

(2005) 05 BOM CK 0046

In the Bombay High Court

Case No : Civil Revision Application No. 654 of 2001

Annasaheb Champatrao Gulhane

APPELLANT

Vs

Managing Director, Maharashtra State Handloom Corporation
Ltd. and Another

RESPONDENT

Date of Decision : 03-05-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5, Order 8 Rule 5(2), Order 9 Rule 13, Order 9 Rule 6

Citation : (2005) 5 BomCR 203

Hon'ble Judges : Kharche S.T., J

Bench : Single Bench

Advocate : A.J. Pophlay, for the Appellant; M.V. Mohokar, for the Respondent

Final Decision : Dismissed

Judgement

Kharche S.T., J.—This civil revision application is directed against the order dated 17-2-2001 passed by the learned 2nd joint Civil Judge, Sr. Dn., Nagpur, in Misc. Judicial Case No. 23.9 of 1995, whereby the application of the applicant for setting aside ex parte decree dated 31-1-1995 passed in Special Civil Suit No. 441 of 1990 was allowed under Order IX, Rule 13 of the Code of Civil Procedure.

2. Mr. Pophlay, learned Counsel, for the applicant contended that the applicant was employed with the defendants/non applicants and he retired from service on 31 -8-1986. Thereafter the applicant was re-employed by issuing an appointment order and his salary remained unpaid from June 1987 to 19-10-1987 amounting to Rs. 26,973,30. He contended that the defendants had appeared in the said suit and filed their written statement on 7-12-1990. However, the defendants had chosen to remain absent and their Counsel had withdrawn his power on 17-12-1992 and consequently the suit was decreed by the 2nd Joint Civil Judge, Sr. Dn, on 31-1-1995. The defendants thereafter appeared before the trial Court and filed application for setting aside the ex parte decree which was allowed.

3. Mr. Pophlay, learned Counsel, further contended that the defendants had

contested the suit by filing their written statement and the issues were also framed and the judgment delivered by the trial Court was on merits. He contended that the trial Court had considered the contentions raised in the written statement and the plaintiff also led substantial evidence in the Court. He contended that the trial Court considered the case of the parties and weighed and assessed the evidence adduced on the touch stone of preponderance of probabilities and it was only thereafter that the judgment was delivered and, therefore, by no stretch of imagination it could be said that the said decree was ex parte. He, therefore, contended that the application under Order IX, Rule 13 of the CPC for setting aside the ex parte decree is not maintainable and the impugned order passed by the trial Court is not sustainable in law. In support of these submissions he relied on the decisions of this Court in the case of (I) Laxman Zingraji Adhau Vs. Sushila Zinguji Thakre and Others, and (II) Himachal Pradesh Co-operative Marketing and Development Federation Limited Vs. M/s. MAFCO Limited, .

4. Mr. Mohokar, learned Counsel appearing for the respondents, supports the impugned order passed by the learned trial Court and contended that the decree passed by the trial Court was not on merits as no opportunity was given to the defendants to lead evidence. Though the written statement was filed the learned Counsel for the defendants had withdrawn his power on 17-12-1992 and thereafter the suit was transferred from one Court to another Court and the defendants were not knowing the dates of hearing of the said suit. He therefore, contended that the trial Court had passed the ex parte decree. It was not on consideration of merits of the case and has been rightly set aside by allowing the application of the defendants for setting aside the ex parte decree under Order IX, Rule 13 of the Code of Civil Procedure. He, therefore, contended that no interference into the said order is warranted and the application may kindly be dismissed.

5. This Court has given thoughtful consideration to the contentions canvassed by the learned Counsel for the parties. In Laxman Zingraji Adhau Vs. Sushila Zinguji Thakre and Others, , cited supra, this Court held as under : "Judgment passed by exercising power under Order 8, Rule 5(2) of the CPC cannot be said to be an ex parte decree under Order 9, Rule 6. Application under Order 9, Rule 13 of the Code for setting aside such judgment and decree is not maintainable. While passing judgment by invoking the power under Order 8, Rule 5, the Court is required to go into the merits of the case set up by the plaintiff though, the merits of the plaintiffs case are required to be seen in the absence of any pleading by the defendant. It is only when the Court is satisfied that the plaintiffs case deserves to be decreed, such judgement and decree are passed and, therefore any judgement and decree passed by invoking the aforesaid power cannot be equated with the ex parte decree passed under Order 9, Rule 6 of the Code."

6. In Himachal Pradesh Co-operative Marketing and Development Federation

Limited Vs. M/s. MAFCO Limited, , cited supra, this Court held as under:

"The defendants had filed their written statement, which was before the Court. The same was considered by the Court; issues were framed and settled by the Court. Finding against each and every issue was recorded by the Court after examining the plaintiffs' substantive evidence in the Court and the defendants' contentions raised in their written statement. Thus, the case of the plaintiff and the case of the defendants was weighed and assessed by the Judge on the touch stone of preponderance of probabilities. It was only thereafter that the judgment was delivered by the Judge and decree came to be passed. Such a decree, by any stretch of imagination, could not be called an "ex parte" decree and, therefore, application made by defendants for setting aside said decree alleging it to be ex parte was not maintainable."

7. In the present case, the learned. 2nd Joint Civil Judge, Sr. Dn. while passing the decree on 31-1-1995 observed in the judgment. "Defendant has not produced any oral or documentary evidence in support of the contents of its written statement. The Counsel for the defendants remained absent in spite of several adjournments were granted and also failed to adduce the evidence. Therefore, there is no hesitation to accept the evidence of plaintiff holding that the appointment of plaintiff was fresh and defendants did not pay the salary of the plaintiff from 1-6-1987 to 19-10-1987 and plaintiff is entitled to recover the salary from the defendants from 1-6-1987 to 19-10-1987.

8. It is not disputed that the defendants had filed their written statement on 7-12-1990 through their learned Counsel who had withdrawn his power by filing pursis on 17-12-1992. It is also not disputed that the Original Civil Suit No. 441 of 1990 filed by the plaintiff was instituted in the Court of Civil Judge, Sr. Dn, and thereafter it was allotted for disposal according to law to the Court of 2nd Joint Civil Judge, Sr. Dn. During the pendency of the said civil suit, the learned Counsel for the defendants withdrew his power on 17-12-1992. Thereafter the suit was transferred to 4th Joint Civil Judge, Sr. Dn. from the file of 2nd Joint Civil Judge, Sr.Dn. and again it was transferred to the Court of 2nd Joint Civil Judge, Sr.Dn. It is also not disputed that the defendants were not knowing the dates of hearing of the suit and the trial Court was not justified in showing absence of the learned Counsel for defendants in the Roznama of the proceedings especially when the learned Counsel for the defendants had already withdrawn his power on 17-12-1992. Therefore, by no stretch of imagination, it could be said that the decree passed by the trial Court was on merits after framing of the issues and the trial Court has considered the matter on merits. The trial Court observed that the defendants have not produced any oral or documentary evidence in support of their contention mentioned in the written statement. In such a situation, the aforesaid decisions of this Court, on which reliance is placed by the learned Counsel for the applicant, have no bearing on the facts and circumstances of the present case and this Court is of the considered view that the trial Court was perfectly correct in setting aside the ex

parte decree by allowing the application under Order IX, Rule 13 of the Code of Civil Procedure. No case has been made out for interference into the impugned order and consequently this revision stands dismissed with no order as to costs.