

Shantilal Vs. State and anr.

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Court : Rajasthan

Decided On : Mar-21-1957

Reported in : AIR1958Raj7

Judge : Wanchoo, C.J. and; Dave, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13 - Order 17, Rules 2 and 3

Appeal No. : Misc. First Appeal No. 18 of 1953

Appellant : Shantilal

Respondent : State and anr.

Advocate for Def. : L.N. Chhangani, Govt. Adv.

Advocate for Pet/Ap. : U.M. Trivedi, Adv.

Disposition : Appeal dismissed

Judgement :

Wanchoo, C. J.

1. This is an appeal by Shantilal against the order of the District Judge, Bhilwara, dismissing the application of Shantilal under Order IX, Rule 9, C. P. C. for restoration of a suit alleged to have been dismissed for default.

2. The facts, which led the appellant to apply under Order IX, Rule 9 may be briefly narrated. The appellant Shantilal had filed a suit in the court of the District Judge, Bhilwara, against the State of Rajasthan, and the Customs and Excise Commissioner. Issues were framed and thereafter dates were fixed for the plaintiff's evidence. Three times the suit was adjourned on the plaintiff's application.

On one of these occasions, the plaintiff's statement was recorded. Thereafter, again, on the plaintiff's application, the suit was adjourned to the 18th of July, 1953, for further evidence of the plaintiff on payment of costs. On this date, the plaintiff did not appear. Consequently the court proceeded under Order XVII, Rule 3 C. P. C. as the plaintiff had failed to produce his evidence fa spite of the time granted to him, and after considering all the materials on the record, including the statement of the plaintiff, dismissed the suit.

3. Thereafter, the plaintiff presented an application to the court under Order IX, Rule 9 for restoration treating the decree of the 16 of July 1953, as a dismissal for default. This application has been dismissed by the District Judge on the ground that the order of the 16th of July was a decree on the merits under Order XVII, Rule 3 against which only an appeal lay, and that it was not a dismissal for default against which an application under Order IX, Rule 9 could lie. Aggrieved by this order the plaintiff-appellant has filed this appeal before us.

4. The main point, that has been urged by learned counsel for the appellant, is that the court had no jurisdiction on the 16th of July, 1953, to proceed under Order XVII, Rule 3, and that it could only proceed under Order XVII, Rule 2, and therefore even if it says in its order that it was dismissing the suit on the merits under Order XVII, Rule 3, that order really amounted only to an order of dismissal for default under Rule 2.

The agreement is that wherever there is a default of appearance on an adjourned date, the only provision to apply is Order XVII, Rule 2, and that Rule 3 only applies when the party, against Whom it is to be used, is present and has failed to produce its evidence, or to cause the attendance of its witnesses, or to perform any other act necessary to the further progress of the suit for which time had been

allowed. In a nutshell it is said that even though an adjournment might have been granted to a party for a particular purpose, Rule 3 will not apply if the party is absent on the adjourned date, for it cannot be said that it had failed to produce its evidence etc., as this presumption of failure cannot be drawn from its mere absence. In such a case it is urged that Rule 2, which applies in terms to the absence of a party, would be the proper provision under which the court should proceed.

5. In this connection learned counsel for the appellant relies on the decision of the Madras High Court in *Pichamma v. Sreeramulu* AIR 1918 Mad 143 (2) (PS) (A), which is the leading case supporting. In that case, the Full Bench of the Madras High Court held that Rules 2 and 3 of Order XVII were independent and mutually exclusive and that where the requisites of Rule 2 were satisfied, Rule 3 could not be applied. Therefore it was held that where a party was absent even though it might have been granted time to do something, the case could only be dealt with under Rule 2, and that it was only when the party had been granted time and was present, and did not carry out the purpose for which the time was granted that Rule 3 could be applied.

It may be mentioned that the view taken in this case was accepted in the Allahabad High Court, vide *Ram Adhin v. Ram Bharose*, AIR 1925 All 182 (B), and the Rangoon High Court vide *KO Tha Lin Bwin v. Ko Hla Kye*, AIR 1930 Rang 270 (C), and the Lahore High Court vide *Madan Gopal v. Budhu*, AIR 1932 Lah 477 (D).

6. The main question therefore that falls for decision is whether presence of a party is essential before an order under Rule 3 can be passed. The matter was considered by one of us sitting singly in *Surajmal v. Mt. Jawahar Bai*, ILR (1953) 3 Raj 603 (E), and it was then pointed out that there was nothing in the language of Rule 3 to come to the conclusion that it could not apply in cases where the party, to whom time was granted, was absent on the adjourned date.

As we read Rule 3, we find nothing in that rule to support the conclusion that that rule can only be applied if the party, to whom the time has been granted, is present on the adjourned date, and then fails to produce his evidence etc. If it was

the intention of the legislature that Rule 3 should only apply when the party is present, there was nothing to prevent it in adding the words 'is present' in this rule, so that it would have read something like this--

'Where any party to a suit to whom time has been granted is present but fails to produce his evidence, etc. etc. . . . '

As the rule stands, all that the court has to see is whether the party to whom time has been granted has failed 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. Now the party may fail in these things in two ways. If he is absent, it follows immediately that he has failed in producing the evidence etc., for in his absence there would be nobody to carry out the order of the court, for which the adjournment had been granted.

