

(1991) 02 OHC CK 0028

In the Orissa High Court

Case No : Civil Revision No. 774 of 1990

Jagannath Mohapatra and Others

APPELLANT

Vs

Banarasi Debi and Others

RESPONDENT

Date of Decision : 11-02-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 1, Order 8 Rule 10, Order 9 Rule 6

Citation : (2002) 1 OLR 196

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : S. Mishra, S. Mantry, R.C. Rath and A.K. Misra, for the Appellant; A.K. Sahoo, S.K. Parida and S. Sahoo for Opp. party No. 1 and R.K. Mohapatra, R.c. Das, B. routray, R.K. Dash, U.K. Samal, N.K. Sahoo and S.K. Nayak for Opp. party Nos. 2 to 5, for the Respondent

Judgement

A. Pasayat, J.—This is an application questioning the correctness of the order passed by the learned Sub ordinate Judge. Puri, holding that the petitioner's application to set aside the order setting them ex parte and for acceptance of the written statement filed by them was not maintainable.

2. A brief advertance to the factual antecedents is necessary to put the controversy in its proper perspective.

The petitioners are defendants 1 to 3 in a suit filed by present opposite party No. 1. The present opposite party Nos. 2 to 5 were defendants 4 to 7 in the suit. The suit was filed on 2.1.1990 and the present petitioners were held to have refused the summons offered to them and on 25.1.1990 the matter was adjourned to 30.1.1990 for proving service of notice. On 3.2.1990. the petitioners 1 and 2 appeared and prayed for time to file written statement. The matter was adjourned from time to time to enable the plaintiff to prove service as against defendant No. 3. the present petitioner No. 3. On 19.6.1990 the petitioners 1 and 2 filed an application for time to file written statement. Time was granted till 28.7.1990 as a last chance, and the plaintiff was required to prove the service on

defendant No. 3. On 28.7.1990 time was again asked for to file the written statement which was granted till 17.8.1990 indicating the same to be last chance. The plaintiff was also required to prove service as against defendants 4 to 7. On 17.8.1990, as the order-sheet reveals, the petitioners did not file their written statement and did not take steps, and were set ex parte. Since service against defendants 4 to 7 was not proved, the matter was adjourned to 27.8.1990 when the plaintiff was to prove service against defendants 4 to 7. On 21.8.1990 a petition to advance the date was filed by the plaintiff with a further petition to accept the service affidavit filed along with the petition. The learned Sub ordinate Judge considered the petitions, and held the service against defendants 4 to 7 to be sufficient. He further held that defendants 4 to 7 were absent on repeated calls and hence they were set ex parte. The matter was further directed to be put up on the date fixed for ex parte evidence by way of affidavit evidence. On 22.8.1990 another petition was filed by the plaintiff to advance the date and to take up the case on that day. It appears that the plaintiff filed affidavits and prayed for acceptance thereof as evidence. The matter was directed to be put up on the date fixed for their consideration. On 27.8.1990 the plaintiff filed hazira. The matter was posted to 6.9.1990 for ex parte judgment on the ground that all the defendants had been set aside, and the plaintiff had filed his ex parte evidence by way of affidavit which was accepted. On 29.8.1990. the petitioners filed an application to advance the date and to set aside the order setting them ex parte. The matter was directed to be put up on the date fixed. On 31.8.1990 a, further petition supported by affidavit was filed to recall the orders dated 17.8.1990, 21.8.1990, 22.8.1990 and 27.8.1990 and to accept the written statement.

The matter was directed to be placed on the date fixed, after service of the petition on the plaintiff. On 6.9.1990, the matter was posted to 13.9.1990 for hearing of the petitions filed to recall the previous orders setting them ex parte. On 13.9.1990 hearing on the said petition was concluded, and the case was posted to 14.9.1990 for delivery of orders. By the impugned order dated 14.9.1990 the learned Subordinate Judge held that the petition was not maintainable and therefore, was rejected.

3. The synoptical resumption of orders as passed shows cavalier fashion in which the proceeding was conducted. From the records I find that defendant No. 3 had already entered appearance on 3.2.1990; yet orders were passed from time to time to prove service against the said defendant, for example, orders passed on 3.5.1990 and 19.6.1990. Defendants 4 to 7 were directed to be set ex parte on 21.8.1990. This was not the adjourned date as appears from the order dated 17.8.1990. The matter was directed to be called on 27.8.1990 when the plaintiff was to prove service against the said defendants. The matter was taken up on 21.8.1990 on the basis of an advance petition praying to accept the service affidavit. It was not proper on the part of the learned Subordinate Judge to pass any order on that day so far as the defendants 4 to 7 are concerned. They were not required to be present on that day and therefore, the observation that they

