

Urmil Wadhawan vs Union Of India & Ors on 23 January, 2019

Author: Anu Malhotra

Bench: Anu Malhotra

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ RSA 210/2018
URMIL WADHAWAN Appellant
Through: Mr. Abhimanyu Bhandari, Adv. with
Mr. Man Mohan Gupta, Adv.

versus

UNION OF INDIA & ORS Respondent
Through

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA
ORDER

% 23.01.2019 Initial submissions have been made on behalf of the appellant. The present RSA 210/2018 is a regular second appeal whereby the appellant assails the impugned order dated 06.03.2013 of the Court of the Senior Civil Judge cum RC (South), Saket in Suit No.1209/2009 vide which the suit of the plaintiff i.e. the appellant herein has been dismissed with preliminary issues framed on 04.04.2012 to the effect:

"Preliminary Issue No 1; whether the plaint discloses any cause of action?

Preliminary Issue No 2; whether the suit is barred by section 41(h) of the Specific Relief Act?"

having been decided against the plaintiff of the said suit and vide the impugned order dated 05.09.2018 of the First Appellate Court in RCA No.20145/2016, the appeal and an application under Order VI Rule 17 of the CPC were observed to be not maintainable in view of the mutation in relation to the property in suit having already been effected during the RSA 210/2018 page no.1 of 7 pendency of the appeal with it having been observed that the only remedy that was left with the appellant is to challenge the order of mutation which had not been done. It has been submitted on behalf of the appellant that on the date 06.03.2013 when the preliminary issue nos.1 & 2 depicted hereinabove, were disposed of and the suit of the plaintiff was dismissed on both the preliminary issues having been decided against the plaintiff, the plaintiff was not present on that date and that as so far till the said date i.e. 06.03.2013, the evidence of the plaintiff had not been led and evidence in the matter had not commenced. It has been submitted on behalf of the appellant that only the provisions of Order IX Rule 9 of the CPC could have been brought into play by the learned trial Court and that the disposal of the preliminary issues as directed vide order dated 06.03.2013 could

not have been made and that an application under Order 9 Rule 9 of the CPC that had been filed by the appellant before the learned trial Court had been declined as being not maintainable in view of the disposal of the suit on preliminary issue nos.1 & 2 and dismissal thereof. It has been submitted on behalf of the appellant in reply to a specific Court query that the aspect of assailing the order dated 31.05.2013 of the learned trial Court rejecting the application under Order 9 Rule 9 of the CPC filed by the appellant has been detailed in para-17 of the appeal that had been filed before the First Appellate Court with the said averments in para-17 being to the effect:

"That aggrieved by the impugned order dated 06.03.2013 the appellant preferred to file an application under Order IX Rule 9, for setting aside the order dated 06.03.2013. The same has been dismissed vide order dated 31.05.2013 whereupon Ld. Court observed that application under Order IX Rule 9 is not maintainable."

RSA 210/2018 page no.2 of 7 It was thus submitted that the impugned order dated 06.03.2013 was sought to be set aside with further directions having been brought forth vide the prayer clause at page-81 of the appeal before the First Appellate Court which reads to the effect:

"b) Set aside the impugned order dated 06.03.2013 in favour of the Appellant and against the Respondents and allow the present appeal in the interest of justice."

Reliance is inter alia placed on behalf of the appellant on the verdict of the Hon'ble Supreme Court in Prakash Chander Manchanda and Another Vs. Janki Manchanda (1986) 4 SCC 699 with specific reference to observations in para-6 of the said verdict which read to the effect:

".... 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 cases 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 that 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 RSA 210/2018 page no.3 of 7 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 defendant 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."

Reliance is also placed on behalf of the appellant on the verdict of the Hon'ble Division Bench of the Hon'ble High Court of Kerela in Balakrishna Pillai Vs. Balakrishnan Nair & Another 1988 SCC OnLine Ker 36 with specific reference to observations in paragraphs 7, 8 , 9 & 10 there which read to the effect:

"7. Order 9 C.P.C. deals with appearance of parties and consequence of non appearance. Rule 1 requires the parties to appear on the day fixed in summons for defendant to appear and answer. The suit shall then be heard unless the hearing is adjourned to a future day fixed by the court. According to Rule 3, where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed. Where the suit is so dismissed, rule 4 provides that the plaintiff may, subject to the law of limitation, bring a fresh suit, or he may apply for an order to set the dismissal aside and in appropriate cases, the court shall make an order setting aside the dismissal. Rule 8 deals with procedure where defendant only appears. When the plaintiff does not appear when the suit is called on for hearing the court shall make an order that the RSA 210/2018 page no.4 of 7 suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and dismiss the suit so far as it relates to the remainder. Where a suit is wholly or partly dismissed under rule 8, rule 9 precludes the plaintiff from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside and in appropriate cases the court is empowered to set aside the dismissal. These are the provisions relating to appearance and non appearance of parties of first hearing.

