RAJASTHAN HIGH COURT

Sewa Ram

Vs.

Misrimal

Civil Revn. No. 229 of 1950
(Wanchoo, C.J. and Bapna, J.)

30.07.1951

JUDGMENT

Wanchoo, C.J.

1. This is a revision by Sewa Ram against an order of the District Judge of Pali.

2. The facts, which have led to this revision, are these. A suit had been filed by Misrimal and others against the applicant. It was fixed for hearing on the 29th of July, 1950. On that date, the applicant was absent, and an order was passed that the suit should proceed 'ex parte', and the written statement of the applicant should be struck off. When the matter came up again for hearing on the 23rd of August, 1950, the applicant appeared, and it was contended on his behalf that the 'ex parte' order was only for that day, viz., the 29th of July, 1950, and that the applicant could appear in the suit thereafter without having the 'ex parte' order set aside. The learned District Judge, however, held that the applicant should not appear in the suit so long as the 'ex parte' order stood, and that he had to apply for setting aside the 'ex parte' order of the 29th of July, 1950. Eventually, the District Judge set aside the 'ex parte' order, and permitted the applicant to appear in the suit on payment of Rs. 100/- as costs. The order striking off the written statement was also set aside.

3. The applicant has come up to this Court, and contends that it was not necessary for him to apply for setting aside the 'ex parte' order, and that he should have been permitted to appear in the suit on the 23rd of August, 1950, and take part in the proceedings from that date, and that the order of the District Judge, by which he was asked to pay Rs. 100/- as damages was in excess of his jurisdiction.

4. This argument is based on the interpretation which learned counsel puts, on Order 9, Rule 7, of the Code of Civil Procedure, which reads as follows :

> "Where the Court has adjourned the hearing of the suit 'ex parte', and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

The argument is that, as the applicant did not want to be put in the position as if he had appeared on the day fixed for his appearance, and merely wanted to take part in the proceedings from the 23rd of August, 1950, Order 9, R. 7, had no application to his case, and he should have been allowed to appear from that date without being made to pay damages for setting aside the 'ex parte' order passed on the 29th July. The leading case on the subject, on which learned, counsel places reliance, is *'Venkatasubbiah v. Lakshminarasimhan',* [1] In that case Wallace, J., relied on the words "be heard in answer to the suit as if he had appeared on the day fixed for his appearance." and said that the Order 9, R. 7, applied to a party who wished to be relegated back to the position which he would have been in if he had appeared at a previous hearing at which he was absent, and who wished the proceedings taken in his absence to be taken over again in his presence. He also went on to say that "ex parte" only meant that the party had not been heard because he was absent and the adjournment of the hearing "ex parte" in the words of R. 7 applied only to the hearing on the particular day when that hearing and adjournment "ex parte" had been made. He further observed that there was one cardinal principle applicable to trials by Courts, namely that a party had a right to appear and plead his cause on all occasions when that cause came on for hearing. He relied on three earlier cases, namely, *'Mannu v. Tulsi',* [2] *'Bhagwat Prasad Tewari v. Muhammad Shibli',* [3] and *'Satyaendra Nath v. Narendra Nath',* [4]

5. This Madras case was followed in *'Harba v. Mt. Chandrabhaga',* [5] *'Men Raj Din v. Hans Raj',*[6] *'Peru Mal Naicken v. Kondama Naiken',* [7] and *'Devi Das Ganpatrao v. Sunderlal* [8] Further, there are certain observations in *'Chandrabhana v. Pukh Raj',* [9] and *'Tulsis v. Gyarsilal and Gyarsilal v. Kana',* [10] where though the point was not the same, the principle behind 'Venkatasubbiah's case', AIR (12) 1925 Mad 1274 was by implication approved.

6. On the other side are two cases, namely, *'Hariram Rewachand v. Pribhdas Mulchand',* [11] and *Mt. Tulsi Devi v. Srikrishna',* [12]

7. Before we consider the reasoning behind 'Venkatasubbiah's case', AIR (12) 1925 Mad 1274, we should like to refer briefly to the cases on which it was based, and the cases which have followed it.

