

# RAJASTHAN HIGH COURT

Sunil Kumar

Vs.

Praveen Chand Chowardia

Civ. W.P. No. 1977 of 2007

(Narendra Kumar Jain, J.)

06.08.2008

## ORDER

**Narendra Kumar Jain, J.**

1. Admit, Mr. Mandhana appears for contesting respondent No. 1. The service of respondent No. 2 is dispensed with.
2. Heard learned counsel for the parties.
3. This writ petition on behalf of defendants is directed against the impugned order dated 19-2-2007 passed by Additional Civil Judge (Sr. Division) No. 1, Beawar, District Ajmer, whereby their application for setting aside the *ex parte* order dated 11-9-2006 has been rejected.
4. Briefly stated the facts of the case are that plaintiff-respondent No. 1 instituted a suit for eviction against defendant-petitioners on different grounds. The suit was contested by defendants by filing written statement. The issues were framed in the case. The plaintiff's evidence was concluded on 6-7-2006 and thereafter the case was fixed for defendants' evidence. The affidavits of D.W. 1 Sunil Kumar and D.W. 2 Radhey Shyam were filed. The case was fixed on 11-9-2006. On that day, neither the defendants nor their counsel was present, therefore, the trial Court passed an *ex parte* order against the defendants and fixed the case for final arguments on 25-9-2006. The trial Court heard the arguments finally on 25-9-2006 and fixed the case for judgment on 5-10-2006. The defendants filed an application for setting aside the *ex parte* order in the trial Court on 28-9-2006. The trial Court rejected the application for setting aside the *ex parte* order vide its order dated 19-2-2007.
5. Learned counsel for the petitioners contended that *ex parte* order was passed by the

trial Court on 11-9-2006 as defendants' advocate could not make himself present due to his illness. His absence on that day was not deliberate, but *bona fide* one for the reason mentioned above. The application for setting aside the *ex parte* order was filed on 28-9-2006 itself, therefore, there was no much delay in filing the application, therefore, it could have been allowed. He further contended that although the provision of law was not mentioned in the application for setting aside the *ex parte* order but intact it was filed under Order 9 Rule 7 read with Section 151, Civil Procedure Code. The trial Court rejected the application on the ground that it was filed after conclusion of the arguments and fixing the case for judgment, therefore, the same was not maintainable, but the application could be allowed by exercising the powers under Section 151, C.P.C. In support of his submissions, he relied upon *Radhey Shyam v. State of Rajasthan* <sup>1</sup> *Sanjay Saxena v. Smt. Rohini Kutty*, <sup>2</sup> He also referred *shipping Corporation of India Ltd. v. Machado Brothers* <sup>3</sup> and contended that unless there is specific prohibition under the provisions of the Code, the powers under Section 151, C.P.C. can be exercised. He also contended that while rejecting the application of the petitioner on 19-2-2007, the trial Court fixed the case for final arguments again on 22-3-2007, therefore, the trial Court itself fixed the case for final arguments and in these circumstances, the application should not have been dismissed on the ground that final arguments in the case have been concluded and case has been fixed for pronouncement of judgment. He further contended that in the changed circumstances where the case has been fixed for final arguments again by the trial Court itself, the application for setting aside the *ex parte* order should be allowed and *ex parte* order may be set aside.

6. Learned counsel for the respondents submitted that the order passed by the trial Court is absolutely legal and justified in the eye of law and the same is based on the judgment of the Hon'ble Supreme Court in *Arjun Singh v. Mohindra Kumar* <sup>4</sup> wherein their Lordships held that after conclusion of final arguments and fixing the case for judgment, the application under Order 9 Rule 7, C.P.C. was not maintainable. The Apex Court also held that the inherent powers under Section 151, C.P.C. in such circumstances cannot be exercised. He also relied upon a judgment of this Court in *Rajasthan Financial Corporation v. Pukhraj Jain*. <sup>5</sup> So far as changed circumstances are concerned about transfer of Presiding Officer and fixing the case for final arguments again by the trial Court, he contended that one cannot be allowed to take benefit of his own fault, such plea has not been taken in the writ petition, what cannot be done directly should not be allowed to be done indirectly and further that alternative remedy is now available with the petitioners to file another application

under Order 9 Rule 7, C.P.C. in the trial Court itself.

7. I have considered the submissions of learned counsel for both the parties and examined the impugned order dated 19-2-2007 along with other documents placed on record with the writ petition and also the order sheets of the trial Court.

8. The admitted facts of the case are that on 11-9-2006, neither defendants nor their counsel was present in the Court and an *ex parte* order was passed against them. The case was fixed for final arguments on 25-9-2006 and on that day the arguments were heard and concluded and case was fixed for pronouncement of judgment on 5-10-2006. The application for setting aside the *ex parte* order was filed by the defendants on 28-9-2006. The trial Court rejected the application vide impugned order dated 19-2-2007 mainly on the ground that after conclusion of the final arguments and fixing the case for pronouncement of judgment, the application under Order 9 Rule 7, C.P.C. is not maintainable.

