

RAJASTHAN HIGH COURT

Madan Lal

Vs.

Prabhu Dayal

S.B. Civil Revision Petition No. 112 of 2007

(Dalip Singh, J.)

28.11.2008

ORDER

Dalip Singh, J.

1. This revision petition has been filed by the plaintiff against the order passed by the learned trial Court dated 17.05.2007 by which the learned trial Court has allowed the application filed by the defendant non petitioner under Order 9, Rule 13 Civil Procedure Code.

2. The facts in brief are that the plaintiff-petitioner filed a suit for eviction against the defendant-tenant in the year 1993. The defendant was served. Written statement was filed by the defendant issues were framed. After the plaintiffs evidence was closed the case was fixed for the defendant's evidence. On the date when the case was fixed for the defendant's evidence i.e. 16.11.2004 the defendant sought time to produce the evidence which was allowed on costs of Rs. 200/- and the case was fixed for 02.12.2004. On 02.12.2004 the defendant was not present and again time was sought on behalf of the defendant and the case was adjourned despite the fact that the costs of Rs. 200/- which have been imposed vide order dated 16.11.2004 had not been paid but on the request of the defendant the case was adjourned on 02.12.2004 to 17.01.2005 subject to payment of costs of Rs. 200/-. The next date fixed for the defendant's evidence was 17.01.2005. On 17.01.2005 the defendant did not appear nor did the defendant's counsel appear nor was cost of Rs. 200/- (16.11.2004) and Rs. 200/- (02.12.2004) paid. Hence, the learned trial Court passed the following order:

(Vernacular matter omitted..... Ed)

3. Thereafter the case was fixed for final arguments on 24.02.2005, 21.03.2005 on

those these (sic) dates which was fixed for final arguments neither the defendant nor his counsel appeared. On 21.03.2005 the arguments were heard and concluded but the defendant did not appear. Thereafter, on 25.05.2005, 08.07.2005, 11.08.2005 and 15.09.2005 on all these dates neither the defendant nor his counsel appeared and the argument heard and the *ex parte* decree in favour of the plaintiff decreeing the suit for eviction was passed. Thus it is clear that even after seeking two adjournments on cost on 16.11.2004 and 02.12.2004 which cost were not paid, the defendant and his witnesses did not appear on 17.01.2005 and *ex parte* order was passed thereafter neither the defendant nor his counsel appeared on six dates that were fixed for nearly nine months.

4. Thereafter the decree was put to execution by the plaintiff. The order of the learned trial Court shows in para 4 that notices of the execution application having being issued by the learned executing Court the same were served upon the defendant judgment debtor on 16.02.2006. Despite service upon the defendant non-petitioner none appeared on the side of the defendant even before the executing Court. On 23.05.2006 in execution of the decree possession was handed over of the premise in dispute to the decree-holder plaintiff-petitioner. After the decree came to be executed and possession handed over the defendant non petitioner filed an application under Order 9 Rule 13, Civil Procedure Code on 02.06.2006 for setting aside the *ex parte* decree dated 15.09.2005.

5. In the application on page 3 in the grounds for setting aside the *ex parte* decree it has been stated by the defendant as follows:

(Vernacular matter omitted...Ed.)

6. The learned trial Court after hearing both the parties allowed the application vide order dated 17.05.2007. The learned trial Court in para 4 of the impugned order gave the following findings:

- (1) That an order for proceeding *ex parte* against the defendants was passed on 17.01.2005 and thereafter the *ex parte* decree was passed on 15.09.2005.
- (2) It is also borne out from the record that the notices of the execution application were served upon the defendant on 16.02.2006 and despite service the defendant did not appear before the Court nor any steps were taken by the defendant.
- (3) On the contrary the defendant has contended that he came to know about the execution of the decree only on 23.05.2006.

(4) It was also found by the learned trial Court that the defendant in his application under Section 5 of the Limitation Act has failed to explain the delay day-to-day w.e.f from the date and the passing of the order till the application was filed.

(5) The defendant was not denied the fact of service of summon on 16.02.2006. Curiously enough in spite of the above findings having been given by the learned trial Court the learned trial Court allowed the application for setting aside the *ex parte* decree and passed an order in favour of the defendant and set aside the decree dated 15.09.2005.