8. The judgment in the first Allahabad case of *'Mannu v. Tulsi',* [13] does not deal with the words of Order 9, Rule 6, or Order 9, R. 7 at all. That was a case where one party had been absent himself on a certain date of hearing. Later, there was an application for referring the case to arbitration, and that party also joined it. It was urged that this was not possible as the party had been absent at an earlier date. But this objection was overruled without any reference, however, to the words of these two Rules. In the case of 'Bhagwat Prasad Tiwari', AIR (9) 1922 All 110 also, no reference was made to the words of these two Rules. Further, it is not clear from the judgment whether there was any application by Bhagwat Prasad Tewari for setting aside the Ex parte' order. We do not, therefore, think that these two cases are any authority for the view that a party against whom an 'ex parte' order has been made can appear at a subsequent hearing without that order having been set aside.

9. In the case of 'Satyendra Nath', AIR (11) 1924 Cal 806 the facts were different When the case came up for hearing on the 12th of April, 1923, the defendants were absent. The plaintiff was present, but wanted one month's time to produce his evidence. The Court ordered that the case should be put up on 14th of April, 1923, for disposal 'ex parte'. On the 14th of April, the defendants appeared and prayed for permission to defend the suit. This prayer was rejected and a preliminary decree was passed 'ex parte'. The High Court held that the plaintiff was also absent on the 12th of April, and consequently Order 9, R. 6, had no application, and therefore Order 9, R. 7, also did not apply. This case, therefore, cannot be an authority on the interpretation of Order 9, R. 7.

10. In the case of 'Harba', AIR (18) 1931 Nag 122 the Nagpur Court relied on the case of 'Venkatasubbiah', AIR (12) 1925 Mad 1274 and there is no fresh reasoning in support of the view taken there.

11. The judgment in 'Mehraj Din's case' AIR (18) 1931 Lah 616 (1) is a very short one without any reasoning, and is based entirely on the case of 'Venkatasubbiah', AIR (12)

1925 Mad 1274.

12. 'Perumal Naicken's case', AIR (26) 1939 Mad 385 follows the case of 'Venkatasubbiah', AIR (12) 1925 Mad 1274 and goes even further. In that case, the defendant did not appear on the date of first hearing, and the case was ordered to proceed 'ex parte'. He appeared six months later applied to have the 'ex parte order set aside, alleging that summons had not been served upon him. This application was dismissed. Thereupon he applied for permission to file a written statement, and to take further part in the conduct of the case. The Munsiff refused to allow him to file a written statement on the ground that the case was proceeding 'ex parte' against him, and his application for setting aside that order had been dismissed but permitted him to cross-examine the witness for the plaintiff. Further, the Munsiff refused to permit him to lead evidence on his side. Varadachariar, J., who referred to the judgment of Wallace, J., in 'Venkatasubbiah's case', AIR (12) 1925 Mad 1274 eventually permitted the defendant to file a written statement as well as to adduce evidence on his behalf. Obviously, this case goes much further than the case of 'Venkatasubbiah', AIR (12) 1925 Mad 1274 and the learned Judge also realized that he was going too far, for he observes as follows at page 386 :

> "I quite realize that the object of Rules 6 and 7 of Order 9 will be frustrated if defendants could be allowed to absent themselves with impunity at the earlier stage of a litigation."

But in the special circumstances of that case, as very little progress had been made, he saw no reason why these Rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defense. We feel, with due respect, that in view of the learned Judge's own observations, this case can hardly be treated as an authority for the view which has been contended for on behalf of the applicant.

13. The last case in this series is the case of 'Devidas Ganpatrao', AIR (31) 1944 Nag 77. In that case also, 'Venkatasubbiah's case' AIR (12) 1925 Mad 1274 was followed but Pollock, J., was apparently driven to the conclusion that Order 9, R. 6, only meant that "the Court proceeds 'ex parte' not for the rest of the suit but only until the defendant reappears". He, therefore, introduced certain words in Order 9 Rule 6, which are not there in order to support the view taken in 'Venkatasubbiah's case' AIR (12) 1925 Mad 1274 and the view which he was taking in Devidas Ganpatrao's case.

14. We now turn to examine the leading Madras case. If we may with great respect, say so, there does not appear to be any justification for the cardinal principle which had been made the basis of his decision by Wallace, J., namely, that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing. We feel that the party can only come and appear according to the provisions of the Code of Civil Procedure. If the party could appear otherwise, it would mean that any party could walk out of Court at any stage and walk in again to take part at a later stage. This, in our opinion, is bound to cause inconvenience and delay, and may sometimes result in injustice to the other side. For example, a case is ordered to proceed 'ex parte', and fixed for 'ex parte' evidence on the next hearing. As is usual, when cases are to be heard 'ex parte', the plaintiff brings one or two witnesses to prove his case. He is then suddenly confronted by the fact that the defendant has put in appearance, and wants to take part from that date. The plaintiff is thus driven to the necessity of asking for an adjournment, for it is a different matter altogether to prove a case when the other side is there to defend it. If he is lucky enough to secure the adjournment without costs, there would at any rate, be delay, for which he cannot be compensated. But if it so happens that the adjournment is refused, and he is forced to rely on one or two witnesses, whom he has brought, while the defendant comes prepared with all his evidence, the plaintiff may lose his case for no fault of his. There could not, therefore, in our opinion, be such a cardinal principle which has been assumed by Wallace, J., in 'Venkatasubbiah's case', AIR (12) 1925 Mad 1274.

