

Faiyaz Khan vs Mithan on 13 October, 1953

Equivalent citations: AIR1954ALL222, AIR 1954 ALLAHABAD 222

JUDGMENT

Mootham, J.

1. This is a defendant's appeal from an order of the Civil Judge, Agra.
2. The 29th February 1952, was fixed by the Civil Judge for the hearing of a suit in which the present respondent was the plaintiff and the present appellant the defendant. On that date counsel for the defendant applied for an adjournment as the defendant was not present and the hearing was adjourned to the 14th March. On the adjourned date the defendant was absent and his counsel stated that he had no instructions, whereupon counsel for the plaintiff asked the court to proceed to decide the suit under Order 17 Rule 3. The court purported to do so; it recorded the evidence of the plaintiff and two witnesses, delivered judgment in favour of the plaintiff and a decree was subsequently drawn up in accordance with the terms of the judgment.
3. One month later, on the 14 April, the defendant applied to the court for the decree to be set aside under Order 9 Rule 13. This application was dismissed by the learned Civil Judge in a brief order in which he said--"The application does not lie as the decision was on merits under Order 17 Rule 3 Civil P. C. 'Order'. Rejected.

It is from this order that the present appeal has been filed.

4. Sri Hari Sarup for the appellant has argued that as the circumstances of this case were not such as to make applicable the provisions of Rule 3 of Order 17 the learned Civil Judge's order must be deemed to have been made under Order 17 Rule 2, and that in consequence an application made under Order 9 Rule 13 to set aside that order would lie. Sri B. L. Chaturvedi for the respondent contends that whether the order of the Judge was right or wrong, it was undeniably made under Order 17 Rule 3 and that the proper remedy was by way of appeal or review.

In support of his argument counsel for the appellant relied on -- 'Raja Singh v. Manna Singh', AIR 1940 All 217 (A), and -- 'Rafiq Ahmad v. Mohammad Shafi', A. I. R. 1949 All 423 (B). both bench decisions of this Court. In each of these cases the lower court gave the plaintiff a decree under Order 17 Rule 3. Applications were then made by the defendants for the decrees to be set aside under Order 9. In -- 'Raja Singh's case (A)' the application was allowed and the plaintiff came in revision to this Court. In -- 'Rafiq Ahmad's case (B)' the application was dismissed and against that order the defendant filed an appeal. In both cases this Court examined the circumstances in which the decrees were passed by the lower courts, and being of opinion that those circumstances were not such as would entitle them to act under Order 17 Rule 3 it held that the decrees must be deemed to have

been made under Rule 2 of that Order and that consequently an application under Order 9 Rule 9 or Order 9 Rule 13 would lie.

5. A different view has however been taken in other cases to which counsel for the respondent drew our attention. In -- 'Nasir Khan v. Itwari', A. I. Rule 1924 All 144 (C) this Court declined in similar circumstances to consider whether the lower court which had made a decree in favour of the plaintiff purporting to act under Order 17 Rule 3 was justified in doing so. The Court said-

"The right of appeal does not depend on what the court ought to have done but on what it actually did. What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal. When the appeal comes up for decision, the appellate court has then to decide whether the order passed was a proper order and one which the court below had jurisdiction to pass. If it decides this question in the negative it will set the order aside."

In --'Udai Ram Gopi Ram v. Raghuraj Singh Khub Chand', A I. Rule 1944 All 211 (D) another bench of th,is Court was of opinion that a Judge who had passed a decree under Order 17 Rule 3 had no jurisdiction to set it aside, and in a recent case, -- 'Sri Krishen v. Radha Krishen', AIR 1952 All 652 (E) the Court, in a judgment delivered by Agarwala J., laid it down that "The question whether an application for restoration is maintainable must be decided upon an interpretation of the order which the court passes. If there is any doubt about the intention of the court passing the order as to whether it intended to proceed under Order 17 Rule 3 or Order 17 Rule 2, in that case we can say that the order should be construed as one which 'ought' to have been passed. But this cannot be done when the court expressly passes an order under one of the two rules. In that case the aggrieved party should file an appeal against the order which is in fact a decree and not apply for restoration."

6. We therefore find ourselves in the somewhat embarrassing position of having to decide I between conflicting decisions of this Court. With great respect we are of opinion that the view taken in the cases which we have last mentioned is to be preferred. We think that if the order granting the plaintiff a decree is actually made by the court under Order 17 Rule 3, an application by the defendant under Order 9 Rule 13 will not lie and that the defendant's remedy is by way of appeal or review. This view appears to us not merely to have the merit of practical convenience -- for it is important that the litigant should be in no doubt as to wrtiere his remedy lies -- but sound in principle. What has to be considered is the power vested in the Judge who decided the suit; and if in so deciding it he purported to act under Order 17 Rule 3 he could have, it appears to us, no jurisdiction under Order 9 Rule 13 to -set aside the decree which he had passed. His order may be wrong but so long as it stands he has no power to alter it.

7. In the case now before us it is abundantly clear -- indeed it is common ground -- that the decree passed on 14-3-1952, was actually made by the Civil Judge under Order 17 Rule 3. We are therefore of the opinion for the reasons we have stated that he was right in dismissing the application subsequently made under Order 9 Rule 13 for that decree to be set aside.

8. This appeal is accordingly dismissed with costs.

9. The interim stay order is discharged.