

(2013) 11 AHC CK 0074

In the Allahabad High Court

Case No : Writ Petition No. 5839 (M/s.) of 2008

Guddu alias Zainul Abdin and Others

APPELLANT

Vs

District Judge, Shrawasti and Others

RESPONDENT

Date of Decision : 21-11-2013

Acts Referred:

Citation : (2014) 102 ALR 86 : (2014) 122 RD 238

Hon'ble Judges : Narayan Shukla, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shri Narayan Shukla, J.—Heard Sri P.K. Mishra, learned Counsel for the petitioners as well as Sri Shravan Kumar Pandey, learned Counsel for the opposite parties. The petitioners have assailed the order dated 19.1.2007, passed by the Civil Judge (Senior Division), Shrawasti, rejecting the petitioners' application No. 22C moved under Order IX, Rule 7 read with section 151 C.P.C. as also the order dated 18th October, 2008, passed by the District Judge, Shrawasti in Civil Revision No. 4 of 2007 upholding the order passed by the Trial Court.

2. Learned Counsel for the petitioners submits that the petitioners are the defendant in the suit. The Court proceeded ex parte with the suit against the defendants assuming the notice served upon the defendant on account of his denial to receive it. The petitioner moved an application on 4.12.2006 for recall of the order as well as to provide him opportunity of hearing at the stage when the suit was finally heard on 28.11.2006 and reserved for judgment on 5.12.2006.

3. Learned Counsel for the petitioners submits that no notice of the suit was served upon the defendant. It was managed by the respondent/plaintiff to make an endorsement on the notice that the petitioner/defendant refused to accept it and as soon as he came to know about the proceeding of the suit, he moved an

application to provide him opportunity of hearing.

4. The learned Trial Court rejected the petitioner's application on the ground that the petitioner moved the application after conclusion of final argument in the case, which has been upheld by the Revisional Court on the ground that it was not permissible for the petitioner to move such an application after final argument of the case.

5. In order to determine the controversy, it is worth to mention the provisions of Order IX, Rule 7 and 13 C.P.C. which are extracted below:

7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous nonappearance.-- Where the Court has adjourned the hearing of the suit ex parte and the defendant, at or before such hearing, appears and assigns good cause for his previous nonappearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

13. Setting aside decree ex parte against defendants.--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:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the services of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

Explanation.--Where there has been an appeal against a decree passed ex parte under this Rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall be under this rule for setting aside the ex parte decree.

6. Learned Counsel for the petitioner also cited a case decided by this Court, i.e., Deepak Mitra Vs. Indian Press (P.) Ltd. and Others, in which also similarly the application under Order IX, Rule 7, C.P.C. was moved after hearing the final argument but before pronouncement of the judgment. This Court held that mere mention of the fact that the case was fixed for delivery of judgment becomes quite meaningless for the purposes of an application under Order IX, Rule 7, C.P.C. In such circumstances it would be justifiable and proper that the Trial Court, instead of now delivering the ex parte judgment in the case, should afford

the opportunity of hearing to the applicant.

7. It is worth to mention that I had occasion to go through some judgments which are much relevant to determine the controversy.

8. In *Deepak Mitra Vs. Indian Press (P.) Ltd. and Others*, (From Allahabad) 13th December, 1963, Hon''ble the Supreme Court has discussed the scope of Order IX, Rule 7 of the CPC as well as Order IX, Rule 13, C.P.C. and held that after the stage contemplated by the Order IX, Rule 7 is passed, the next stage is only passing of a decree which on the terms of Order IX, Rule 6 the Court is competent to pass and then follow the remedy of the party to have that decree set aside by application under Order IX, Rule 13, C.P.C. In this matter the defendant appeared after conclusion of the hearing but before pronouncement of the judgment. Therefore, on the basis of the aforesaid proposition, the Hon''ble Supreme Court held that learned Civil Judge was not competent to entertain the application purporting to be Under Order IX, Rule 7, C.P.C. and consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petitioner under Order IX, Rule 13, C.P.C.

9. Hon''ble Supreme Court has considered the judgment of *Arjun Singh (supra)* in its subsequent judgment, i.e., *Bhanu Kumar Jain Vs. Archana Kumar and Another*, . Relevant paragraph 16 is reproduced below:

Order IX, Rule 7 of the Code postulates an application for allowing a defendant to be heard in answer to the suit when an order posting a suit for ex parte hearing was passed, only in the event, the suit had not been heard; as in a case where hearing of the suit was complete and the Court had adjourned a suit for pronouncing the judgment, an application under Order IX, Rule 7 would not be maintainable (See *Arjun Singh Vs. Mohindra Kumar and Others*,). The purpose and object of Order IX, Rule 7 of the Code has been explained by this Court in *Vijay Kumar Madan and Others Vs. R.N. Gupta Technical Education Society and Others*, and *Ramesh Chand Ardawatiya Vs. Anil Panjwani*, .

10. Order IX, Rule 13, C.P.C. speaks that in which cases the decree is passed ex parte against the 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. In the case on hand, admittedly/the ex parte hearing was completed on 28.11.2006 and next date was fixed for pronouncement of judgment on 5.12.2006. Meanwhile, the petitioner moved an application under Order IX, Rule 7, C.P.C. on 4.12.2006 whereas on the basis of the proposition laid down by Hon''ble the Supreme Court in the case of *Arjun Singh (supra)* and *Bhanu Kumar Jain (supra)*, I am of the view that the stage of moving the application under Order IX, Rule 7, C.P.C. by the petitioner had been over and the petitioner could

only file an application under Order IX, Rule 13, C.P.C after ex parte judgment. The grounds which were taken by the petitioner for setting aside ex parte proceeding of the case are very much available to him under Order IX, Rule 13, C.P.C.

Therefore, I do not find errors in the orders impugned.

In the result, the writ petition stands dismissed.