15. We may in this connection refer to the observations of O'Sullivan, J., in 'Hariram Rewachand's case' AIR (32) 1945 Sind 98 at page 102. While dealing with the cardinal principle enunciated by Wallace, J., O'Sullivan, J., observed as follows :

> "'Cardinal principles', 'principles of natural justice', 'fundamental principle of justice' and the like are indeterminate terms liable to cause misconception and arguments based upon them must necessarily be considered with circumspection. With the greatest respect, I demur to the proposition that a party has a right to appear and plead his cause on all occasions when the cause comes on for hearing.

I am aware of no such 'cardinal principle'. Assuming that Wallace, J., meant by the 'right to appear and plead his cause' something more than the right merely to argue

that he meant the right 'to be heard in answer to the suit.' and all that that expression implies, I again with the greatest respect am unable to accept the view that the Civil Procedure Code does not deprive a defendant who has deliberately failed to obey a summons, or a direction to be present at an adjourned hearing, of that right." We must, therefore, construe Order 9, R. 7, and the connected R. 6, without reference to any such cardinal principle as Wallace, J., enunciated, and must hold that the right of a party to appear and defend a suit is circumscribed by the provisions of the Code of Civil Procedure.

16. In order to put a correct interpretation on Order 9, R. 7, we may briefly refer to the scheme of Order 9. This Order deals with the first appearance of parties and consequence of non-appearance. R. 1 provides that on the day fixed for the defendant to appear and answer, the parties shall be present in Court in person or by pleader, and the suit shall then be heard unless adjourned for a future day. R. 2 provides for dismissal of suit where summons is not served in consequence of plaintiff's failure to pay costs. R. 3 provides for what happens where neither party appears on the day so fixed. R. 4 provides for remedies for the plaintiff in case the suit is dismissed under Rules 2 and 3. R. 5 provides for dismissal of the suit, if the plaintiff fails to apply for fresh summons within a certain time. Then we come to Rule 6, which provides for what the Court has to do, if the plaintiff appears and the defendant does not appear on the first day of hearing. Clause (a) of this Rule says that if the plaintiff appears, and the defendant does not appear, and it is proved that the summons was duly served, the Court may proceed 'ex parte'. It also provides for what the Court should do in case the summons was not duly served; but we are not concerned with that. What is the meaning to be attached to the provisions of Clause (a) of Rule 6(1)? Is it only that this clause means what Pollock, J., said in 'Devidas Ganpatrao's case' AIR (31) 1944 Nag 77, namely, that the suit would proceed 'ex parte' only until the defendant appears? We do not think that this is the meaning of this clause. Obviously, the clause says that if the summons is duly served, the Court may proceed 'ex parte'. This refers to the future, and there is, in our opinion, no reason to cut down this future period to the time till the defendant chooses to appear. If the intention of the legislature was that the Court should proceed 'ex parte' only till such times as the defendant chooses to appear, it should have been made clear by express words as no such words are to be found in this clause, the only interpretation, in our view, is that the proceedings will be 'ex parte' in future, and the limit of this future period must coincide with the time for which the suit lasts. We are supported in this view by the observations of O'Sullivan, J., in 'Hariram Rewachand's case' AIR (32) 1945 Sind 98 to the following effect :

> "It follows that reading Order 9, Rules 1 and 6, Civil Procedure Code together, the defendant, in order to save ex parte proceedings against him must appear on the day fixed in the summons and answer the suit. It is to be observed that it is not sufficient for the defendant to take any course short of the appearance contemplated by Order 9 Rule 1, Civil Procedure Code"

The same view was taken by a Full Bench of the Oudh Chief Court in 'Mt. Tulsha Devi's case' AIR (36) 1949 Oudh 59. There can, therefore, be no doubt that once an order that the suit may proceed 'ex parte' against a party is made, that order lasts till the suit comes to an end, unless it is set aside.