8. The provisions of Order 17 deal with subsequent stages of the litigation. Rule 1 of Order 17 enables the court for sufficient cause at any stage of the suit to adjourn the hearing of the suit. Where the court declines to grant adjournment of bearing of the suit the court has to proceed under rule 2 or rule 3. These two rules deal with different situations. Rule 2 deals with case of failure of parties to appear on any day for which hearing of the suit is adjourned, i.e., evidently adjourned under rule 1. The court may proceed to dispose of the suit in any one of the modes prescribed in that behalf or make such other order as it thinks fit. In other words where rule 2 applies the court is enabled to dispose of the suit either under rule 6 or rule 8 of Order 9. Where the suit is so disposed of the party whose failure to appear led to the disposal has remedies in accordance with the corresponding provisions of Order 9, viz., rules 9 or 13. As indicated above where rule 2 applies ordinarily dismissal must be under Order 9. The explanation inserted by the amending Act of 1976 vests a discretion in the court to dispose of the suit on merits only in one contingency, viz., that the evidence or substantial portion of the evidence has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. In such a case the court in its discretion may proceed with the case as if such parties are present.

9. Rule 3 applies to a case where any party to a suit to whom time has been granted fails (a) to produce his evidence, or (b) RSA 210/2018 page no.5 of 7 to cause the attendance of the witnesses or (c) to perform any other act necessary to the further progress of the suit, for which time has been allowed. In such contingencies, the court may notwithstanding the default proceed in one of the two ways, that is, (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. Even where conditions requisite under rule 3 are satisfied the court can proceed to decide the suit only when the parties are present. If the parties are or any one of them is absent the court cannot dispose of the suit on merits. It can proceed only under rule 2. Under the main part of rule 2, disposal is to be under Order 9. Where the conditions contemplated in the explanation under rule 2 exist the court has discretion to decide the suit on merits. Where the disposal purports to be on merits, if the conditions requisite for disposal on merits are absent, disposal in the eyes of law is only under order 9 C.P.C. In such a case, remedies under order 9 CPC would be available to parties.

10. In the present case Order 17 rule 3 C.P.C. is not attracted. This is not a case where the plaintiff failed to produce his evidence though time was granted to him or failed to cause attendance of witnesses though time was granted to him or failed to perform any other act necessary to the further progress of the suit for which time was granted. Posting of the suit for trial on 1-4-1982 was not in response to a request or application made by the plaintiff. It was a posting given by the court of its own accord. Therefore rule 3 cannot apply. Rule 2 will apply because the suit came up for trial on 1-4-1982 on adjournment of the hearing as contemplated under rule 2. If that be so disposal can only be under order 9, subject, of course to the operation of explanation. The explanation is not attracted in the instant case because evidence or substantial portion of the evidence of the plaintiff had not been recorded and the failure of the plaintiff to appear was not preceded by recording of such evidence. We are therefore of the opinion that disposal in the instant case was a disposal under order 9 C.P.C. Plaintiff RSA 210/2018 page no.6 of 7 is therefore entitled to seek restoration of the suit, subject to the existence of good ground, under the provisions of order 9 C.P.C."

On a consideration of the submissions made, without any observations on the merits or demerits of the averments made in the appeal or on the issue now being formulated in terms of Section 100 (4) of the CPC which is formulated to the effect:

"Whether the Ld. Trial Court could have disposed the suit on merits without any trial and in the absence of the Appellant?"

notice of the appeal and the accompanying application and the substantial question of law formulated hereinabove be issued to the respondents on taking of steps by the appellant, process returnable on 26.03.2019.

JANUARY 23, 2019
vm

ANU MALHOTRA, J

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