

Patel Engineering Ltd. Vs. United Estate and Builders Pvt. Ltd.

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Court : Mumbai

Decided On : Aug-25-2011

Judge : Roshan Dalvi, J.

Acts : Code of Civil Procedure (CPC) - Order 43 Rule 1(d), Order 9 Rule 13, Section 2(2)

Appeal No. : APPEAL FROM ORDER NO. 589 OF 2011 WITH CIVIL APPLICATION NO. 811 OF 2011

Appellant : Patel Engineering Ltd.

Respondent : United Estate and Builders Pvt. Ltd.

Advocate for Pet/Ap. : Mr. Ashish Kamat, Adv.

Judgement :

1. The Appellant has filed this Appeal from the Order challenging the order allowing restoration of the Respondent's Suit earlier dismissed for default. The Respondent has claimed that the Appeal from Order is not maintainable as it is not an appealable order. The Appellant claims that it is appealable under Order 43 Rule 1(d) of the Code of Civil Procedure. Order 43 Rule 1 (d) relates to an order under Order 9 Rule 13 of the Code of Civil Procedure. Order 9 Rule 13 relates to setting aside a decree ex parte against the Defendant. The order impugned is not a decree passed ex parte against the Defendant. It is an order rejecting an order of restoration of the Suit. A decree under Section 2(2) is a formal expression of

adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the Suit. An order rejecting an application allowing restoration of a Suit would, rather than determine the rights of the parties for any matters in controversy, restore for determination all of them which remain to be adjudicated. Consequently the order is not appealable as claimed by the Appellant. The Appeal is not maintainable. It deserves to be dismissed on that score alone as argued by Ms. Ghone on behalf of the Respondent.

2. Nevertheless the facts of the case have been stated to the Court and it can be seen that this Appeal even on merits is not worth admission.

3. The Respondent filed a Suit on 10.06.2002 in the Bombay City Civil Court. The Suit came to be dismissed on 23.02.2005 for want of prosecution by default in appearance. I am told that both the parties did not appear on the day the Suit was dismissed. The Respondent took out a Notice of Motion five years thereafter in March, 2010 for restoration of the Suit. A notice was given to the Appellant. The Notice of Motion initially reached hearing on 09.04.2010. It was adjourned to 26.04.2010. On 26.04.2010 the board was discharged and the matter was shown adjourned to 02.07.2010. It came to be adjourned to 25.06.2010 when the application for restoration was allowed but with costs of Rs.5000/-. The Suit was restored to file to be heard on merits.

4. The Appellant claims that there is no justification in restoring the Suit. Sufficient cause for the delay in taking out the application for five years is not shown. The Appellant also claims that it has acted on the orders of dismissal. How it is acted is not stated.

5. The Appellant took out its own application for setting aside the ex parte order restoring the Suit. That application came to be rejected. The Suit has remained restored. It has remained to be heard on merits. The Appellant resists the Suit being heard on merits.

6. The relevant provisions of the Code of Civil Procedure for appearance of parties and consequences of non appearance are required to be first noted. These are Rules 3, 4, 8 and 14 of Order 9 which run thus :

3. Where neither party appears, suit to be dismissed.- Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

4. Plaintiff may bring fresh suit or Court may restore suit to file.- Where a suit is dismissed under rule 2 or rule 3, the plaintiff may

(subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for [such failure as is referred to in rule 2], or for his non- appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

8. Procedure where defendant only appears. - Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit.-

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

14. No decree to be set aside without notice to opposite party.- No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party. (emphasis supplied by italics)

7. A reading of these provisions show that when the Suit is dismissed when both the parties fail to appear it may be restored upon the satisfaction of the Court for the reason of non appearance and application for restoration would be filed by the Plaintiff alone. The Court has to be satisfied of the non appearance.

The matter is between the Plaintiff and the Court. If the Defendant has also not appeared when the Suit was dismissed there is no provision for even notifying the Defendant of the application for restoration of the Suit. [See. *Ramjilal v. Kesheo Ram & Anr.* 64 IC 767= AIR 1923 Oudh 55]

8. However when the Defendant appears and the Plaintiff does not appear and the Suit is dismissed and the application for restoration is made, notice has to be given to the Defendant of the application for restoration because the Defendant had appeared and had knowledge of the dismissal of the Suit.

9. Similarly when the Plaintiff appears and the Suit is decreed ex parte and that decree has to be set aside by the Defendant notice has to be given to the Plaintiff because the Plaintiff had appeared and had knowledge of the decree.

10. This is the case when neither party had appeared when the Suit was dismissed. It could have been simplicitor restored to file to be heard on merits. Of course the Court would give fresh notice to the Defendant for being heard on merits if the Defendant does not appear after the Suit is restored to file.

11. It may be mentioned that despite these provisions which are specific with regard to the notice to the opposite party by way of practice and for the sake of interest of justice parties are called upon to serve every application taken out by them to the opposite party. Consequently the Notice of Motion taken out by the Respondent for restoration of their Suit was served upon the Appellant and the Appellant was to be heard though that was not a mandatory requirement under the Code of Civil Procedure.

12. It is correct that the Notice of Motion served upon the Appellant was adjourned from 26.04.2010 to 02.07.2010. It was indeed heard and disposed of before that date and hence the Appellant herein was not heard. The Appellant has not applied

for being heard on merits of that application. The Appellant simplicitor sought to get that order set aside. Even in this Appeal the Appellant has not offered for being heard on merits of the application for restoration of the Suit. The Appellant simplicitor claims that the Appeal be allowed and the order of restoration be set aside so that the Suit remains dismissed.

13. How the order of restoration came to be passed is, therefore, required to be noted. It was upon an application which was served upon the Appellant. The order was passed upon payment of costs. All that the order did was to allow the parties to be heard on merits. It is the most equitable order of the kind. If the delay of five years resulted in the Appellant acting upon the order of dismissal to alter the position of the parties that would be seen when the case of the parties is heard on merits. Though that is the contention, it has not been shown how the Appellant acted upon the said order. Setting aside the order of restoration without the Appellant showing how it has acted upon the order of dismissal is most inequitable and even improper. The vehemence of the Appellant not to proceed on the merits of the case, speaks much of such inequity. Consequently the rejection of the Appellant's application resisting the restoration of the Suit for it to be heard on merits is just and equitable. It does not deserve to be interfered with even if the Appeal was maintainable. The Appeal is, therefore, dismissed with costs of Rs.10,000/-.

14. The Civil Application is disposed of accordingly.

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