

Prakash Chander Manchanda and Another

Vs

Janki Manchanda

Civil Appeal No. 2847 of 1986

(O. Chinnppaa Reddy, G. L. Oza JJ)

18.11.1986

JUDGMENT

OZA, J. -

1. This appeal arises as a result of leave granted by this Court against the summary dismissal of the first appeal by the appellant before the High Court of Delhi. The first appeal was filed against an order passed by the Sub-Judge First Class, Delhi rejecting the review petition filed by the petitioner. The facts necessary for disposal of this case are that in a suit filed against the present appellant in the court of Sub-Judge First Class, Delhi when the matter was fixed for evidence of the defendants as the plaintiff's evidence was over and defendant-present appellant's evidence was to begin when the case was taken up on January 24, 1985. The order-sheet of the court shows that no DW is present and at the request of the counsel of the defendant the case was adjourned to May 7, 1985. It is stated that on this date for some reason, the case was transferred to another board and in the transferee court, the order-sheet showed presence of the counsel for parties and it further shows that as the case was received on transfer it was ordered to be put up on August 21, 1985.

2. Learned counsel for the appellant disputed the mention in these proceedings about the presence of the counsel of the defendant-appellant. But in any event as it is not important for the decision of this appeal it is not necessary to go into that question.

3. On August 21, 1985 it appears that there was a holiday and therefore the case was put up before the learned Judge on August 22, 1985 and it was postponed to October 30, 1985 for the evidence of the defendant. On October 30, 1985 the order-sheet showed that the counsel for plaintiff was present but no one was present for the defendant. The court therefore directed the case to be taken up at 1 p.m. At 1 p.m. again the situation remained the same as it is clear from the order-sheet. It is also shows that none of the witnesses for defendants was also present and therefore the court passed the order : "The case was called but none has appeared on behalf of the defendant and no DWs present. The evidence of defendant closed. Now to come up for arguments." The next date fixed was November 1, 1985. On this date also nobody appeared for the defendant and counsel for the plaintiff who was present sought adjournment and the case was adjourned to November 8, 1985. On November 8, 1985 arguments of the plaintiff's counsel were heard and as none was present for the defendant the case was fixed for judgment on November 11, 1985. On this date also counsel for the plaintiff was present. Nobody was present for the defendant and order-sheet shows that a judgment was not ready it was postponed to November 21, 1985. On November 21, the Judgment was dictated and pronounced and the order-sheet also shows that the learned Judge ordered decree to be prepared. It appears that after this the defendant claimed that they came to know about the decree on January 18, 1986 as on that day the plaintiff came to take possession and therefore filed an

application under Order 9 Rule 13 for setting aside the ex parte decree which was dismissed by the trial court holding that the case was disposed of not in accordance with Order 17 Rule 2 but in accordance with Order 17 Rule 3 and therefore the application under Order 9 Rule 13 was not maintainable.

4. The appellant-defendant thereafter filed an application for review but that application also was dismissed by the trial court. Thereafter the first appeal was filed before the High Court of Delhi which was dismissed summarily by impugned order.

5. Learned counsel for parties submitted at length the controversy that existed before the amendment to Code of Civil Procedure in 1976 about the interpretation of Order 17 Rule 2 and Order 17 Rule 3. Apparently there were two views, one was that Order 17 Rule 3 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 could not 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 or under Order 17 Rule 3.

6. In some decisions, the High Courts have gone to the extent of saying that even if the trial court disposes of the matter as if it was disposing it on merits under Order 17 Rule 3 still if the party against whom the decision was pronounced was absent it could not be treated to be a disposal in accordance with Order 17 Rule 3 and provisions of Order 9 will be available to such a party either for restoration or for setting aside an ex parte decree. Learned counsel placed before us a number of decisions of various High Courts on this aspect of the matter. But in our opinion in view of the amendment of these two rules which have been made by 1976 amendment of the Code of Civil Procedure it is not disputed that to the facts of this case, Code of Civil Procedure as amended will be applicable and therefore it is not necessary for us to go into that question. Order 17 Rule 2 and Rule 3 as they now stand reads :

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 9 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 this discretion proceed with the case as if such party were present.

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 witness, 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 is clear that in cases where a party is absent the only course as mentioned in Order 17 Rule 3(b) is 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 it 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 modes directed under Order 9. The explanation to Rule 2 gives a discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in case 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 remain absent and for the 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 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on October 30, 1985 the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that up to the date i.e. October 30, 1985 when the trial court closed the case of defendants there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the court to proceed to dispose of the matter in any one of the modes provided under Order 9.

7. It is also clear that Order 17 Rule 3 as it stands was not applicable to the fact 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 an error. Unfortunately even on the review application, the learned trial court went on in the controversy about Order 17 Rules 2 and 3 which existed before the amendment and rejected the review application and on appeal, the High Court also unfortunately dismissed the appeal in limine by one word.

8. The learned counsel for the respondent attempted to contend that in this view of law as it now stands an application under Order 9 Rule 13 will be maintainable. However it was suggested that there was also an objection of limitation about the acceptance of that application. It is apparent that the learned trial court has not considered the application on merits but has only rejected it as not maintainable and that order has been maintained. This objection of the learned counsel for the respondent is not necessary for us to go into at this stage as in view of the law discussed above, the order rejecting the application as not maintainable, has to be set aside and it will be open to the learned trial court to consider the application under Order 9 Rule 13 and dispose it of in accordance with that law and while so doing, it may even examine the objections that may be raised by the respondent.

9. The appeal is therefore allowed with costs. The order passed by the Hon'ble High Court and also the trial court rejecting the application of the appellant under Order 9 Rule 13 is set aside and it is directed that the learned trial court will proceed to hear and dispose of the application under Order 9 Rule 13 filed by the appellant in accordance with law.

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