7. The submission of the learned counsel for the petitioner in the face of the findings given in para 4 of the order dated 17.05.2007 by the learned trial Court is that the learned trial Court has committed a material illegality in the exercise of its jurisdiction in allowing the application filed under Order 9, Rule 13, Civil Procedure Code.

8. Learned counsel for the defendant non petitioner on the other hand submitted that the present suit was one based upon tenancy and the defendant had denied the tenancy and in the interest of justice the defendant should be permitted to contest the suit on merits rather than passing a decree *ex parte* in favour of the plaintiff. It has further been submitted that the learned trial Court while allowing the application has compensated the plaintiff with costs of Rs. 5000/-. In support of his contention the learned counsel for the defendant non-petitioner has also pointed out and referred to the order sheets to show that the plaintiff was granted several opportunities for leading his evidence whereas the defendant was granted mere two opportunities to produce his evidence and as a result of his absence the *ex parte* order was passed by the learned trial Court on 17.01.2005 and *ex parte* decree on 17.09.2005. He has further submitted that after the *ex parte* order when the case was fixed for final arguments as many as six opportunities were granted to the plaintiff for arguing the case on merits.

9. Learned counsel for the defendant has relied upon a decision of this Court in the case of *Jagdish Prasad Swami v. Ramji Lal Joshi*, reported in ¹ A decision of the Hon'ble Supreme Court In the case of *M.K Prasad v. P. Arumugam*, reported ² in

10. Having heard the learned counsel for the parties and having perused the record and considered the submissions made before me as well as the judgments cited at the bar, I find from the record that in the application which was filed by the defendant under Order 9, Rule 13 Civil Procedure Code which has been quoted above, the defendant has only stated that on 15.01.2005 the defendant No. 1 had to proceed to Delhi to attend marriage and, therefore, he could not present himself before the Court on

17.01.2005 and he returned from Delhi on 20.01.2005. The entire application does not disclose as to what the defendant did after having returned from Delhi on 20.01.2005 till the application was filed on 02.06.2006 i.e. for a period of nearly one year and four months. For the aforesaid period there is no mention by the defendant in his application regarding any steps he took to find out from his counsel as to what transpired on 17th January, 2005. The only explanation which has been sought to be given is that the counsel had assured him that he would inform him about the proceedings and if the defendant was required to appear he would send the necessary information.

11. I am of the view that once the defendant came back from Delhi on 21.01.2005 as alleged i.e. after the date fixed for his evidence on 17th January, 2005 it was the duty of the defendant to find out from his counsel as to what had transpired in the Court on the said date. His failure to have done so amounts to the negligence on the part of the defendant. Once negligence is established then *bona fide* end. Having come to the above findings on the basis of the averments made in the application of the defendant dated 02.06.2006 the application lacks in *bona fides* and it cannot, therefore, be held that the defendant was prevented by sufficient, cause from appearing before the Court on, the date fixed or thereafter or from having moved the application within a reasonable, time.

12. Apart from the above as has been held by the learned trial Court in para 4 of the impugned order the defendant was served with the notices of the execution on 16.02.2006 this fact has not been denied by the defendant as held by the learned trial Court the learned trial Court has categorically given a finding that the summons' which were served of the execution application, on the defendant on 16.02.2006 bear the signatures of the defendant. Even after having being served with the summons on 16.02.2006 the defendant non- petitioner did, not take any steps to find out as to what had happened in the suit, either from his counsel or in the Court by inspecting the file or appearing in pursuance of those summons to find out in what connection the said summons have been served on him on 16.02.2006. It only shows the negligence on the part of the defendant. As it is stated by the defendant in his application that he only approached the counsel after the possession was taken from him on 23.05.2006 and applied for the certified copies and obtained the certified copies on 29.05.2006 which were received on 31.05.2006 and then filed the present application under Order 9, Rule 13, Civil Procedure Code on 02.06.2006 but no explanation for not having taken steps to find out the further progress in the suit after 17.01.2005 which he knew was

for his evidence. Again after being served with the notices of the execution on 16.02.2006 no steps were taken. If the parties are negligent the Court cannot come to their rescue and set aside *ex parte* decrees on mere asking on the pretext of justifying the order on payment of cost.