Another way in which he may fail to do so is by appearing in court and saying that he is unable, for this reason or that, to produce his evidence etc. In both cases, however, we have no hesitation in coming to the conclusion that there is a failure to produce the evidence, or to cause the attendance of the witnesses or to perform any other act necessary to the further progress of the suit. It is true that where the party is absent it is open to the court, instead of proceeding under Rule 3, even if that rule is applicable, to proceed under Rule 2 treating it as a case of mere failure to appear. The court is not bound to proceed under Rule 3, for the words used there are-

'the Court may, notwithstanding such default, proceed to decide the suit forthwith.'

The discretion is in the court, where a party is absent, and has thus on account of his absence failed to produce the evidence etc., either to proceed under Rule 3, or to treat it as a case of mere absence and to proceed under Rule 2. Of course, where the party is present and has failed to produce the evidence etc., Rule 2 will not apply, and the court will have no option except to proceed under Rule 3, unless it decides to grant a further adjournment for reasons to be recorded.

But to say that merely because a party is absent there cannot be a failure to produce the evidence is in our opinion, with all respect to the view of the Pull Bench in the Madras case (A), incorrect. The effect of holding that a party must be present before Rule 3 can be applied would I really amount to making Rule 3 completely useless. Supposing a party had been granted time to produce evidence and is unable to do so, all that he has got to do, if he wants to avoid the penalty of Rule 3, is to absent himself, and the court then, on the view taken in the Madras case (A), would be bound to proceed only under Rule 2, thus rendering Rule 3 completely nugatory. An interpretation, which makes a provision of the law like Rule 3 completely nugatory, cannot, in our opinion, be correct,

7. We may in this connection refer to the decisions of other High Courts on this matter.

8. The Calcutta High Court in *Brojendra Nath v. Promatha Bhusan*, AIR 1933 Cal 412 (P) has held following its earlier decisions that Rules 2 and 3 are not mutually exclusive, and that Rule 3 would apply even if the party is absent, provided the adjournment had been granted at his instance, as failure to produce the evidence etc. would follow from the absence itself of the party. Of course, the Calcutta High Court has laid down, another condition for the application of Rule 3, namely that there must be materials on the record for the court to proceed to decide the suit. That is a separate matter which need not detain us at this stage.

9. The Bombay High Court in *Basalingappa Kushappa v. Shidramappa Irappa*, AIR 1943 Bom 321 (G) by a Pull Bench decision hold that the provisions of Rules 2 and 3 were not mutually exclusive. They said that in a case where time had been granted and the party concerned failed to appear there was a double default, namely there was a default of appearance which would come under Rule 2, and failure to produce evidence etc. which would come under Rule 3.

They went on to point out that it was open to a court to act under Rule 3 also in such circumstances provided there was material on the record on which the suit could be decided on the merits under Rule 3. This view, therefore, is the same as the Calcutta view and the application of Rule 3 is made to depend also on the presence or absence of materials.

10. In *Tekchand Nenoomal v. Kalusing Manjusing*, AIR 1943 Sind 94 (H) the Sind Chief Court also held that the two rules were not mutually exclusive, and that where a party was absent on the adjourned date which had been granted on his request for taking certain act on, the court had a discretion to proceed either under Rule 2 or Rule 8.

11. In *Sitalprasad Kalka Prasad v. Sukya*, AIR 1948 Nag 310 (I), it was held by the Nagpur High Court that even if the party was absent the Provisions of Order XVII, Rule 3 would apply provided there was a failure to produce evidence etc. on the adjourned date of hearing.

12. In Allahabad the view seems to have changed in recent years after the decision in *Ram Adhin v. Ram Bharose* (B). In *Bhutan Ram v. Madan Lal*, AIR 1947 All 40 (J), a learned Single Judge went even further, and held that if the conditions of Rule 3 were present, that rule must be applied and not Rule 2. But in a later case in *Chandra Mohan v. Raghunath Prasad*, AIR 1950 All 338 (K), the Allahabad High Court did not go so far but merely said that if the party, to whom time was granted, was absent the court could proceed under Rule 3. In *Sri Krishen v. Radha Kishen*, AIR 1952 All 652 (L) also it was held that where a party, to whom time was granted for doing certain things, failed to appear on the adjourned date, the court could act under Rule 8.

13. So a review of these authorities shows that the preponderance of the authority is in favour of the decision in *Surajmal's case* (E). We are of opinion that the correct view to take is that where time has been granted to a party and he fails to appear, and thus fails to produce the evidence etc., it is open to the court to proceed under Rule 3; but as Rule 3 is a discretionary provision it is also open to the court, in the case of absence of a party, to proceed under Rule 2.

