

Firm Sood Traders Vs. Paras Ram

Firm Sood Traders Vs. Paras Ram

SooperKanoon Citation : sooperkanoon.com/889404

Court : Himachal Pradesh

Decided On : Apr-09-1985

Reported in : AIR1985HP93

Judge : T.R. Handa, J.

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

Appeal No. : Civil Revn. No. 92 of 1980

Appellant : Firm Sood Traders

Respondent : Paras Ram

Advocate for Def. : Prem Goel, Adv.

Advocate for Pet/Ap. : Kapil Dev Sood, Adv.

Disposition : Petition allowed

Judgement :

ORDER

T.R. Handa, J.

1. The petitioner herein has invoked the revisional jurisdiction of this Court under Section 115, Civil P. C. to seek the quashing of the order DA 14-9-1979 recorded by the Sub-Judge, Kallu, whereby the learned Sub-Judge allowed the application

of the respondent purporting to have been made under O. 9 Rule 13, C. P. C. anti set aside the decree earlier passed in favour of the petitioner and against the respondent on 24-8-1978.

2. The material facts which are relevant for the purposes of this petition are clearly borne out from the record and are beyond the pale of controversy. These facts show that the suit giving rise to these proceedings was filed by the petitioner-plaintiff against the respondent-defendant for the recovery of Rs. 26,507.66 on the basis of a pronote. The suit was filed in May 1974. The respondent-defendant contested the suit and on the pleadings of the parties two issues were struck by the trial court. The parties were thereafter called upon to produce their evidence in respect of their respective contentions. The petitioner-plaintiff closed its evidence on 7-1-1975 and there after the case had been adjourned from time to time for the evidence of the respondent-defendant. After availing of several opportunities for producing his evidence, some even on payment of costs, the respondent-defendant failed to examine a single witness till 7-4-1976 when he moved an application before the trial court under the provisions of the Himachal Pradesh Agricultural Relief of Indebtedness Act praying that proceedings in the suit be stayed as he was a marginal farmer within the meaning of that Act and no decree could be passed against him. That application was ultimately rejected by the learned trial court vide its order dt. 25-6-1977. The suit was then adjourned to 12-9-1977 for evidence of the defendant-respondent. It was later only on 29-5-1978 that the defendant examined two of his witnesses. After these two witnesses were examined, the defendant prayed for yet another adjournment on the plea that he was to produce only one more witness. That prayer of the plaintiff was allowed by the trial court on the express condition that the defendant would on the adjourned hearing produce his third witness at his own responsibility. The case was then adjourned to 24-8-1979 for remaining evidence of the defendant on the adjourned date, that is 24-8-1978 neither the defendant nor his witness put in appearance. The counsel for the defendant, however, appeared on his behalf and prayed for an adjournment. In support of this prayer of adjournment no reason was assigned and the learned trial court rightly declined this request for adjournment. It appears that after the request for adjournment was declined by the trial court, counsel for the respondent-defendant withdrew from the case without leave of the court and

without assigning any reason- Thereafter the trial court proceeded with the trial of the suit. It recorded the statement of the plaintiff in rebuttal, heard arguments addressed by the counsel for the plaintiff and pronounced its judgment on merits there and then. The judgment of the learned trial court, it may be observed, discussed the entire evidence adduced in the suit on either side and was thus delivered on merits.

3. Subsequently on 15-9-1979 the respondent-defendant filed an application under Order 9 Rule 13, C. P. C. alleging therein that the suit had been decreed against him ex parte and praying that the ex parte decree be set aside. He pleaded that he could not attend the court on 24-8-1978 on account of his eye operation. The petitioner-plaintiff resisted that application, inter alia, on the ground that the application under Order 9 Rule 13, C. P. C. was not maintainable as the decree had been passed under Order 17 Rule 3, C. P. C. and the proper remedy for the respondent-judgment-debtor was to file an appeal against that decree. On merits also the petitioner-plaintiff denied if (here was any sufficient cause to set aside the decree.

4. The learned trial court vide its impugned order held that the court on 24-8-1978 had proceeded under Order 9 Rule 6 and not under Order 17 Rule 3, C, P. C. in passing the decree and as such the petition under Order 9 Rule 13, C. P. C. was maintainable. Finding further that the respondent was prevented by sufficient cause from putting in appearance on 24-8-1978, it set aside the decree DA 24-8-1978.

5. On the face of the undisputed facts and circumstances of this case as narrated above, the short submission made on behalf of the petitioner by his learned counsel, Shri K. D. Sood, is that the trial court while passing the decree in favour of the petitioner-plaintiff against the respondent-defendant on 24-8-1978 had acted not under Order 9 but under Order 17 Rule 3, C. P. C. Such a decree, proceed the submissions, could not be challenged under Order 9 Rule 13, C. P. C. On this premises it was contended that the court below in entertaining and accepting the application of the respondent made under Order 9 Rule 13, C. P. C. had acted beyond jurisdiction and the impugned order is thus wholly unsustainable in law.

6. The counter submission made on behalf of the respondent by Shri Goel, the learned counsel for the respondent, is that on the facts of this case when admittedly neither the respondent-defendant nor his counsel was present at the time the decree was passed, the trial court could not proceed under Order 17 Rule 3, C. P. C. and it cannot be said to have acted only under Order 9 read with Order 17 R, 2, C. P. C. Order 17 Rule 3 C. P. C., according to Shri Goei, could be invoked only when both the parties were present before the Court.

7. I have considered the respective contentions raised on behalf of either side. In my view the only vital point on which we need focus our attention for a correct decision of [his case is whether the decree passed by the trial court on 24-8-1978 in the circumstances narrated above was an ex parte decree within the contemplation of Order 9 Rule 13, C. P. C. for it is only then that an application under that provision for getting it set aside would be maintainable. The answer to this question, in my opinion, must be in the negative. As is obvious from the narration of facts given earlier, the suit was not only at an advanced stage of the trial when the decree was passed on 24-8-1978 but a substantial portion of the evidence of either party had already been recorded by then. In a situation like this the court must be deemed to have proceeded under Rule 2 of Order 17 as amended by the Amending Act of 1976 (Act 104 of 1976). This Rule after its amendment reads : --

'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.

Explanation.-- Where the evidence or a substantial portion of the evidence of any party has already- been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.'

8. The explanation which has been newly added to this Rule clearly provides that where the evidence of a party has been wholly or partly let in and the party

absents itself at the adjourned hearing, it will be deemed to be present at such hearing. A decision, therefore, given in the suit after consideration of the evidence already let in, though in the physical absence of the party will not be an ex parte decision in view of the legal fiction introduced by the explanation aforesaid that such party though actually and physically absent should be deemed to be present. The decree dt. 24-8-1978 which had been passed on merits after considering the evidence adduced on either side must, therefore, be taken as the decree passed on merits in the presence of the parties and in view of the language of the explanation appended to Rule 2 of Order 17. C. P. C. it is just not possible to call such a decree as an ex parte decree. It being so, the provisions of Order 9 Rule 13, C. P. C. could not be invoked to attack such a decree. The only course open to the respondent-defendant was to prefer an appeal against that decree.

9. I, thus, find that the trial court in entertaining and accepting the application of the respondent-defendant made under Order 9 Rule 13, C. P. C. had acted without jurisdiction. I would, accordingly, set aside the impugned order of the learned trial court and restore the decree dt. 24-8-1978 obtained by the petitioner-plaintiff against the respondent-defendant.