

(2008) 09 OHC CK 0052
In the Orissa High Court

Bata India Ltd.

APPELLANT

Vs

Amiya Sankar Patra

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Provincial Small Cause Courts Act, 1887 — Section 17

Citation : (2008) 106 CLT 881 : (2008) 2 OLR 794

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.S. Chauhan, C.J.—This writ appeal has been filed against the judgment and order of the learned Single Judge dated 7.8.2008 passed in W.P.(C) No. 6322 of 2008 by which the writ petition of the appellant has been partly allowed against the order of the trial Court dated 5.4.2008. By the said order the trial Court while considering the application under Order 9, Rule 13 of the CPC (hereinafter called "CPC") without deciding the same directed the appellant to deposit the entire decretal amount within a month and directed to list the applications for interim relief, under Order 9, Rule 13, CPC and u/s 47, CPC filed by the appellant thereafter.

2. Being aggrieved and dissatisfied the appellant preferred W.P.(C) No. 6322 of 2008 which has been disposed of by the learned Single Judge reducing the amount to 50 per cent as directed by the trial Court. Hence this appeal.

3. We have heard learned Counsel for the parties and perused the record.

4. The question which arises for consideration is as to whether such a condition could have been imposed by the trial Court prior to disposal of any of the applications pending before it.

5. Order 9, Rule 13, CPC reads as under:

Rule 13. Setting aside decree ex parte against defendant. In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by

which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(Emphasis added)

It is evident from the plain language of the provision itself that Court is competent to impose such a condition provided it sets aside the ex parte decree and restore the matter for hearing de novo.

6. Under Order 9, Rule 13, CPC the Court has jurisdiction to impose condition including direction for payment of cost or for deposit of decretal amount or part of it or to furnish security. The expression "upon such terms as to costs, payment into Court or otherwise as it thinks fit" in Order 9, Rule 13 CPC indicates that the Court is empowered to impose terms. Now what are these terms has been specified in the expression "as it thinks fit" leaves discretion of the Court quite open. It has not been provided that the Court is not empowered to use its discretion to the extent of direction for deposit of decretal amount or furnishing of security. (Vide *Raj Kumar Soni Vs. Mohan Meakin Breweries Ltd.*, ; *B. Madan Mohan Vs. B. Kanhaiya Lal* ; *Nanak Chand Vs. Goswami Preetam Lal*, ; *Emperor Vs. Batuk*, ; *Jayshree Distribution Piplani Katra and Others Vs. Jayshree Tyres and Rubber Products, Allahabad and Another*, ; *Chhagan Raj and Others Vs. Suman Mal and Another*, ; *Northern Carriers Pvt. Ltd. Vs. United India Insurance Co. Ltd. and Another*, ; *B. Padmavathi Rai v. Parrathiamna* AIR 1976 Karnt 97; *Life Insurance Corporation of India Vs. Anjan Kumar Arora and Others*, ; and *Jagdamba General Store and another Vs. IIIrd Additional District Judge, Dehradun and others*, .

7. In *V.K. Industries and Others Vs. Madhya Pradesh Electricity Board, Rampur, Jabalpur*, , the Hon"ble Supreme Court held that the money decree is not stayed ordinarily unconditionally and the Court may impose conditions to deposit cost or the decretal amount or part thereof or the party may be asked to furnish security while restoring a case, but such conditions should be reasonable and not harshly excessive.

8. Thus, while allowing an application for setting aside the ex parte decree, the Court is competent to impose the condition of pre-deposit of decretal amount in full or part or ask to furnish security or impose such other reasonable conditions. But no condition can be imposed for entertaining the application itself.

9. This view is fully supported by the judgment of the Madras High Court and Allahabad High Court respectively in *Narayanan Chettiar v. Chidambaram Chettiar* AIR 1940 Mad 585 and in *Kunj Behari Lal alias Kunji Lal Vs. Kashi Prasad*, . Such a condition can be imposed only after allowing an application under Order 9, Rule 13, CPC and not prior to that as a condition precedent to

entertain the same.

10. It is beyond our imagination as under what circumstances the condition can be imposed in consideration of the application to set aside the ex parte judgment and decree. More so, the entire amount may be asked to be deposited only when the bona fides of defendant is found to be doubtful. The Court does not have power to impose any such condition before entertaining into the merits of the application filed under Order 9, Rule 13, CPC for the simple reason that it cannot be condition precedent for entertaining an application under Order 9, Rule 13, CPC. If at the time of setting aside the ex parte decree the Court comes to the conclusion that the defendant had sufficient cause for being absent on the date the ex parte decree was passed the question of imposing such a condition would not arise while setting aside the ex parte decree. The Court can merely award costs to compensate either side for the inconvenience and loss caused to the said party. Therefore, the Court under no circumstance should impose a condition in onerous terms. (Vide Raj Kumar Soni Vs. Mohan Meakin Breweries Ltd.,).

11. A Division Bench of the Calcutta High Court in Life Insurance Corporation of India Vs. Anjan Kumar Arora and Others, dealing with the issue came to the conclusion "while allowing an application for restoration, the Court can certainly impose conditions and they are at times done. But such conditions must be reasonable and must have some justification having regard to the attending circumstances. Such condition cannot be imposed which is arbitrary."

12. In Valluru Kasturio Bai and Anr. v. Pamulapati Varalakshmi AIR 1983 NOC 176, the Andhra Pradesh High Court held that conditions so imposed should not only be reasonable but Court must record reasons for imposing such conditions for the reason that such a direction can be issued only in special circumstances depending upon the facts of a case.

13. Needless to say that there may be requirement under some special statute in making deposit of the entire decretal amount for entertaining such an application as provided u/s 17 of the Provisional Small Cause Courts Act, 1887. Where it is so provided under the statute, the Court has no option but to enforce such a statutory provision. (Vide Kedarnath Vs. Mohan Lal Kesarwari and Others, ; Ram Chandra (deceased L.Rs.) and others Vs. IXth Additional District Judge, Varanasi and others, and Suresh Chand Vs. VII-Additional District Judge, Muzaffarnagar and others,). Such a condition is required to be enforced mandatorily if it is so provided under a particular statute. It has so been provided therein that Small Cause Courts are conferred with jurisdiction to try summarily such specified category of cases which need to be and are capable of being disposed of by adopting summary procedure of litigation.

The instant case relates to employment and enforcement of service conditions including compensation etc. This is not being tried by the Small Cause Court.

14. Therefore, in view of the above, the law can be summarized that the Court is competent to impose a condition while allowing an application. Under Order 9,

Rule 13, CPC. Direction to deposit any part of the decretal amount or imposing any condition is not justified for entertaining an application under Order 9, Rule 13, CPC. Imposing such a condition would be tantamount to execution of a decree either partly or fully before considering the application under Order 9, Rule 13, CPC.

15. Thus, in view of the above, we set aside the order dated 5.4.2008 passed by the trial Court as well as the judgment/order of the learned Single Judge dated 7.8.2008 and request the learned trial Court dealing with the execution matter to take up the application filed under Order 9, Rule 13, CPC first and dispose it of in accordance with law. In case the learned trial Court comes to the conclusion that the application has merit only then, it may impose the condition etc. In case the application is rejected, learned trial Courts requested to consider the application u/s 47, CPC. Learned Counsel for the respondent undertakes that the defendant shall file objection to the said application within two weeks from today. The trial Court may take up the case immediately thereafter and conclude the hearing of all the applications expeditiously preferably within a period of six months from the date of filing of the certified copy of the judgment before the Court concerned.

The appeal is accordingly disposed of.

B.N. Mahapatra, J.

16. I agree.