Where the court proceeds under Rule 2, the remedy under Order IX may in appropriate cases be available. But where the court proceeds under Rule 3, the only remedy of the party is to file an appeal against the decree that is passed under Rule 3.

14. Before we leave this case, we should like briefly to refer to three other cases of this Court, which have touched on this question though they are not exactly on all fours with the point raised before us.

15. The first case is *Ram Karan v. Radha Mohan*, ILR (1953) 3 Raj 798 (M). In that case, it was held that if time was granted to a party and he failed to appear on the adjourned date, and thus failed to produce evidence etc., the Court could proceed to decide the suit forthwith under Order XVII, Rule 3; but a rider was added namely this could be done if there were materials on the record on which the decision could be based.

This was in line with the view taken by the Calcutta and Bombay High Courts in the cases (F and G) referred to above. A further question that arose in that case was whether if Order XVII, Rule 3 was wrongly applied when Rule 2 should have been applied, an appeal would lie. Bapna and Sharma JJ., who decided that case, were of the opinion that in such a case the only remedy available to the party was by an application under Order IX.

16. In a later case *Banwari Lal v. Nathulal*, ILR (1954) 4 Raj 684 (N), however, the same two learned Judges took a slightly different view on the question whether an appeal would lie or not, though they took the same view on the question whether the Court could, proceed under Order XVII, Rule 3. In that case Bapna and Sharma JJ. held that if the party was assent, an order under Rule 3 could be passed; but, if the order was passed by a mistake under Rule 3 when it should have been passed under Rule 2, the party could either appeal or make an application under Order IX.

It is unfortunate that their own earlier decision in *Ram Karan's* case (M) was not noticed by the learned Judges, and so there is a slight contradiction between the two cases.

17. In between these two decisions, this Bench decided *Mool Raj v. Narsingh Das*, ILR (1953) 3 Raj 1038 (O), and the view taken in that case was that if a case was wrongly decided under Rule 3 when it should have been decided under Rule 2, the party has a right of appeal as that right 'does not depend on what the Court ought

to have done but on what it actually did.' It was also pointed out that in such an appeal the appellate Court could go into the question whether there was sufficient cause for the absence of the party in the trial Court, and was not precluded from looking into the materials which might be placed on the record of the appeal to show such cause, and if the Court was satisfied that there was sufficient case for the party's non-appearance it might set aside the decree and send the case back for retrial.

The hardship, which learned counsel for the appellant pointed out would arise if Rule 3 were applied in a case where a party was absent, can always be mitigated in the manner pointed out in Mool Raj's case (O). We may also point out that though Mool Raj's case (O) was not concerned with the point, which is substantially raised before us, it is in line with what had been said in Banwari Lal's case (N), and is not in agreement with the earlier judgment in Ram Karan's case (M) which the same learned Judges, however, seem to have departed from. The view, therefore, that is prevalent in this Court is also in accord with the judgment of one of us in Surajmal's case (E), and that, in our opinion, is the correct view.

18. We have then to see whether the District Judge was right in dismissing the suit under Order XVII, Rule 3. C. P. C. It is not in dispute that 16th of July was fixed on the application of the plaintiff appellant and on payment of certain costs. It is further not in dispute that the plaintiff appellant had to produce his evidence at this stage. It is admitted that he was absent, and therefore failed to produce his evidence. The District Judge was, therefore, right in proceeding under Order XVII, Rule 3. This ratings us to the question whether it is necessary that there should be materials on the record before the Court proceeds under Rule 3.

As we have already pointed out, this seems to be the view of the Calcutta and Bombay High Courts and this is also the view which had been adopted by implication in Ram Karan's case (M). We have some doubt whether it is absolutely essential that there should be materials on the record before a Court can proceed under Order XVII, Rule 3. We may point out a case of parole debt where it may be eminently just to proceed under Order XVII, Rule 3, even though there may be no material on the record. Take the case of a plaintiff to whom adjournments after

adjournments had been granted to produce his evidence, the case depending purely on oral evidence.

Eventually let us suppose that on the 12th adjourned date he fails to appear, and the Court decides to proceed under Order XVII, Rule 3. There may be no documentary evidence as in the case is the Court precluded from proceeding under Rule 3 in such a case after giving so much indulgence to the plaintiff simply because there is no material on the record? However, as in this case there was some evidence inasmuch as the plaintiff, at any rate, had been examined it cannot be said that there was no material on the record on which the Court could proceed under Order XVII, Rule 3.

Therefore, though we express, with respect, some doubt about the view that there must be materials on the record before a Court can proceed under Order XVII, Rule 3, we need not express a firm opinion on this point in the circumstances of this case. In this case, there were some materials, and the Court looked into these materials before dismissing the suit under Order XVII, Rule 3. In those circumstances, the only remedy open to the appellant was to appeal. He could not make an application under Order IX, Rule 9, and the Court below was right in dismissing the application.

19. The appeal fails, and is hereby dismissed: but in the circumstances we pass no order as to costs.

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