Girraj Kishore vs Maslehuddin on 13 March, 1951

Equivalent citations: AIR1952ALL198, AIR 1952 ALLAHABAD 198

JUDGMENT

Agarwala, J.

1. This is an appeal against an order refusing to set aside an ex parte decree.

2. The appellant was the defendant in a suit for recovery of money. The 28th April 1949 was fixed for final hearing of the salt. On 26th April 1949, an application was made for fixation of another date. This application was put up on the date already fixed. On the date fixed, that is, on 28th April 1949, the Court rejected the application and proceeded to decide the suit ex parte. The appellant then made an application for setting aside the ex parte decree. In that application he had stated that he had gone to Calcutta on 16th April 1949 and had sent a telegram and a letter from there on 23rd April 1949 for the postponement of the case, that he had to start from Calcutta on an urgent call and started on 24th April 1949, that he got down at Allahabad remaining here for two days, that he reached Aligarh on 27th April 1949 in the evening and that he was too weak and exhausted to approach his lawyer and so he was absent on the date fixed, that is, on 28th April 1949.

3. The lower Court disbelieved the allegations made in the affidavit and rejected the application on two grounds, first, that since 28th April 1949 was an adjourned date and his counsel was present on that date, though for the purpose of moving an application for adjournment only, it will be deemed that the appellant was present on the date of the hearing and so the order passed by the Court must be deemed to have been parsed on merits and secondly, that there were no merits in the application.

4. It appears that the suit was filed on 3rd June 1947. On 10th October 1947, issues were framed and 5th December 1947 was fixed for final hearing. There was an application for transfer and the hearing of the case was stayed. When the transfer application was rejected, the hearing of the case was resumed and 20.1.1949 was fixed for final hearing. On that date the case could not be heard because of the Court being busy in other cases and the case was fixed for final bearing on 22nd February 1949. On that date also the Court could not take up the case and fixed 28th April 1949 for final hearing.

5. As already stated, on 26th April 1949, an application had been made for fixation of another date. The application was taken up on 28th April 1949 and counsel for the appellant appeared in Court in support of it. The application was rejected. One of the learned counsel, Shri Bhajan Lal, appearing for the appellant stated that he had no instructions in the suit, while another counsel, Shri Govind Prasad, stated that he had instructions to press the application for adjournment and no more. Counsel for the plaintiff urged that the case be decided on merits. The Court observed :

> "I have carefully perused Order 17, Rules 2 and 3 Civil P. C., and having regard to the same and the interest of justice I think that the case may not be heared and decided on merits. The contesting defendants being absent, the case shall be heard ex parte against them."

The case was ultimately decided ex parte and not on merits against the defendants. The judgment of the Court below expressly stated that the case was being decided ex parte against the defendants.

6. It has been urged before us that the case must be deemed to have been decided on merits under Order 17 Rule 2. Order 17, Rules 1 to 3 are as follows "1. (1) Court may grant time and adjourn hearing. The Court may, if sufficient cause is shown, at any stage of the suit grunt time to the parties or to any of them and may from time to time adjourn the hearing of the suit.

* * * * *

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 be dispose of the suit in one of the modes directed in that behalf by Order IX or mate such other order as it thinks fit.

HIGH COURT AMENDMENTS.

Allahabad.--Add to Rule 2:--"Where the evidence, or a substantial portion of the evidence, of any party has already been recorded, and such party fails to appear on such day, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits. Explanation :--No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application.

3. Court may proceed notwithstanding either party famils 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 witnesses, 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 proceed to decide the suit forthwith."

7. From a reading of these rules, it is clear that Rule 3 applies to a case in which an adjournment has been granted at the instance of a party, while under Rule 1 the Court may adjourn the case at the instance of a party, and also suo motu Rule 2 applies to a case both when the adjournment has been granted at the instance of a party & also when it has been made suo motu by the Court. There is nothing to show that Rule 2 is confined to a case in which the suit is adjourned at the instance of a party. The words "on any day to which the hearing of the suit in adjourned" are wide enough to include an adjournment at the instance of a Court. The argument, therefore, that Rule 2 applies only when the case has been adjourned at the instance of a party is not correct. This view in supported by several decisions Enatulla v. Jiban Mohan A. I. R. (1) 1914 Cal 360; and Nawal Kishore v. Azim Uddin, A. I. R. (22) 1935 ALL. 210. There is only one decision to the contrary reported in Toolsy

Money Dassee v. Prosad Money Dassee, 2 cal. W. N. 490. The observation there is obiter.

8. In this case, although the suit had been adjourned on several occasions at the instance of the Court itself and not at the instance of the appellant or any other party, it must be held that the case fell within the purview of Order 17 Rule 2, Civil P. C. By virtue of the Explanation to Rule 2, a party shall not be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader. In the present case, one of the counsel appearing for the appellant stated that he had instructions to press the application which had already been made on 26-4-1949. He did not make an application on 28-4-1949. This fact, however, does not make any difference and in my opinion, the party would be deemed to be present because he was represented in Court by an agent or pleader, though for a limited purpose. The phrase "engaged only for the purpose of making an application' is merely by way of an illustration and is not exhaustive. If a party is represented in Court for the purpose of pressing an application which had already been made, he will still be deemed to be present on that date. In ray opinion, therefore, on 28-4-1949 the appellant would be deemed to be present in Court and Order 17 Rule 2 could not apply to the case. The Court should have proceeded to decide the case on the merits. There is no doubt that the Court took a wrong view of the law when it decided that it would proceed to decide the case not on merits but ex parte. The fact, however, remains that the Court did not decide the case on the merits bat decided it ex parte. In such a case an application for restoration was the proper procedure. Order 9 Rule 13 applies to such an application. Order 9 Rule 13 provides :

> "In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

The words "in any case in which a decree is passed ex parte against a defendant" obviously refer to a case in which a decree is in fact passed ex parte against the defendant. The fact that the Court was wrong in law in passing a decree ex parte against the defendant does not detract from the fact that the decree was in fact passed ex parte. As such, the case is covered by Order 9 Rule 13, Civil P. C. In my judgment, the view of the lower Court that the case was decided on merits or that the application for setting aside the ex parte decree did not lie, was erroneous. The application for setting aside the ex parte decree was perfectly maintainable.

9. The next question to be decided is whether on the merits the application of the appellant should have been allowed. The question was whether the appellant deliberately absented from the Court on the date fixed for final hearing or whether he was prevented by any sufficient cause from appearing in Court. Having considered the evidence on the record, I am not satisfied that the appellant was prevented by any sufficient cause from appearing in Court on 28-4-1949. It is in evidence that the appellant himself took delivery of goods at Aligarh on 28-4-1949. It appears to me that the appellant did not deliberately appear in Court in the hope that he would have the ex parte decree set aside

later on. I agree with the reasons given by the lower Court for disbelieving the appellant's story.

10. I would, therefore, dismiss this appeal with costs.

11. Saran J.--I am in agreement with the conclusion arrived at by my learned brother and would dismiss the appeal with costs.

12. By the Court--The appeal is dismissed with costs.