

M/S. Arvind Enterprise Vs. M/S. Saraogi Enterprises

M/S. Arvind Enterprise Vs. M/S. Saraogi Enterprises

SooperKanoon Citation : sooperkanoon.com/851663

Court : Kolkata

Decided On : Feb-26-1992

Reported in : AIR1993Cal24,(1992)2CALLT102(HC),1992(2)CHN7,96CWN810

Judge : S.K. Mookherjee and; A.K. Nandi, JJ.

Acts : [Presidency Small Cause Courts Act, 1882](#) - Sections 38 and 48;; [Code of Civil Procedure \(CPC\), 1908](#) - Section 52 (2) - Order 8, Rules 1 and 10

Appeal No. : C.O. 1068/91

Appellant : M/S. Arvind Enterprise

Respondent : M/S. Saraogi Enterprises

Advocate for Def. : Mr. G. Gupta and ;Mr. Gouri Shankar Gupta, Advs.

Advocate for Pet/Ap. : Mr. M.M. Saha and ;Mr. J.B. Pramanik, Advs.

Judgement :

ORDER

S.K. Mookherjee, J.

1. This Revision has been directed against the judgment and order dated 8th January, 1991 passed by the Full Bench under S. 38 of the Presidency Small Cause Courts Act.

2. The plaintiff filed a suit for recovery of a sum of Rs. 7482/- and odd and aSso of interest thereon against the defendant. The defendant, however, paid the principal before service of summons upon him by cheque, which was encashed by the plaintiff. In the written statement the defendant asked for disposal of the suit on full satisfaction on the ground that the claim had been satisfied. The plaintiff filed an application for recording such receipt and for proceeding with the suit for realisation of interest. Since on the date fixed, defendant was not present. Trial Court fixed 6-9-89 for ex parte order. The trial Judge rejected the plaint for extinguishment of the cause of action in the absence of the defendant against the plaintiff. The plaintiff preferred an application under S. 38 of the Presidency Small Cause Courts Act. Full Bench allowed the application, set aside the judgment of the trial court and remanded the case to the trial Judge for disposal according to law. The defendant being aggrieved by the said order of Full Bench has preferred this Revision.

3. The judgment of the Full Bench has been attacked on a very short point. In order to appreciate the argument advanced on behalf of the defendant-petitioner, reproduction of S. 38 of the Presidency Small Cause Courts Act is necessary.

'New trial of contested cases -- Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under S. 52(2) of the Code of Civil Procedure) order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings.

Explanation -- Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant.'

4. The explanation is S. 38, by a deeming provision, makes all suits contested except two types namely, where the decree is passed on consent' or 'in default of appearance by the defendant'. The language of the explanation makes the intention of the Legislature clear that ordinarily every decree passed in a Small Cause Court suit shall be deemed to be contested. The legislature intended to impart as wide a meaning as possible to the terms 'contested suits' and as such by

implication 'excepted decrees' should be given a restricted meaning. This is possible only if the second class of suit is allowed to derive its colour from the first one. In other words, the word 'appearance' as used in the said explanation must mean the 'first appearance' after service of summons on the defendant requiring him to file a Written Statement in conformity with the provisions of O. 8 R. 1 of the Civil P.C. R. 10, O. 8 authorises the Court to pronounce judgment against the defendant and on the pronouncement of such judgment a decree also can be drawn up. Such a decree has been held to be not appealable after the amendment of the Civil P.C. in 1976, since the previously existing Cl. (b) of O. 43, R. 1 of the said Code has now been omitted. The provisions of the Civil P.C. have been made applicable by S. 48 of the Presidency Small Causes Courts Act. This construction also is compatible with the principle of ejusdem generis, as an admission of liability by non-traverse and such admission is an inherent characteristic in both the classes of suits covered by the exception part of the explanation. This will also avoid any inconsistency and frustration of the legislative intent by maintaining the enlarged coverage of the deeming provision. At this stage, we would like to add that even without filing any Written Statement the defendant may appear and contest the decree on the basis of the Plaint itself. In that event also the decree would become a contested one.

5. Applying the aforesaid criteria or tests to the facts of the case, the contention raised on behalf of the petitioner that the decree of dismissal passed in the suit was not a contested one cannot be upheld. The defendant appeared and filed a Written Statement and the Court on an adjourned date had to fix the suit for ex parte hearing. The suit was ultimately dismissed on consideration of the merits of the defence pleaded through Written Statement. In other words, the Trial Court treated the suit as contested one.

6. Regarding the other point urged by Mr. Saha on behalf of the petitioner that the payment having been accepted by the plaintiff without reservation no further claim was tenable we do not propose to express any view as that will be a matter on evidence in course of the trial before the Small Cause Court.

7. Since both the submissions made by Mr. Saha fail the Revisional application fails also but there will be no order as to costs.

A.K. Nandi, J.

8. I agree.

9. Petition dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com