of the plaintiff might be taken then and there and judgment might be pronounced. In that case O. lx R. 13 would come in. The defendant can, besides filing an appeal or an application for review have recourse to an application under O. lx, R. 13 to set aside the ex parte decree.'

(11) After considering the provisions of law and the relevant authorities, my conclusion is that the court has the jurisdiction and power to proceed under Order 17 Rule 2 of the Code against the absent party and act in accordance with the provisions of Order 9 of the Code. But, if material has been placed on the record and a party should commit a default, which hinders the further progress of the suit and the suit had been adjourned at its request, then the court can proceed under Rule 3. Should the court wish to proceed under Rule 3 and decide the case forthwith on the material already placed without giving a further opportunity to the defaulting, party, then the presence or absence of the party is not material, since the absence itself may constitute or aggravate the default. If the full material has been placed by both the parties, then the question of default is not likely to arise. In substance, the difference would only arise if it is the plaintiff who commits the default and also absents himself, then the court can proceed under Rule 2 or 3. But, so far as the defendant is concerned, the decree in any event against him would be ex parte based on the material placed on the record by the plaintiff, whether the court proceeds under Rule 2 or Rule 3. Since the ex parte decree

would be based on the material on record and not by way of punishment it would be open to the defendant to apply to the court for setting aside the ex parte decree. It would also be open to him file an appeal against the decree if he be so advised, as is mentioned in the Supreme Court decision and one remedy does not exclude the other.

(12) I am of the view that the powers under Rule 2 would ordinarily be exercised in the absence of the parties and Rule 3 would be applied when the party commits default. But when there is default as well as absence, both the powers are available to the court and they are not mutually exclusive and it will depend upon the facts and circumstances of each case, as to under what provision of law the court has acted. In the instant case, the question that has been argued at length does not directly arise, since this revision is not preferred against the order of the court passing the ex parte decree, nor does the question arise as to under what provision of law the court ought to have then proceeded. The present revision is directed against the order setting aside the ex parte decree and for that purpose the original order of the court passing the decree is to be construed. This order on its face purports to be one under Order 17 Rule 2 and so the application for setting it aside was clearly maintainable under the said provision of law read with the provisions of Order 9. The impugned order does not suffer from any jurisdictional error or legal infirmity. It also advances substantial justice in the facts and circumstances of the case. Consequently, the revision is dismissed. Costs will abide by the result of the suit.

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