

Mohan Lal Vs. Om Prakash

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Court : Rajasthan

Decided On : Sep-08-1987

Reported in : AIR1989Raj132; 1988(1)WLN243

Judge : D.L. Mehta, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13 - Order 37, Rules 3(5) and 4 - Order 43

Appeal No. : Civil Revn. Petn. No. 176 of 1987

Appellant : Mohan Lal

Respondent : Om Prakash

Advocate for Def. : B.L. Mandhana, Adv.

Advocate for Pet/Ap. : G.D. Parwal and; J.P. Goyal, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

D.L. Mehta, J.

1. Defendant petitioner has preferred this revision petition against the order dated 5-1-87 passed by the learned Additional Civil Judge No. 4, Jaipur City. Jaipur in

Civil Suit No. 324 of 1986 whereby the application of the petitioner under Order 37, Rule 4 for setting aside the ex parte decree passed on 5-9-1986 was rejected:

2. Plaintiff non-petitioner instituted a summary suit under Order 37. C.P.C. for the recovery of Rs. 5,233/- on the basis of the Cheques issued by the petitioner towards the payment of the loan. Cheques were dishonoured by the Bank. The cheques issued were of the date of 13th September, 1984 and 15th October, 1984. The petitioner closed his account earlier in September. 1984. Mr. Mandnana appearing on behalf of the non-petitioner submitted that the revision petition is not maintainable' as the appeal lies under Order 43, Rule 1(d). Sub-rule (d) of Rule 1. C.P.C. is reproduced as under : --

'(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte.'

The necessary ingredient of this Clause (d) is-- (i) that the application should be moved for setting aside the decree under Rule 13 of Order IX, (ii) second 'ingredient is that such an application should be of a case in which appeal lies. It is an admitted position in this case that under Order 37, Rule 4, there is a special provision for, setting aside the ex parte decree passed under Order 37. It will not be out of place here to mention that under Rule 13 of Order 9 defendant may apply to the Court by which the decree was passed for an order to set it aside the decree and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called upon for hearing, the Court shall make an order for setting aside the decree. Thus, under Rule 13 of Order 9 the necessary ingredient is (1) summonses or summons was not duly served on the applicant (2) he was prevented by any sufficient cause from appearing when the suit was called for hearing.

3. Under Order 37, Rule 4, the Court can only under special circumstances set aside the decree.

4. There is a difference between 'special circumstances' occurring in Rule 4, and 'sufficient cause' occurring in Rule 13. 'Special circumstances' are not synonymous with 'sufficient cause'. Apart from that in Clause (d) of Rule 1 of Order 43 only the

application under Rule 13 of Order 9 has been referred. There is no provision under Order 43 for setting aside the ex parte decree passed under Order 37, similar to Rule 13 of Order 9.

5. Mr. Mandhana appearing on behalf of the non-petitioner has cited before me the case of V. Thiagarajan v. Mohammad Umar Sait, AIR 1978 Mad 223, in which, it has been held as under :-- (para 5)

'I must confess my inability to appreciate the order under revision, which only shows that the learned City Civil Court, had not even cared to look at the provisions of Section 44 of the Evidence Act. Section 44 of the Evidence Act occurs under the heading 'judgments of Courts of justice when relevant'. This provision relates to procedure. It does not confer any right on the party. Therefore, the respondent herein is not enabled to move the Court under Section 44 of the Evidence Act. A mere reading of that section,..... will clearly show that if a judgment sought to be relied upon in a proceeding, it is well open to the party to contend that the judgment sought to be relied on, was obtained by fraud, this is far from saying that a Court has jurisdiction to set aside a decree under this section at the instance of one of the parties saying that it was obtained by fraud. Though the order under revision in terms does not refer to Section 44, the very application for the invoking the jurisdiction of the City Civil Court was under Section 44. Therefore it was necessary on the part of the learned Judge to have adverted to this section before entertaining the application. He had not cared to do so. Not only that as if adding insult to injury no reference is made to the order in I.A. No. 14962 of 1974, He is completely oblivious to that proceeding which has got a material bearing on the issue, namely, I.A. No. 14962 of 1974, as the narration of the facts would disclose that was an application under Order 37, Rule 4. C.P.C. filed by the respondent herein to set aside the decree dated 1-3-72.'

