

Maya Devi and anr. Vs. Hari Singh

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Court : Rajasthan

Decided On : Aug-02-2002

Reported in : 2002(3)BLJR2500; 2002(5)WLC336

Judge : S.K. Keshote, J.

Appeal No. : Civil Revision Petition No. 1566 of 2002

Appellant : Maya Devi and anr.

Respondent : Hari Singh

Advocate for Def. : Mr. S.K. Gupta

Advocate for Pet/Ap. : Mr. Mandhana

Disposition : Petition Allowed

Judgement :

S.K. Keshote, J.

1. This revision petition under Section 115, C.P.C. is directed by the plaintiff-petitioners against the order dated 16.11.2000 of the Civil Judge (Junior Division), Bharatpur in Civil Suit No. 34/1990. Under this order the learned trial Court has grant-id the application filed by the defendant/non-petitioner under Order IX, Rule 7, C.P.C. Parties herein after referred as the plaintiff and defendant.

2. The facts of their brief are that the suit for permanent injunction was filed by late Laxman Singh, predecessor-in-title of the petitioners against the defendant/ non-petitioner.

3. The suit was fixed for plaintiffs evidence on 10.5.1999. As on that date both the parties nor their Counsel were present, the suit was dismissed in default. The application filed by the plaintiff under Order IX of the C.P.C. was granted and the suit was ordered to be restored to its original number.

4. It is not in dispute that the notices with copy of this application of the plaintiff was sent to the Counsel of the defendant. That is not sent for personal service upon the defendant. The Counsel has refused to take the notice on the ground that he has left this brief long back. Another Counsel has been engaged by the defendant. This refusal of the notices by the Counsel was taken to be sufficient service of the defendant and the application aforesaid has been granted. Not only that application of the plaintiff was allowed, but for non-appearance of the defendant or his Counsel, the Court has ordered to proceed ex-parte against him.

5. The defendant on 13.8.1999 filed an application under Order IX, Rule 7, C.P.C. and the prayer has been made therein for setting aside of the order dated 2.6.1999. This application was came to be allowed under the impugned order. Hence this application.

6. Mr. Mandhana, learned Counsel for the plaintiffs contended that Mr. Gopal Ram Gupta, was the Counsel for the defendant and as per the provisions contained under Order III, Rule 4(2) of the C.P.C, a notice of that application for restoration of suit has rightly been ordered to be issued to him. He refused to accept the notice and the trial Court has rightly taken it to be sufficient service.

7. It has next been contended that the learned trial Court has not awarded costs in favour of the plaintiff.

8. Lastly, it is urged that the evidence of the plaintiff was recorded on 21.7.1999 and 6.8.1999 and the arguments in the suit were heard on 9.8.1999 and the case was posted for judgment on 11.8.1999. In this factual background what it is

contended that the application filed by the defendant under Order IX, Rule 7 of the C.P.C. was no Unimaginable.

9. Mr. S.K. Gupta, learned Counsel for the defendant in contra submitted that the learned trial Court has passed a just and reasonable order in which this Court may not interfere with under Section 115 of the C.P.C.

10. It is next contended that Mr. Gopal Ram Gupta, was not remained Advocate in the suit of the defendant. In a case where the Advocate has refused to take the notice of the application in all the fairness and to do substantial justice to the parties, the Court instead of relying on the service on refusal of the notice should have sent the same to the defendant. In case the matters are permitted to be decided in this way and manner, it will result in causing serious injustice and irreparable injury to the defendant. The Advocate has given out the reasons not to accept the notices and in the matter the Court should have adopted an approach to do substantial justice. This conservative view taken by the Court below is not proper and reasonable. Carrying this contention further the learned Counsel for the defendant submitted that for this conduct of the Advocate the litigation should not be permitted to suffer.

11. Lastly, it is contended that in the trial Court the application of the defendant was not opposed on the ground that the suit is reached at the stage of pronouncement of the judgment.

12. I have given my thoughtful consideration to the rival submissions made by the learned Counsel for the parties.

13. Order III, Rule 4(2) C.P.C. provides that:

Every such appointment shall be filed in Court and shall, for the purposes of Sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

14. The Explanation that is inserted to Sub-rule (2) of Rule 4 of Order III, C.P.C. reads as under:

Explanation--For the purposes of this sub-rule, the following shall be deemed to be proceedings in the suit:

(a) an application for the review of decree or order in the suit;

(b) an application under Section 144 or under Section 152 of this Code, in relation to any decree or order made in the suit;

(c) an appeal from any decree or order in the suit; and

(d) any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of moneys paid into the Court in connection with the suit.