17. Let us then turn to Rule 7 to see if any other interpretation is possible on the language of this Rule. We may point out that this Rule is to be read along with Rule 6, because sometimes it may happen that the suit may not be decided on the day on which the order to proceed 'ex parte' has been passed. So Rule 7 provides for adjourning of the hearing of the suit 'ex parte', and also provides what the Court can do in case the defendant appears at the adjourned hearing, namely, that the Court may hear the defendant as if he had appeared on the day fixed for his appearance, if he shows good cause for his previous non-appearance. There is no scope, if one reads Rules 6 and 7 together, for the view that a defendant who has absented himself, and against whom it has been ordered that proceedings will be taken 'ex parte', can appear at any later stage, without showing good cause for his previous non-appearance. It may be argued that Order 9, R. 6, applies only to the first hearing of the case, and whatever may be the penalties for failure to appear on the first hearing, the same penalties do apply if the party present on the first hearing and absented himself on later hearing But this argument is met by the provisions of Order 17, R. 2, which provides that where the parties, or any of them, fail to appear on art adjourned date of hearing, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9. It follows, therefore, that if a party has absented himself on some date after the first date of hearing, the Court can order proceedings against him 'ex parte'. In such case, the duration of 'ex parte' proceedings, in our opinion, must be the same as the duration of an 'ex parte' order passed under Order 9, R. 6, namely, till the suit terminates. In 'Venkatasubbiah's case', (AIR (12) 1925 Mad 1274), the effect of Order 17, R. 2 was not considered at all by Wallace, J. As pointed out by O'Sullivan, J., in 'Hariram Rewachand's case', AIR (32) 1945 Sind 98, a party is no

more entitled to absent himself at an adjourned hearing without risk of 'ex parte' proceedings than he would be at the first hearing.

18. We may, further refer to the provisions of Order 9, R. 12, which are as follows :

> "Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear."

Now suppose that a defendant has been ordered to appear personally on some later hearing in the suit, and he fails to appear, and there is no sufficient cause for this failure. In such a case the Court is authorized to pass an order that proceedings be 'ex parte' in terms of p. IX, R. 6. Can it be said that on the cardinal principle enunciated by Wallace, J., such a defendant can walk in on a later hearing and take part in the proceedings from that stage without getting this 'ex parte' order set aside? We feel that if this is possible, it would be making the various provisions of Order 9 absolutely nugatory. We, therefore, agree, with all respect, with the view taken by O'Sullivan, J., in 'Hariram Rewachand's case' AIR (32) 1945 Sind 98. The reasons given in that case for holding that an 'ex parte' order lasts till the suit is decided, and the party must get it set aside before he can be heard thereafter, were amplified in the Full Bench case of 'Mt. Tulsha Devi', AIR (36) 1949 Oudh 59. It was pointed out in that case that it was one thing to prove one's own case in the face of active opposition of a defendant, and quite another to prove it one sided with the defendant precluded from appearing. We are, therefore, of opinion that once an 'ex parte' order has been passed against a defendant, it lasts till the termination of the suit, and the defendant cannot be permitted to appear in defense unless he gets the 'ex parte' order set aside in the manner provided in Order 9, R. 7, that is by assigning good cause for his non-appearance. In this view of the matter, we are of opinion that the District Judge was right in insisting upon an application for setting aside of the 'ex parte' order before allowing the applicant in this case to appear to defend the suit. As for the amount that was ordered by him as costs, we are of opinion that that cannot be challenged in revision. In any case, the amount does not appear to me excessive in the circumstances of the present case.

19. We may finally refer to another point. The District Judge, while ordering that the

suit should proceed 'ex parte', also struck off the defense. This he could not do. We point this out for the benefit of the subordinate Courts in this State, though in this case the matter has no practical importance as the District Judge has also set aside the order striking off the decree.

20. We, therefore, dismiss this revision with costs of this Court to the opposite party.

Revision dismissed.

Cases Referred.

1. AIR (12) 1925 Mad 1274
2. AIR (9) 1922 All 33
3. AIR (9) 1922 All 110
4. AIR (11) 1924 Cal 805
5. AIR (18) 1931 Nag 122
6. IR (18) 1931 Lah 616 (1)
7. AIR (26) 1939 Mad 385
8. AIR (31) 1944 Nag 77
9. 147 Mar LR 88
10.(1947) Jai LR 303
11. AIR (32) 1945 Sind 98
12. AIR (35) 1949 Oudh 59
13. AIR (9) 1922 All 33