were absent on repeated calls does not stand to reason. Further, the direction by the learned Subordinate Judge to put up the matter on the date fixed for ex parte evidence by way of affidavit is also suffers from serious infirmity. Affidavit is not evidence in terms of Section 3 of the Evidence Act. The manner of adducing evidence is provided under Order 18 of the Code of Civil Procedure, 1908 (in short the Code'), which deals with the hearing of the suit and examination of witness. Order 19 relates to affidavit and the language of Order 19, Rule 1 shows that the adjudication of the rights in civil suits cannot be based on affidavits alone. All that the rule permits is that in particular fact or facts may be proved by affidavit or that the affidavit of any person may be read at the hearing and that too on such a condition as the Court thinks reasonable after the Court has permitted the same by an order passed for sufficient reasons. This rule, in my opinion, is applicable to evidence of a formal character and has to be sparingly used, for example, in cases where it is difficult or highly inconvenient to insist upon the personal attendance of witness. My view gains strength from the observations of the Supreme Court in *Sudha Devi Vs. M.P. Narayanan and Others*, and *Smt. Anjula v. Milan Kumar* : AIR 1981 All 173. The order dated 21.8.1990 is significantly deficient in this regard. Further, refusal to vary orders setting the defendants 1 to 3 ex parte has been made on the ground that a petition under Order 9, Rule 7, of the Code is not maintainable when the hearing is concluded. The learned Subordinate Judge has relied upon a decision of this Court in *Municipal Council, Cuttack v. Pramod Kishore Das* : CLR (1968) 34 1180. For its view, this Court drew sustenance from decision of the apex Court in *Arjun Singh Vs. Mohindra Kumar and Others*, . It was decided by the Supreme Court that where the Court adjourns the suit for the purpose of pronouncing judgment, there is no adjournment of "hearing" of the suit and therefore. Order 9, Rule 7 has no application. The ratio of the decision of this Court has no application to the facts of the present case. In the present case, no date for hearing of the suit was fixed by the Court. In the absence of that, the suit could not have been posted for judgment on the basis of the affidavits which were treated to be evidence. I find it difficult to accept the contentions raised on behalf of the opposite parties that the petition filed by the present petitioners was under Order 9, Rule 7 of the Code, and therefore, the impugned order is justified. On a bare perusal of the petition concerned, I find that the same was styled as one under Order 9, Rule 7 read with Section 151. It is trite law that it is the substance not the form which is material.

4. As indicated above, no date of hearing was fixed and that the learned Subordinate Judge indicated that the matter was posted for judgment appears to be a fortuitous circumstance. The procedure to be adopted when plaintiff alone appears is laid down in Order 9, Rule 6. Fixing a date of hearing is a statutory mandate. It is submitted on behalf of the opposite parties that once the present petitioners were set ex parte and had not filed written statement, it was open to the Court to pronounce the judgment on the date of their failure to file the written statement within the time permitted. Reference in support of this stand

has been made to the provisions of Order 8, Rule 10 of the Code. Undoubtedly the provision in question authorises a Court to pronounce judgment against a person who has not filed written statement required under Order 8, Rules 1 and 9. It also authorises the Court to make such order as it thinks fit. Here the Court did not pronounce the judgment on the concerned date, and on the contrary desired filing of affidavits. Therefore, this is not a case which is covered by the circumstances indicated under Order 8, Rule 10. The decision in Municipal Council's case (*supra*) was one where the regular date of hearing had been fixed, and thereafter the matter had been posted for judgment. There was no procedural infirmity involved. A decision is an authority for what is decided on the facts of a particular case. Circumstances vary, situations vary and a decision is not a chemical formula to have universal application. Each case is decided on its own facts and circumstances, and no decision on fact can be a precedent to conclusions on facts. The action of the learned Subordinate Judge in asking the plaintiff to file affidavits without recording reasons to which aspect I have referred to in some details above, and posting the suit for judgment without fixing a date of hearing had no sanctity in law. As appears from the orders dated 17.8. 1990, 21.8.1990 and 22.8.1990, the matter was posted to 27.8.1990 for proof of service and/or for submission of affidavits, and not for hearing. A defendant though set *ex parte* is not disentitled from participating in the proceeding. Therefore, posting the matter for judgment without fixing the date of hearing is illicit.

5. I, therefore, set aside the order in question and the order refusing to accept the prayer for setting aside the *ex parte* order against the present petitioners, who have filed the written statement and the draft issues along with the application for setting aside the *ex parte* order. The written statement and the draft issues be accepted.

The Civil Revision is accordingly disposed of.