# Smt. Sudha Devi vs M.P. Narayanan & Ors on 26 April, 1988

## Equivalent citations: 1988 AIR 1381, 1988 SCR (3) 756, AIR 1988 SUPREME COURT 1381, 1988 26 REPORTS 317, 1988 HRR 352, (1988) 2 JT 217 (SC), (1988) 14 ALL LR 444, 1988 (3) SCC 366, 1988 RAJLR 328, (1988) PAT LJR 78, 1988 2 JT 217

## Author: L.M. Sharma

## Bench: L.M. Sharma, A.P. Sen

PETITIONER:
SMT. SUDHA DEVI

Vs.

RESPONDENT:
M.P. NARAYANAN & ORS.

DATE OF JUDGMENT26/04/1988

BENCH:
SHARMA, L.M. (J)
BENCH:
SHARMA, L.M. (J)
SEN, A.P. (J)

CITATION:
1988 AIR 1381 1988 SCR (3) 756
1988 SCC (3) 366 JT 1988 (2) 217
1988 SCALE (1)952

ACT:
Code of Civil Procedure, 1908: Order IX, Rule 13-Decree exparte-Setting aside of-Held, even in absence of a defence Court not entitled to pass an ex-parte decree without reliable relevant evidence.
Indian Evidence Act, 1872: Section 3-Affidavits can be used as 'evidence' only when ordered by court under Order XIX, Rules 1 or 2 C.P.C.
Constitution of India, Article 136: Plaintiff in suit cannot be allowed to fill up lacuna in evidence at S.L.P. stage.

HEADNOTE:
The plaintiff-appellant filed a suit for ejectment of

the tenant defendant No. 1 for default in payment of rent and also to have wrongfully sublet the flat to the second defendant. None of the defendants appeared. At the ex-parte trial the plaintiff examined one witness and tendered certain documents in evidence. The Single Judge decreed the suit. Subsequently to the decree the two defendants are alleged to have inducted the third defendant (respondent No. 1) to occupy the demised flat. The plaintiff filed an application for modification of the decree. The respondent No. 1 first filed an application for setting aside the ex-parte decree, but later withdrew it and assailed the decree in appeal. The Letters Patent Bench allowed the appeal and set aside the decree on the ground that the plaintiff's sole witness did not disclose his concern with the suit property or his relationship with the plaintiff and that on the basis of the meagre evidence led by her, she had failed to establish her case.

In the appeal to this Court it was contended on behalf of the appellant that the witness was the husband of the plaintiff-appellant and thus he was fully conversant with the relevant facts and that the criticism by the High Court was not justified. Reliance was placed on an affidavit filed in this Court. It was further contended that even ignoring the relationship of the witness with the plaintiff, his evidence was adequate to prove the plaintiff's case which has not been rebutted by any of the defendants either by filing a written statement or by cross examining the witness.

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Allowing the appeals and remanding the suit for retrial.

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HELD: 1. The plaintiff cannot be allowed a decree on the evidence led by her in the suit founded on the plaint as it is. Even in absence of a defence the Court cannot pass an ex-parte decree without reliable relevant evidence. The fact that the plaintiff chose to examine some evidence in the case cannot by itself entitle her to a decree. The Letters Patent Bench was, therefore, justified in scrutinising the evidence from that angle. [760B-D]

2. The suit was filed and the relief was claimed on the basis that the third defendant was inducted in the flat in question by the other two defendants after they had suffered a decree. There is not an iota of evidence led by the plaintiff to prove this story. On the other hand, the evidence of the sole witness, who positively stated that the defendant No. 3 was in possession of the flat in question from before the date of the decree passed in the earlier suit, disproves this part of the case. If the defendant No. 3 is assumed to be in possession from before the earlier decree several other issues would arise for consideration on which the plaintiff will be required to lead further evidence necessitating retrial. [760D-E]

3. Affidavits are not included in the definition of 'evidence' in s. 3 of the Evidence Act and can be used as evidence only if for sufficient reasons Court passes an order under Order XIX, Rules 1 or 2 of the Code of Civil Procedure. The plaintiff-appellant cannot be allowed to fill up the lacuna in the evidence belatedly at the Supreme Court stage. [759E-F]

4. In view of the prayer made by the plaintiff in the High Court and in C.A. No. 4145 of 1986 before this Court for remanding the suit for retrial and the concession of defendant No. 3 before this Court, the judgments of the High Court are set aside and the suit is remanded to the Single Judge for retrial and disposal in accordance with law expeditiously. [761B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4145-46 of 1986.

