
(1976) 04 SHI CK 0003
In the High Court Of Himachal Pradesh
Case No : F.A.O. No. 4 of 1973

Amar Chand

APPELLANT

Vs

Firm Dasondhi Mal Kuljas Rai and Others

RESPONDENT

Date of Decision : 28-04-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 43 Rule 1, Order 9 Rule 13

Citation : AIR 1977 HP 58 : (1976) 5 ILR HP 326

Hon'ble Judges : D.B. Lal, J

Bench : Single Bench

Advocate : H.S. Thakur, for the Appellant; D.P. Sud, for the Respondent

Final Decision : Dismissed

Judgement

D.B. Lal, J.—This first appeal is directed against the decision of the Subordinate Judge 1st Class, Kulu, wherein an application for restoration under Order 9, Rule 13 of the CPC has been dismissed. The appellant was defendant in a suit filed by M/s. Firm Dasondhi Mal Kuljas Rai for specific performance of a contract of sale of timber and in the alternative for recovery of damages in lieu thereof. The material dates during the course of hearing "commenced from 20-9-71 when after the plaintiffs" evidence was over the defendant was asked to produce his evidence on 7-10-1971.

2. On 7-10-1971 the defendant asked for adjournment and 26-10-1971 was fixed. On 26-10-1971 again the defendant asked for adjournment and 24-11-1971 was fixed. On 24-11-1971 the defendant again asked for adjournment and the Court ordered him to pay Rs. 16 as costs and further ordered:

"If evidence is not produced by that date the defence will be struck off as the case is oldest one.""

On 8-12-1971 the counsel for the defendant stated that he had no instructions.

No steps were taken for the summoning of witnesses. Perhaps the costs were also not paid. Thereafter the court ordered:

"I proceed ex parte against the defendant as he is not taking interest at all in this case. To come up for arguments on 31-12-1971."

3. After the arguments were heard a judgment was pronounced on 19-1-1972. The evidence was considered on merit on each issue and the suit was decreed for Rs. 10,610-81 Paise. However, the learned trial Judge noted that in view of his findings on several issues and for the reasons recorded he passed an ex parte decree in favour of the plaintiffs and against the defendant with costs. Thereafter the defendant filed an application under Order 9, Rule 13 of the CPC and pointed out that he was ill and that was sufficient cause for his absence on 8-12-1971 and, therefore, the decree should be set aside and the suit restored for further evidence. The cause shown by the defendant was not considered sufficient and the learned trial Judge dismissed the application for restoration on 5-1-1973. The present appeal is filed against that order.

4. A preliminary objection has been taken on behalf of the respondent-plaintiffs that the decision of the learned trial Judge was on merit under Order 17, Rule 3 of the CPC and as such the application for restoration under Order 9, Rule 13 of the CPC was not maintainable and on that ground alone the same could be rejected. It is contended on behalf of the appellant that such a plea could not be raised at the stage of appeal because the ground was not taken before the learned trial Judge and because the ground depended on a mixed question of law and fact and unless facts are ascertained the ground itself may not be sustainable. I am not inclined to accept this contention on behalf of the appellant. The learned counsel referred to the order-sheet of several dates regarding which a reference is made above and thereafter referred to the order made on 8-12-1971 and the subsequent judgment pronounced by the Court. From that alone he inferred that the Court intended to decide the suit forthwith under Order 17, Rule 3, C.P.C, and did decide it on merits within a reasonable time. As such the decision of the Court could not but be under Order 17, Rule 3, C.P.C. and hence the decision was on merits. He did not refer to any other fact nor to any controversial question regarding fact, because the state of affairs noted down for all these dates in the order-sheet, is admitted" between the parties. Therefore, the ground does not involve any disputed question of fact. It is purely legal ground and in my opinion can be raised at the stage of appeal.

