
(1998) 02 AHC CK 0036
In the Allahabad High Court
Case No : C.M.W.P. No. 10836 of 1997

Devendra Kumar Mishra and another	APPELLANT
Vs	
District Judge and others	RESPONDENT

Date of Decision : 06-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 3, Order 30 Rule 6, Order 30 Rule 8, Order 30 Rule 8(1), Order 30 Rule 8(2)
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1998 All 340 : (1998) 2 AWC 1413

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : S.P. Srivastava, for the Appellant; S.C. and Pankaj Bhatia, for the Respondent

Judgement

S.R. Singh, J.—Impugned herein is the order dated 24.8.1996 passed by Judge, Small Cause Court-11. Kanpur Nagar. By order dated 24.8.1996, the learned Judge. Small Cause Court rejected Application No. 153C filed by the petitioner--Devendra Kumar under Order XXX, Rule 8 of the CPC at the final hearing stage after two witnesses of the plaintiff respondent had already been examined holding, with reference to the averments made in the written statement filed on behalf of the petitioner and co-defendant Yogendra Kumar Mishra, that the defendant-petitioner was a partner in the firm--Kumar Medical Stores. Ramaipur. Post Ramaipur. district Kanpur Nagar. It was also held that the application was filed with a view to protracting the disposal of the suit. Revision preferred against the said order came to be dismissed aide order dated 17.2.1997 holding that the application under Order XXX, Rule 8 of the CPC was not maintainable since it was not moved before the date of final hearing and also that there was no jurisdictional error in the impugned order. Aggrieved, the instant writ petition has been filed for quashing of the aforestated orders.

2. It is not disputed that the suit was filed for ejectment of the defendants from the shop situated in Shakuntala Market, Ramaipur, district Kanpur Nagar and for

recovery of Rs. 5,260 as arrears of rent from 1.3.1985 to 2.2.1988. According to the plaint allegation, the shop in question was let out on a monthly rent of Rs. 150 to Kumar Medical Stores through Shailendra Kumar Mishra. It was further alleged that Shailendra Kumar Mishra, Devendra Kumar Mishra and Yogendra Kumar Mishra (defendant Nos. 2, 3 and 4) were the partners of Kumar Medical Stores liable to pay rent Jointly as well as severally. Summons were issued to the defendants. It appears that written statement was filed jointly by Devendra Kumar and Yogendra Kumar (defendant Nos. 3 and 4). In para 2 of the said written statement. It was stated that the shop was opened by Indra Sen Mishra (the father of the petitioners) Jointly with the petitioners as well as defendant No. 2 out of the Joint family funds. Appearance of the petitioner in response to the summons Issued to them was. however, without any protest and the application under Order XXX, Rule 8. C.P.C.. as stated herein above, was moved at the final hearing stage after the evidence of plaintiff's witnesses was recorded in the case.

3. Learned counsel for the petitioners urged that the Courts below have misconstrued and misinterpreted the provisions contained in Order XXX. Rule 8. C.P.C. and erred in rejecting the application moved on behalf of the petitioner-- Devendra Kumar Mishra. The respondent's counsel refuted the submissions made by the learned counsel for the petitioner and urged that the application filed on behalf of the petitioner-Devendra Kumar Mishra under Order XXX. Rule 8, C.P.C. was rightly rejected by the Courts below and no interference was warranted by this Court under Article 226/227 of the Constitution.

4. Considering the submissions made across the Bar. I find no illegality much less an illegality apparent on the face of the record so as to warrant interference by this Court under Article 226/227 of the Constitution. In Gajendra Narain Singh Vs. Johri Mal Prahlad Rai, , it has been held by the Supreme Court that where a person is served with summons as a partner of the defendant firm and he files an appearance without protest, his appearance must be deemed to be on behalf of the firm, and unless the Court permits him to withdraw the appearance initially filed, it continues to be an appearance on behalf of the firm. It may be pertinently observed here that according to Rule 5 of Order XXX of the Code where a summons is issued to a firm and is served in the manner provided by Rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having control or management of the partnership business, or in both character and. In default of such notice, the person served shall be deemed to be served as a partner and according to Rule 6 where persons are sued as partner in the name of their firm, they shall appear individually in their own names but all subsequent proceedings shall, nevertheless, continue in the name of the firm. Rule 8 (1) of Order XXX of the Code, however, provides that any person served with summons as a partner under Rule 3 may enter an appearance under protest. denying that he was a partner at any material time and it is only on such appearance being made that sub-rule (2) of Rule 8 of the Code enables the

plaintiff or the person entering the appearance under protest to apply to the Court, at any time before the date fixed for hearing and final disposal of the suit, for determining whether that person was a partner of the firm and liable as such. The Court is then required to go into the question and determine whether such person was a partner at the material time. Court's finding that such person was a partner at the material time would, however, not preclude such person from filing defence denying liability of the firm in respect of the claim against the defendant as visualised by sub-rule (3) and in case the Court holds that such person was not a partner of the firm and was not liable as such, the plaintiff would not be precluded from otherwise serving a summons on the firm and proceeding with the suit : but in that event, the plaintiff shall be precluded from alleging the liability of that person as a partner of the firm in execution of any decree that may be passed against the firm.

5. In the instant case, there is nothing on the record to show that the petitioners had, on summons being served on them, put in appearance under protest so as to entitle them to avail of the provisions of Rule 8 of Order XXX of the Code of Civil Procedure. Concededly, the application was filed after testimonies of two witnesses of the plaintiff had been recorded in the case. Impugned orders, in my opinion, do not suffer from any illegality and the writ petition deserves to be dismissed.

6. In the result, the writ petition fails and is dismissed. The parties shall bear their own costs. The interim order granted by the Court has already expired. No order, therefore, needs to be passed in that regard.