From the Judgment and order dated 10.7.85 and 11.11.85 of the High Court of Calcutta in Appeal No. 477 of 1984.

Tapas Ray and B.R. Agarwal for the Appellant.

V.A. Bobde, Rajiv Dutta and Ms. Mridula Ray for the Respondents.

The Judgment of the Court was delivered:

SHARMA, J. By the impugned judgment the Division Bench of the Calcutta High Court set aside the ex-parte decree passed by the Original Side of the Court in favour of the plaintiff Sudha Devi, the present appellant. The dispute between the parties is in regard to a flat in a building on Lord Sinha Road, Calcutta. The plaintiff prayed for a decree for Rs.1,44,730 as past mesne profits besides future mesne profits at the rate of Rs.170 per day and for "if necessary, decree as against the third respondent for possession of the flat" described in the plaint. By way of an alternative relief to the money claimed, an inquiry for determination of the mesne profits was asked for. None of the defendants appeared. At the ex-parte trial the plaintiff examined one witness and tendered certain documents in evidence. The learned Single Judge decreed the suit and the defendant No. 3 (present respondent No. 1) filed an appeal therefrom which was allowed on 10-7-1985 by the judgment which is under challenge in Civil Appeal No. 4146 of 1986. The plaintiff thereafter filed an application with a prayer to modify the judgment and remand the suit for retrial. The prayer was rejected by the order dated 11-10-1985. Civil Appeal No. 4145 of 1986 is directed against this order.

2. According to the plaintiff's case, the defendant No. 1 Baranagar Jute Factory Company Ltd. was the tenant in respect to the flat in question under the plaintiff. The Jute Company defaulted in payment of rent and also wrongfully sublet the flat to the second defendant Sadhan Chattopadhyaya, which led to the filing of an eviction suit by the plaintiff. Both the defendants were impleaded in the suit but they did not appear to contest. An ex-parte decree of eviction was passed on 19-2-1982. It is further pleaded that subsequent to the decree, either of the two defendants or both wrongfully inducted the third defendant to occupy the demised flat. The plaintiff was, therefore, entitled to the reliefs mentioned in the plaint.

3. The third defendant filed an application under the provisions of Order IX, Rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree, but later withdrew the same and assailed the decree in appeal on merits. The Letters Patent Bench allowed the appeal and set aside the decree on the ground that the plaintiff, on the basis of the meagre evidence led by her, failed to establish her case.

4. The fact that the plaintiff obtained an ex-parte decree in the earlier suit against the defendant No. 1 and 2 is established by the copy of the decree exhibited in the case. The allegation in the plaint so far as the third defendant is concerned, is in paragraph 7 in the following words:

> "7. Subsequent to the said Decree on a date or dates which the plaintiff is unable to specify until after disclosure by the defendants, the first and/or second defendants wrongfully permitted and allowed the third defendant to occupy the said demised flat. The first and/or second defendants by themselves and/or by the third defendant are still in wrongful possession of the said demised flat."

The only evidence relevant to this part of the case is to be found in the oral evidence of the plaintiff's sole witness Nand Kumar Tibrewal. The High Court (in appeal) has declined to rely on his evidence mainly on the ground that the witness has not disclosed his concern with the suit property or his relationship with the plaintiff. He has been rejected as incompetent. The learned Counsel for the appellant contended that the witness (now deceased) was the husband of the plaintiff-appellant and thus he was fully conversant with the relevant facts. The criticism by the High Court that the witness did not state anything in his evidence which could connect him with the plaintiff or the property and thus make him competent was attempted to be met before us by relying on an affidavit filed in this Court. We are afraid, the plaintiff cannot be allowed to fill up the lacuna in the evidence belatedly at the Supreme Court stage. Besides, affidavits are not included in the definition of 'evidence' in s. 3 of the Evidence Act and can be used as evidence only if for sufficient reason court passes an order under Order XIX, Rules 1 or 2 of the Code of Civil Procedure. This part of the argument of Mr. Tapas Ray must, therefore, be rejected.