5. The distinction under Rule 2 and Rule 3 of Order 17 is well marked. Rule 2 applies when the suit is adjourned for any date and a party fails to appear on that date. In that contingency the Court may either proceed under Order 9 or make such other order as it thinks fit. But when a party obtains time to produce 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 and does not do so, the Court may notwithstanding such default, proceed to decide the suit forthwith. That decision cannot but be on merit. The form of the

order by itself will not go to decide the question. It is the substance of the order and the intention with which the Court proceeded on that date, and in fact how it proceeded, these would be relevant factors to hold if the decision was on merit under Rule 3. It is totally immaterial that the Court mentions the expression "ex parte" or even mentions Order 17, Rule 3 because that would not be a deciding factor. How the Court intended to proceed, that would be essential to prove in order to bring the case under Rule 2 or under Rule 3 of Order 17. In the instant case no doubt the Court used the expression "ex parte" in its order dated 8-12-1971 and similarly used that expression while delivering the judgment on merit on 19-1-1972 but nevertheless the Court intended to put an end to litigation. It was clearly considered that time was granted to the defendant more than once to produce evidence and no steps were taken to summon the witnesses. The case was an old one. The Court intended to decide the suit forthwith. With that purpose the order dated 8-12-1971 was passed. Therefore, the decision was under Rule 3 of Order 17. The expression "ex parte" was used merely to indicate that one of the parties was absent and so the decision was being given in the absence of that party, although it was a decision on merit,

6. As held in *Chandan Lal Joura v. M/s. Amin Chand Mohan Lal*, a Partnership Firm AIR 1960 P&h 500 the Court could not have struck off the defence because that was not called for. Therefore, to that extent the order dated 24-11-1971 may not be correct but nonetheless the intention of the Court was clear. It wanted to cut short the litigation. The Court wanted to decide the suit on merit in the absence of the defendant. In fact all the evidence on record was duly considered on merit and the judgment was pronounced. In *Sansnath Tripathi v. Tri-pathi Bhagwat Nath* AIR 1966 All 615 a learned Judge of that Court rightly held that provisions of Rule 3 are directory and their disregard cannot affect validity of act done. The learned Judge made that observation with reference to the prescribed time limit within which the judgment could be pronounced. The expression used is "forthwith" which according to the learned Judge means within reasonable period. That controversy does not exist in the present case. The ratio of this decision can only be availed of, to this extent, that the application of Rule 3 is directory, and if the Court thought fit it could still proceed under Order 9 but the question before me is, as to whether the Court has really proceeded under Order 9 or it has proceeded under Order 17, Rule 3 of the Code of Civil Procedure. In my opinion the circumstances do not leave any doubt that the Court proceeded under Order 17, Rule 3 and the decision was on merit. There are two cases: *Usta Khalik Khar v. Ghulam Mohammad Bhat* AIR 1964 J&K 63 and *Hari Ram v. Krishan Lal* (AIR 1964 J & K 79) which emphasise, that it is the substance and not the form of the order which has to be seen. The crux of the matter would be: How the Court thought it fit to act on that day? if it thought fit to act under Rule 3 for which there was legal justification the decision cannot but be on merit. It would, therefore, be pertinent to consider as to whether the Court did not want to have any further hearing in the case and it decided to dispose it of on the material already on the record and as such tried to dispose of

the suit within a reasonable time and without delay. If it did, the decision is under Rule 3 and hence on merit. Similar view was taken by a Full Bench of the Allahabad High Court in Seth Munna Lal Vs. Seth Jai Prakash, . The substance of the order has to be seen and even if the Court purports to act under O. 17, Rule 3 conditions may be made out to bring the case under Order 9 or under Order 17, Rule 2, C.P.C. In that contingency an application for restoration under Order 9, Rule 13 would be maintainable. The learned counsel for the appellant relied upon *Prativadi Bhayankaram Pichamma v. Kamisetti Sreeremulu* AIR 1918 Mad 143 and *Sri Dhana Lakshmi. Ginning and Rice, Oil Working Co., Man-galagiri v. Yelukuru Yellappa Cbetti* AIR 1952 Mad 160. With respects to the learned Judges I did not feel much impressed by these decisions. The subsequent view of the Jammu and Kashmir High Court and of the Allahabad High Court, of which reference is made above must be preferred. It is more than clear from the orders made in this case that on four specific dates prayers were made for adjournment on behalf of the defendant and the same was allowed. On 24-11-1971 even costs were awarded and the Court expressed a desire to decide the suit on merit by mentioning that the defence was to be struck off as the evidence was not being produced by the defendant. Thereafter on the next date the learned counsel for the defendant gave out no instructions and obviously on an adjourned date, the defendant had not taken any steps for production of witnesses. Rule 3 of Order 17 was thus attracted and the decision was on merit

7. If it was so, it is evident the application for restoration under Order 9, Rule 13 of the CPC was not maintainable and could be rejected merely on that ground. The appeal, therefore, fails on this preliminary objection and must be dismissed.

8. The appeal is dismissed without making any order as to costs.