

Manak Chand Vs. Mool Chand and anr.

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Court : Rajasthan

Decided On : Mar-27-2002

Reported in : 2003(2)WLN618

Judge : Harbans Lal, J.

Appeal No. : S.B. Civil Revision Petition No. 1563 of 1996

Appellant : Manak Chand

Respondent : Mool Chand and anr.

Disposition : Petition allowed

Judgement :

Harbans Lal, J.

1. This revision petition is directed against the judgment and decree dated 5.2.1994 passed by learned Munsif, Lalsoth under Order 17 Rule 3, CPC dismissing the suit of the plaintiff-petitioner.

2. The plaintiff-petitioner filed a suit for possession under Section 6 of the Specified Relief Act, 1963 against the defendant/non-petitioners in the Court of learned District Judge. Dausa pleading therein inter alia that the defendants forcibly dispossessed him with the help of police from the Kham house marked ABCD in the enclosed site plan which was got constructed by him on agricultural

land situated at village Mohammadpura, Tehsil Lalsoth bearing old Khasra No. 186 and new Khasra No. 63/2 through a registered sale deed dated 15.7.1970 from Thakur Gumani Ram Ji. The defendant-non-petitioners denied the allegations in their written statements and pleaded that the land in question was sold to them by one Raghunath Singh and though the land was entered in the name of plaintiff but it was in actual possession of Ramla, Srila etc. who are Bairwas by caste. It appears that the suit was transferred to the learned Court below on account of amendment in the pecuniary jurisdiction of the Civil Courts. The trial Court after framing the issues fixed the case on 19.3.1993 for plaintiffs evidence on 22.6.1993. It was directed that summons of the witnesses and the process fee be filed within three days. The plaintiff had infact already filed the summons and process fee on 1.3.1993 but due to lapse on the part of the concerned clerk the same were not issued. The suit was first dismissed in default on 30.4.1993 but was restored on 11.10.1993. On 6.12.1993 the learned Munsif directed that the learned District Judge be requested for transfer of the case. On subsequent 2-3 dates the order from the learned District Judge was awaited and on 4.1.1994 the case was again fixed for 18.1.1994 for the evidence of the plaintiff. On that day, the case was adjourned for the evidence of the plaintiff to 5.2.1994 at the cost of Rs. 75/-. On 5.2.1994 neither the plaintiff nor his learned Counsel was present in the Court so the evidence of the plaintiff was closed and the suit was decided on merits under Order 17 Rule 3, CPC relying upon the Full Bench Judgment of this Court in Gopi Kishan v. Ramu, reported in 1964 RLW 155. As there was no evidence on record, the suit was dismissed. Hence this revision petition stating that no appeal is provided against the judgment and decree passed under Section 6 of the Specific Relief Act, 1963.

3. this Court ordered on 6.11.1996 that notices be issued to the non-petitioners to show cause as to why this revision petition should not be admitted and disposed of. No one has appeared on behalf of the non-petitioners despite service of notice.

4. I have heard learned Counsel for the petitioner-plaintiff. He has contended that the learned lower Court has committed grave illegality in passing the impugned order under Order 17 Rule 3, CPC in the absence of petitioner and without there being any evidence of the petitioner on record. According to him, the order which

could have been passed in the facts and circumstances of the case was an order under Order 17 Rule 2, CPC and not under Order 17 Rule 3, CPC.

5. I have perused the impugned judgment and decree and the authority relied upon by the learned lower Court in its judgment.

6. It may be stated at the out set that the view taken by the learned lower Court is based on the Full Bench decision of this Court in Gopi Kishan's, case (supra) but that was an authority which interpreted the provisions of Order 17 Rules 2 and 3, CPC as they stood before amendment of the CPC in 1976. Admittedly, there were two views one was that Order 17 Rule 3, CPC could be used for deciding the matter on merits if the party is present but has failed to do what was expected of that party to do and this Rule can be used against a party who was present, whereas, the other view was that even if a party is absent but has failed to do what was expected of him then it was the discretion of the Court either to proceed under Order 17 Rule 2, CPC or under Order 17 Rule 3, CPC. In some of the decisions the view taken was that even if the trial Court disposed of the matter as if it was disposing of it on merits under Order 17 Rule 3 CPC still if the party against whom the decision was pronounced was absent it should not be treated to be a decision in accordance with the Order 17 Rule 3, CPC and the provisions of the Order 9 will be available to such a party either for restoration or for setting aside the ex-parte decree. But, after the amendment in the Civil Procedure Code in 1976 the provisions of Order 17 Rule 2 and Rule 3, CPC as they stand now, read as under:

Order 17 Rule. 2: Procedure if parties fail to appear on day fixed:

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. Order 17 Rule 3: Court may proceed notwithstanding either party fails to produce evidence etc.

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,--

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) If the parties are, or any of them is absent, proceed under Rule 2

It cannot be disputed that these amended provisions are applicable and govern the present case.

7. Amended provisions of Order 17 Rules 2 and 3, CPC have been interpreted by the Hon'ble Apex Court in Prakash Chandra Manchanda and Anr. v. Smt. Janki Manchanda, reported in : [1987]1SCR288 wherein the evidence of the defence was closed in his absence and the case was decided under Order 17 Rule 3, CPC and application filed on his behalf under Order 9 Rule 13, CPC for setting aside the ex-parte decree was dismissed by the trial Court holding that the case was disposed of not in accordance with Order 17 Rule 2, CPC but under Order 17 Rule 3, CPC and, therefore, the application under Order 9 Rule 13, CPC was not maintainable. In these facts and circumstances, it has been held by the Hon'ble Apex Court as under:

It is clear that in cases where a party is absent only course is as mentioned in Order 17(3) (b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2. Similarly, the language of Rule 2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the mode directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 2 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remains absent and for that party no evidence has been examined up to that date, the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9, CPC. It is therefore clear that after this amendment in Order 17 Rules 2 and 3, CPC. there remains no doubt and controversy... It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as

admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not be disputed that the Court when proceeded to dispose of the suit on merits had committed any error.

8. In this view of the matter, therefore, the view taken by the learned lower Court is patently erroneous and against the authoritative pronouncement of the Hon'ble Apex Court and is therefore not sustainable.

9. In the result, this revision petition is allowed and the impugned judgment and decree dated 5.12.1994 passed by the learned Munsif-cum-Judicial Magistrate, Lalsoth is hereby set aside and the case is remitted back to him with the directions to proceed with the suit further from the stage it was on 5.12.1994 after affording an opportunity of hearing to both the parties. The parties are directed to appear before the learned Munsif on 29.4.2002.

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