5. The learned counsel next urged that even ignoring the relationship of the witness with the plaintiff, his evidence is adequate to prove the plaintiff's case which has not been rebutted by any of the defendants either by filing a written statement or cross-examining the witness. Mr. Bobde, the learned counsel representing the defendant No. 3 (respondent No. 1 before us), contended that the witness contradicted the case pleaded in the plaint by positively stating that the defendant No. 3 was

in possession of the flat in question from before the date of the decree passed in the earlier suit. The plaintiff's assertion in paragraph 7 of the plaint is thus contradicted and the suit cannot be decreed on its basis. The learned counsel proceeded to analyse the situation arising out of the records of the case to show that if the defendant No. 3 is held to be in possession since before the earlier decree, other issues would arise in the suit, on which the plaintiff will be required to lead further evidence. The learned counsel strenuously argued that in the facts and circumstances of the case, the prayer of the plaintiff made after the disposal of the appeal before the Letters Patent Bench for remanding the suit to the learned Single Judge (Original Side) for retrial was fit to be allowed and that Civil Appeal No. 4145 of 1986 should be allowed by this Court.

6. On the failure of the defendants to appear in the suit, the learned trial Judge decided to proceed with the case ex-parte. Even in absence of a defence the court cannot pass an ex-parte decree without reliable relevant evidence. The fact that the plaintiff chose to examine some evidence in the case cannot by itself entitle her to a decree. The High Court (in appeal) was, therefore, perfectly justified in scrutinising the evidence from this angle. The suit was filed and the relief was claimed on the basis that the third defendant was inducted in the flat in question by the other two defendants after they had already suffered a decree, and there is not an iota of evidence led by the plaintiff to prove this story. On the other hand, the evidence of the sole witness disproves this part of the case. Having regard to the allegations in the plaint, the facts emerging from the documents and the oral evidence, it is clear that several other questions may arise for consideration if the defendant No. 3 is assumed to be in possession from before the earlier decree. We, therefore, agree with Mr. Bobde that the plaintiff cannot be allowed a decree on the evidence led by her in the suit founded on the plaint as it is.

7. After hearing the learned counsel for the parties at considerable length, we also agree with Mr. Bobde that in the interest of justice the prayer made on behalf of the plaintiff before the High Court after the disposal of the appeal for remand and retrial of the suit is fit to be allowed. As nobody is disputing this position before us, we do not consider it necessary to further deal with this aspect. In view of the prayer made by the plaintiff in the High Court and in Civil Appeal No. 4145 of 1986 before this Court and the concession of the defendant no. 3 before us, we hold that the suit should be sent back to the learned Single Judge for retrial. The plaintiff may file an application for amendment of her pleading, if so advised, and in that case the learned Single Judge shall dispose it of in accordance with law. The defendants will thereafter be allowed to file their written statements within a period to be indicated by the Court. The suit will thereafter be taken up for further trial as expeditiously as may be possible. The evidence already led by the plaintiff shall continue to be evidence in the suit.

8. In the result, the judgments of the High Court dated 10-7-1985 and 11-10-1985, passed in Appeal No. 477 of 1984 are set aside and the suit is remanded to the learned Single Judge for disposal in the light of the observations made above. We feel that the suit ought to be disposed of as expeditiously as possible and we expect and hope that the trial Judge will be able to dispose it of within six months. The appeals before us are allowed in the above terms. The parties shall bear their own costs in this Court; but so for the costs in the High Court are concerned they shall abide the final result in the litigation.

P.S.S. Appeals allowed.