6. The point at issue was not discussed by the Madras High Court whether an appeal rejecting the application for setting aside the decree made under Rule 4 of Order 37 is appealable or not.

7. I have already considered that the provisions of Rule 13 of Order 9 and Rule 4 of Order 37 are not synonymous. The legislature in its wisdom has not inserted

under Order 43 that rejecting an application for setting aside the decree passed under Order 37 should also be made appealable. The omission to include Rule 4 of Order 37 under the provisions of Order 43 is a sufficient guideline to arrive at a conclusion that no appeal lies when the application under Rule 4 of Order 37 is rejected by the Court. I do not find any force in the submissions of Mr. Mandhana about the maintainability of the revision petition.

8. Mr. Goyal appearing on behalf of the present petitioner defendant submitted that summonses were served on his client on 26th August, 1986. The date fixed for appearance was 29-8-86. His client neither appeared on 29-8-86 nor on 5-9-86, the day on which one decree has been passed. Mr. Goyal submits that his client was assured by the present non-petitioner that the suit shall be settled out of the Court and it is not necessary for him to contest the suit. He submits that the assurances given were taken on their face value and for this reason his client did not appear before the Court.

9. Under Rule 13 of Order 9 the Court has power to set aside the ex parte decree if the defendant succeeds in satisfying the Court that he was prevented by any sufficient cause from appearing in the Court. Under Rule 4 of Order 37 it is necessary for the defendant to show that 'special circumstances' exist to set aside the decree. Mere 'sufficient ground' cannot be equated with 'special reason' sufficient cause and 'special circumstances' appearing in Rule 13 of Order 9 and Rule 4, Order 37 respectively are not synonymous. Legislature in its wisdom has used the words 'specialcircumstances' in Rule 4 of Order 37. The gravity of the reasons is more high in case of 'special circumstances' as provided under Rule 4 of Order 37. It will not be out of place here to mention that the words 'sufficient cause' and 'special reasons' carry different meanings. The word 'cause' cannot be equated with 'reasons' and similarly the word 'sufficient' cannot be equated with 'special', Special circumstances ordinarily mean that the defendant was prevented to appear in the Court on account of unavoidable circumstances beyond his control. In such circumstances, I hold that the meaning assigned to the words 'sufficient cause' under Rule 13 of Order 9 cannot be given to the words used in Rule 4 of Order 37 to the words 'special reasons'.

10. A person who has issued cheques having no account in the Bank cannot ordinarily believe on the assurance given by the plaintiff that the case shall be settled out of the Court and it is not necessary to appear in the Court. Even if it is assumed though it is not correct that such assurance was given even then it cannot be said that the petitioner was prevented to appear in the Court and it was not within his power to appear in the Court. This ground may be a 'sufficient cause' in some cases under Rule 13 of Order 9 but it cannot be said that it is a 'special reason' as envisaged under Rule 4 of Order 37.

11. The second limb of the argument of Mr. Goyal is that defendant may at any time within 10 days from the service of such summons for judgment may apply to the Court to grant leave to defend the case. Mr. Goyal submits that in this case the Court was not justified in passing the decree on 5th September, 1986 as his client was served only on 26th August, 1986. The words 'within 10 days' as used in Clause (5) of Rule 3 of Order 37 needs interpretation.

12. Within ten days may mean that the period may be less than 10 days or at the most on the 10th day. It cannot go beyond that, Mr. Goyal submits the day of 26th August, 1986 on which his client was served and the day 5th September, 1986 on which the judgment was delivered should be excluded. If both the days are included then there will be 11 days. If both the days are excluded then there will be 9 days. I am of the view that the proper construction of the words 'within 10 days' should be given and only one day can be excluded at the most. On 26th he was served and, at the most he can make a submission that the day of service should be excluded. He cannot make a submission that the day of 5th September should also be excluded. Thus, the Court passed the decree on the 10th day after the day of service. The Court was justified in passing the decree on the 10th day after the date of service. If Mr. Goyal's argument is accepted then it will tantamount a direction that the decree should be passed beyond 10 days and not within 10 days. For this reason also I do not find any force in the submission made by Mr. Goyal counsel for the petitioner.

13. I have already held that the petitioner has failed to show 'special reasons'. I do not find any force in the revision petition. Revision petition is dismissed. No order

as to costs.

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