15. It is undisputed position that Shri Gopal Ram Gupta, was engaged by the defendant as his Advocate in the suit.

16. It is also not in dispute that Shri Gopal Ram Gupta filed his 'Vakalatnama' in the suit for the defendant.

17. Learned Counsel for the parties are in agreement that this appointment of Mr. G.R. Gupta, Advocate is not determined with the leave of the Court by a writing signed by the defendant or Shri Gupta. On appointment of another Counsel after taking no objection of earlier engaged Advocate, his appointment does not automatically stand determined. Determination of the appointment of an Advocate is with the leave of the Court by a writing signed by the client or the pleader. Until all the proceedings in the suit are ended so far as regard the defendant Shri Gupta's appointment as his Advocate remains in force. On the date on which the notice of the application filed by the plaintiff-petitioner under Order IX, Rule 9, C.P.C. was sent to him by this legal fiction his Vakalatnama remains in force. Thus his refusal to accept notice on the ground as what has been stated thereon is not legally permissible to him. He continued to be an Advocate of the defendant for this purpose i.e. to accept the service of notice of the application afore-stated and

the learned trial Court is correct in its approach to accept it to be sufficient service. The defendant or on his behalf the Advocate has not put appearance in the proceedings and rightly Court ordered to proceed ex-parte against the defendant to proceed in the suit in accordance with law. An Advocate can get himself relieved of his this duty to act for the party in the suit either all the proceedings therein are ended so far as regard, the client or his Vakalatnama is determined. He cannot on his own take it to be the determination of his appointment on engagement of another Advocate with no objection from him by the client. Where he desires or wants to relieve of his this duty he should have taken all care and responsibility to act in accordance with the provisions of Sub-rule (2) of Rule 4 of Order III, C.P.C.

13. An application for restoration of a suit dismissed in default is a part of the proceedings in the suit. The Advocate of the defendant does not require fresh appointment to contest this application. The authority of Mr. Gupta to act as an Advocate for the defendant do not stand determined on dismissal of the suit in default and the notice of this application has rightly been issued in his name at his address. Though he has refused to accept the notice but as his appointment has not been determined it is valid service and Court has rightly acted thereupon accordingly. His simple note on the notice that he is no more Advocate of the defendant as they have appointed another Advocate or that the file has been taken back or that he has been instructed not to appear does not relieve him of Fills this legal duties. The Advocate can withdraw himself from the suit only with the leave of the Court and that is not the case here.

19. In the memo of revision petition, the factual averments made that after order to proceed ex-parte made on 2.6.1999 the evidence of plaintiffs was recorded on 21.7.1999 and 6.8.1999 and final arguments were heard on 9.8.1999 and the case was posted for judgment on 11.8.1999 have not been denied by the learned Counsel for the defendant/non-petitioner.

20. Order IX, Rule 7, C.P.C. begins with the words,, 'where the Court has adjourned the hearing of the suit ex-parte'. From these words as it appears there has to be a hearing on the date to which the suit was ordered to stand over.

Where entire hearing of the suit has been completed and the Court has, being competent to pronounce the judgment then and there, adjourned it merely for the purpose of pronouncement of the judgment, it is not an adjournment of hearing of the suit as there is nothing more to be heard in the suit.

21. Order XX, Rule 1, C.P.C. needs to be referred here:

Judgment when pronounced--The Court, after the case has been heard, shall pronounce judgment in the open Court, either at once or, as soon thereafter as may be practicable, on some future day; and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleader.

22. In the suit, out of which this revision petition arises, the arguments were heard and the next date is fixed for pronouncement of judgment. After hearing was completed and suit has been adjourned for pronouncement of judgment, the defendant was to hear the judgment pronounced. The matter would have at the stage of Order IX, Rule 6, C.P.C. to be followed up by passing of ex-parte decree. The only provisions under Order IX, Rule 13, C.P.C. is applicable.

23. On perusal of the order of the learned trial Court it reveals that this important and material aspect has not been considered and the relief has been granted in using phraseology 'in the interest of justice'.

24. Section 151, C.P.C. is a provision saving of inherent powers of the Court, it provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such an order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.

25. It is no more *res integra* that the inherent powers of the Court cannot be override express provisions of the Code.

26. Where the defendant could not have been granted relief under Order IX, Rule 7, C.P.C, the learned trial Court erred in giving relief to him under the provisions of Section 151, C.P.C. The order granted relief in his case to defendant with the aid and help of Section 151, C.P.C. is wholly perverse. In case this order is allowed to

stand, it will certainly occasion a failure of justice to the plaintiff. The defendant will get right to participate and contest the suit on merits, which is otherwise legally not permissible to him.

27. In the result, this revision petition succeeds and the same is allowed. The order dated 16.11.2000 of the Civil Judge (Junior Division), Bharatpur in Civil Suit No. 34/1990 is set aside. The application filed by the defendant under Order IX, Rule 7, C.P.C. is dismissed. The learned trial Court is directed to decide the suit, out of which this revision petition arises, within a period of two months from the date of the receipt of certified copy of this order. No order as to costs.

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