9. This Court in *Radhey Shyam Sharma v. State of Rajasthan* (supra) held that after the case is reserved for judgment, Order 9 Rule 7 will not come into play at all as the case has not been adjourned for hearing. The judgment of the Apex Court in Arjun Singh's case ( AIR 1964 Supreme Court 993) (supra) was followed by this Court. However, this Court took a view that where law is silent and where it does not directly or by necessary implication prohibit doing of a thing then Court has inherent powers under Section 151 to meet such contingencies. This Court exercised the powers under Section 151, C.P.C. and set aside the *ex parte* order.

10. In *Sanjay Saxena v. Smt. Rohini Kutty* (supra), this Court followed the above referred judgment of Radhey Shyam's case (supra) and held that after the completion of the final arguments in *ex parte* proceedings, the *ex parte* proceedings can be set aside under Section 151, C.P.C.

11. This Court in *Rajasthan Financial Corporation v. Pukhraj Jain* ( AIR 2001 Rajasthan 71) (supra) considered the various authorities including the judgment of the Hon'ble Supreme Court in *Arjun Singh v. Mohindra Kumar* (supra) and *Sanjay Saxena v. Smt. Rohini Kutty* (supra) of this Court and held that decision given in *Sanjay Saxena v. Rohini Kutty* runs directly contrary to the decision of the Supreme Court in Arjun Singh's case and for that reason it is not a good law. This Court held that there is no hiatus between closure of case for judgment and pronouncement of judgment, therefore, parties cannot move any application as there is no stage in between closure of case for judgment and pronouncement of judgment, therefore, parties cannot move

any application including the application under Section 151, C.P.C. as there is no stage in between closure of case for pronouncement of judgment and actual pronouncement of judgment.

12. In *Arjun Singh v. Mohindra Kumar* ( AIR 1964 Supreme Court 993) (supra), the Hon'ble Apex Court in para 17 held as under :

"17.....The opening words of Order 9 Rule 7 are, as already seen, 'Where the Court has adjourned the hearing of the suit *ex parte*.'.....If, therefore, the hearing was completed and the suit was not "adjourned for hearing," Order 9 Rule 7 could have no application and the matter would stand at the stage of Order 9 Rule 6 to be followed up by the passing of an *ex parte* decree making R. 13 the only provision in Order 9 applicable. If this were the correct position, it would automatically follow that the learned Civil Judge would have no jurisdiction to entertain the application dated May 31, 1958 purporting to be under Order 9 Rule 7, or pass any order thereon on the merits."

13. The Hon'ble Supreme Court in *Arjun Singh's* case (supra) in para 19 further held that the first question that arises is whether the Court has the inherent jurisdiction which learned counsel contends that it has. For the purpose of the discussion of the question in the context of the relevant provisions of the Code, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by Section 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.....In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit : (1) where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order 20 Rule 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow

that after the stage contemplated by Order 9, Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order 9 Rule 6 the Court is competent to pass and then follows the remedy of the party to have that decree set aside by application under Order 9 Rule 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order 9 Rule 7.

14. The Hon'ble Supreme Court in para 20 further held that it is very difficult to appreciate the ends of justice which are supposed to be served by the Court being held to have the power which the learned counsel says must inhere in it.

15. The two Judges Bench of the Supreme Court in *Shipping Corporation of India Ltd. v. Machado Brothers* (AIR 2004 Supreme Court 2093) (supra) in para 20 held that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151 of the Code, the Courts have all the necessary powers under Section 151, C.P.C. to make a suitable order to prevent the abuse of the process of Court. Therefore, the Court exercising the power under Section 151, C.P.C. first has to consider whether exercise of such power is expressly prohibited by any other provisions of the Code and if there is no such prohibition then the Court will consider whether such power should be exercised or not on the basis of facts mentioned in the application. It is relevant to mention that the Hon'ble Supreme Court in *Shipping Corporation of India Limited v. Machado Brothers* has not considered the earlier three-Judges Bench judgment in *Arjun Singh v. Mohinder Kumar* <sup>6</sup> where in para 19 of the judgment, it has been held that it is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.

16. In view of the aforesaid discussion of various judgments of this Court and the Hon'ble Supreme Court, it is clear that three-Judges Bench of the Supreme Court in Arjun Singh's case has categorically held that the opening words of Order 9 Rule 7, C.P.C. are, "Where the Court has adjourned the hearing of the suit ex parte." Now,

what do these words mean? Obviously they assume that there is to be a hearing on the date to which the suit stands adjourned. If the entirety of the "hearing" of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under Order 20 Rule 1, there is clearly no adjournment of "the hearing" of the suit, for, there is nothing more to be heard in the suit. Therefore, where the hearing was completed and the suit was not adjourned for hearing. Order 9, Rule 7 could have no application and the matter would stand at the stage of Order 9 Rule 6 to be followed up by the passing of an *ex parte* decree making R. 13 the only provision in Order 9 applicable. The Hon'ble Supreme Court further held that inherent powers of the Court cannot override the express provisions of the law. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.