13. So far as the decision cited at the bar are concerned in *Jagdish Prasad Swami's case*³ on the application under Order 9, Rule 13 it was held that on account of the postman not having been examined service of notices was held to be doubtful and consequently, the application was allowed which is not there in the present case. The same has no application in the facts and circumstances of the present case where service of summons is not disputed. So far as the judgment of the Hon'ble Supreme Court in *M.K Prasad's case 2001(2) Apex Court Journal*⁴ is concerned it relates to not insisting on explanation of each days delay which is not relevant in the facts of the present case as in the instant case summon were served, written statement was filed, plaintiffs witnesses were cross- examined and then the defendant did not appear not his counsel appeared nor did the defendant lead any evidence. Then the *ex parte* hearing continued for several dates but no effort was made to appear in Court from January to September 2005 and there is no satisfactory explanation for the same. Even after notices in execution were served on the defendant on 16.02.2006 the defendant did no appear nor did he file any application for setting aside the *ex parte* decree. Thus, the judgment in M.K Prasad's case has no application to facts of the present case as held and findings given by the learned trial Court and confirmed by this Court as those findings have not been challenged also.

14. In the facts and circumstances of the present case, the defendant had been participating in the suit proceedings after service of summons and filed his written statement and then absented himself at the stage of defense evidence and chose not to appear when the case was fixed for the defendant's evidence on 17th January, 2005 having taken two earlier adjournments on 06.11.2004 and 02.12.2004 which were granted on cost and not paying costs for those adjournments. The defendants had the knowledge of the suit, he had filed the written statement and having sought two adjournments for leading the evidence chose not to appear before the trial Court. Even after the *ex parte* order was passed on 17.01.2005 neither the defendant nor his counsel appeared before the trial Court when the case was adjourned on several occasions for hearing of the arguments. In the execution proceedings the notices were again served upon the defendant on 16.02.2006 before the decree was executed and possession was taken on 23.05.2006. There is nothing on record to show as to what the

defendant did between 17th January, 2005 up to the passing of the decree on 15.09.2005 and further after having been served with the notices in the execution proceedings on 16.02.2006 up to the delivery of possession in execution on 23.05.2006. In the facts and circumstances, therefore, the judgments cited by the learned counsel for the defendant has no application. It is a sheer case of negligence on the part of the defendant and lacks *bona fides*. Where *bona fides* are absent there can be no sufficient cause for setting aside the *ex parte* order.

15. So far as the contention of the learned counsel for the defendant- respondent that the plaintiff has been compensated with costs is concerned, it may be stated here that in the facts of this case two adjournments were granted on costs of Rs. 200/- each on 16.11.2004 and 02.12.2004 which were not paid and still the defendant did not appear for leading evidence on 17.01.2005 having sought adjournments earlier. The litigants cannot be allowed to take things so casually and then come forward and state that the decree may be set aside on costs by compensating the plaintiff. A decree may be set aside on showing sufficient cause for non-appearance. The present one in the opinion of this Court as has been held above is a case of gross negligence and merely on payment of cost the *ex parte* decree cannot be set aside where all the findings were arrived at against the defendant by the learned trial Court as well as this Court on the question whether the defendant was prevented from appearing in Court by sufficient cause.

16. In the facts and circumstances, I find that the learned trial Court having given a categorical findings against the defendant in para 4 of the judgment has committed a material illegality in allowing the application filed by the defendant under Order 9, Rule 13, Civil Procedure Code in spite of all the said findings on payment of costs. The said application is accordingly dismissed. The revision petition is allowed and the impugned order dated 17.05.2007 is set aside.

17. No order as to costs.

Revision allowed.

Cases Referred.

1. 2007(2) Civil Court Cases 614 (Raj): 2007 (2) WLC 133
2. 2001(2) Apex Court Journal 60(S.C): 2001(6) SCC176
3. 2007(2) WLC 133
4. 60 (S.C):2001(6) SCC 176

