

Deo Nand vs Achaiber Misir And Ors. on 4 November, 1953

Equivalent citations: AIR1954ALL361, AIR 1954 ALLAHABAD 361

ORDER

Brij Mohan Lall, J.

1. This is an application in revision by a defendant in a pending suit. There are three-defendants in all. Summonses were issued to all of them by the trial court but only two of them put in appearance in the suit. The present applicant remained absent. The court ordered the case to proceed 'ex parte' against him. One of the defendants raised a plea of tenancy rights and an issue was remitted to the revenue court for decision. The revenue court has sent its decision. When the case was put up before the learned Munsif for hearing the present applicant put in appearance and made an application for setting aside the order directing the case to proceed 'ex parte' against him. His application was not accompanied by an affidavit and the learned Munsif was not satisfied that there were sufficient grounds for his absence on the previous dates. He rejected that petition. Against this order this revision has been filed. The learned counsel for the applicant contends that the learned Munsif had no-jurisdiction to reject his petition.

2. In this connection reference may be made to O. 9, R. 7, Civil P. C., which runs as follows:

"Where the Court has adjourned the hearing of the suit 'ex parte' and the defendant, at or before such hearing, appears and assigns good-cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

It appears from a mere perusal of this rule that the applicant has to show good cause for his previous non-appearance and it is only on such cause being shown that the court may allow him to put in appearance subject to payment of such costs as the Court may consider proper. Learned counsel for the applicant refers to the last portion of this rule viz. that the defendant be heard "as if he had appeared on the day fixed for his appearance" and contends that this rule applies only when a party wants the Court to go back upon some proceedings that have already taken place and re-quires it to go through the said proceedings over again. He argues that if a defendant wants to proceed from the stage at which he appears and does not require the Court to retrace its steps, this rule will not apply and that such a defendant will have an absolute right without obtaining Court's permission to take part in the proceedings from the stage they have reached.

I agree that this interpretation is correct. But by adopting this interpretation the applicant gains nothing because, in the present case, the stage for filing the written statement was over and the issues had been framed long ago. What the applicant now wants is that he may be permitted to file a

written statement and if new pleas are taken fresh issues may be framed. As stated above the other two defendants are already contesting the suit. Therefore, the only object of filing a fresh written statement could be to raise new pleas. This means that the proceedings that have taken place during the last two years have to be brushed aside and the parties are to be relegated to the position which they occupied two years ago. If he also raises a plea of tenancy the case will have to be sent back again to Revenue Court. Rule 7 is, therefore, applicable and unless the applicant shows good cause for his absence on previous dates he has no right to ask the Court to set aside the order directing the case to proceed 'ex parte' against him.

3. Learned counsel has cited the case -- 'Bhagwat Prasad v. Muhammad Shibli', AIR 1922 All 110 (A). From a perusal of the judgment of that case it appears that the trial court did not seem to have recorded any finding to the effect that the applicant had failed to assign a good cause for his non-appearance. In the circumstances the case is clearly distinguishable from the present one. Moreover this case contains no reference to O. 9, R. 7, Civil P. C. The headnote mentions Order 9 rule 11 although there is no reference even to Order 9, Rule 11 in the body of the judgment.

4. Another case relied upon by the learned counsel for the applicant is that reported in --'Mannu v. Tulsi', AIR 1922 All 33 (B). In that case one out of two defendants had put in appearance and the case was ordered to proceed 'ex parte' against the absent defendant. On the date fixed for hearing the absent defendant also put in appearance and all parties agreed to refer the dispute to arbitration. An award was delivered. It was against the plaintiff. The plaintiff challenged the award on the ground, 'inter alia', that the order of reference was bad because the defendant against whom the case had been ordered to proceed 'ex parte' had not got the said order set aside before making the reference. This contention was overruled. Once an order of reference was made at the instance of, 'inter alia', the defendant who had previously absented himself, the Court was deemed to have given him permission to take part in the proceedings and to have impliedly set aside the order directing the case to proceed 'ex parte' against him. This case also does not help the applicant.

5. The next case cited by the learned counsel is that reported in -- 'Satyendra Nath v. Narendra Nath', AIR 1924 Cal 806 (C). In that case, the defendant had filed written statement and issues had been framed. On a certain date he was absent. The case was ordered to proceed 'ex parte'. When the adjourned date arrived the defendant put in appearance and wanted to take part in the proceedings. He was allowed to do so. This case also is distinguishable from the present one inasmuch as there was no going back upon anything that had been done. The defendant took up the thread from the stage the case had reached. His written statement was already there. This, as pointed out above, cannot be done in the present case. The defendant cannot put in appearance and proceed with the case. He will have first to file a written statement and get fresh issues framed. In other words, the Court will be called upon to retrace its steps and to start fresh proceedings for which the stage has already passed.

6. Another case relied upon by the learned counsel for the applicant is that reported in --'Radhabai v. Anant Pandurang', AIR 1922 Bom 345(1) (D). In that case the Court passed an order directing the case to proceed 'ex parte' against defendant No. 4. The said defendant put in appearance then and there but he was not allowed to take part in the proceedings. The High court set aside that order.

That case also is distinguishable because in that case also the defendant could proceed from the stage the case had reached and had not to retrace its steps. It may be pointed out that in this case their Lordships observed as follows:

"But if he (defendant) does not appear before the suit is heard then he has no right to be heard."

7. This means that if the hearing has begun the defendant has no right to come and take part in the proceedings. I am, therefore, of the opinion that this authority also does not help the applicant.

8. The Court had jurisdiction to pass the order it did and there is no good ground for interference.

9. I have refrained from saying anything as to the merits of the learned Munsif's decision, viz., whether or not there was sufficient cause for the applicant to be absent on the date of previous hearing. This is a question of fact and I am reluctant to examine the finding of the learned Munsif on that issue. But if the ultimate decision of the suit goes against the defendant and he prefers an appeal he will certainly be able to challenge the finding of the learned Munsif before the appellate Court.

10. The revision fails and is hereby dismissed.