17. The learned trial Court rejected the application on the ground that the arguments were concluded on 25-9-2006 and case was fixed for pronouncement of the judgment on 5-10-2006, therefore, the application filed on 28-9-2006 under Order 9 Rule 7, C.P.C. was not maintainable. The order of the trial Court is perfectly justified and is in accordance with the judgment of the Hon'ble Apex Court in Arjun Singh's case ( AIR 1964 Supreme Court 993) (supra). The position of the law is well settled that provision of Order 9 Rule 7, C.P.C. and Section 151, C.P.C. both cannot be invoked, where arguments have been completed and has been reserved for pronouncement of judgment.

18. Now another submission of learned counsel for the petitioner is that while rejecting the application under Order 9 Rule 7, C.P.C. on 19-2-2007, the learned trial Court itself fixed the case for final arguments again on 22-3-2007. It is also relevant to mention that the impugned order was challenged by the petitioners by filing the present writ petition on 19-3-2007 and this Court stayed the further proceedings of the trial Court vide order dated 23-3-2007. The Presiding Officer in the trial Court at the relevant time was one Shri Sita Ram, who has now been transferred. This fact has not been disputed by learned counsel for both the parties also that another Presiding Officer has been posted in the trial Court. In these circumstances, the judgment cannot be pronounced in the matter by new Presiding Officer, who has now been posted in the said Court as he did not hear the arguments and case will ultimately be fixed for final arguments. Now, there are two options in the matter, one is that petitioners can be given a liberty to file another application under Order 9 Rule 7, C.P.C. as the matter is

still pending for final arguments and another is that looking to the facts and circumstance of the present case, the *ex parte* order can be set aside by this Court itself under Order 9 Rule 7, C.P.C. From the order sheet of the trial Court dated 19-2-2007 also it is clear that the case in the trial Court is fixed for final arguments. The suit was filed for eviction of defendant-petitioners and granting of liberty to file another application to defendant-petitioners may further delay the proceedings, therefore, the same exercise can be done by this Court also. The *ex parte* order was passed on 11-9-2006 and the application was filed on 28-9-2006 itself. The contention of learned counsel for the petitioner is that the defendants' counsel could not attend the Court due to his illness on 11-9-2006 resulting in passing the *ex parte* order in the matter. The facts of the case show that the cause pleaded by defendant for setting aside the *ex parte* order appears to be good cause. The application was filed within 17 days itself from the date of *ex parte* order. The suit has been filed for eviction of defendants and in case the *ex parte* order is not set aside, then the defendants may suffer irreparable loss due to passing of *ex parte* decree.

19. The Hon'ble Supreme Court in *Ramesh Chandra Sankla v. Vikram Cement* <sup>7</sup> held that now it is well settled that jurisdiction of High Courts under Arts. 226 and 227 is discretionary and equitable. There are no limits, fetters or restrictions placed on the power of superintendence in this clause and the purpose of this article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein. Paras 80 and 81 of the judgment are reproduced as under:

"80. Now it is well settled that jurisdiction of High Courts under Arts. 226 and 227 is discretionary and equitable. Before more than half a century, the High Court of Allahabad in the leading case of *Jodhey v. State* <sup>8</sup> observed:

There are no limits, fetters or restrictions placed on the power of superintendence in this clause and the purpose of this article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein."

(Emphasis supplied)

81. The power of superintendence under Article 227 of the Constitution conferred on every High Court over all Courts and Tribunals throughout the

territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised *ex debito justitiae*, i.e. to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a Court of law but also as a Court of equity. It is, therefore, power and also the duty of the Court to ensure that power of superintendence must advance the ends of justice and uproot injustice."

20. In view of above discussion, I am satisfied that there was good reason for non-appearance of the defendants' advocate on 11-9-2006 in the trial Court. The case is now fixed for final arguments in the trial Court, therefore, the *ex parte* order can be set aside under Order 9 Rule 7, Civil Procedure Code. The matter is old one, therefore, the grant of liberty to petitioner to move another application in the trial Court will further delay the proceedings. In these circumstances, I think it fit and proper that ends of justice will meet in case the *ex parte* order dated 11-9-2006 passed by the trial Court is set aside.

21. Consequently, the writ petition is allowed. The impugned order passed by the trial Court dated 19-2-2007 as well as *ex parte* order dated 11-9-2006 both are set aside at the cost of Rs. 3000/- to be paid by defendants to the plaintiff within a period of four weeks from today, failing which the *ex parte* order will remain in tact. The defendants have already filed their affidavits on 6-7-2006 and now the case will be fixed for cross-examination of defendants' witnesses by the plaintiff. Both the parties are directed to appear before the trial Court on 3-9-2008. The suit was filed in the year 1998 and it being an old matter, I think it fit and proper to direct the trial Court to decide the suit as early as possible but not later than four months from today.

22. Cost of this writ petition is made easy.

Petition allowed.

Cases Referred.

1. (1987 (II) RLR 399)
2. 1999 DNJ (Raj) 322
3. (AIR 2004 SC 2093)
4. (AIR 1964 SC 993)
5. (2000 (3) RLR 698): (AIR 2001 Raj 71)
6. (AIR 1964 SC 993)
7. (2008 (8) JT (SC) 1)
8. (AIR 1952 All 788)

