

(1968) 07 OHC CK 0010

In the Orissa High Court

Case No : Civil Revision No. 285 of 1967

K. Venkata Suryanarayana Patnaik

APPELLANT

Vs

Royal Chit Fund and Another

RESPONDENT

Date of Decision : 11-07-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 1, Order 10 Rule 2, Order 10 Rule 4(2), Order 17 Rule 3, Order 9 Rule 9

Citation : AIR 1968 Ori 295 : (1968) 34 CLT 1389

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : N.V. Ramdas and N.B.K. Murty, for the Appellant; R.C. Misra, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, J.—In T.M.S. No. 6 of 1967 the learned Subordinate Judge passed the following order on 29-4-1967:--

"Defendant 2 files petition for time as per the reasons stated therein. Petition is allowed. To 21-6-1967 for settlement of issues on examination of parties. Written statement in the meantime."

On 21-6-1967 defendant No. 2 filed written statement and filed hazira for his examination under Order 10, Rules 1 and 2, C.P.C No steps were taken by the plaintiff that day. The Court accordingly dismissed the suit for default. On the very day the plaintiff's advocate filed an application for restoration of the suit, a case was registered under Order 9, Rule 9, C.P.C. There was no challenge regarding the existence of sufficient cause for the plaintiff's absence on 21-6-1967. The M.J.C. was contested on the question of maintainability of the application for restoration of the suit under Order 9, Rule 9, C.P.C. After having heard the matter fully, the learned Subordinate Judge restored the suit. Against this order the civil revision has been filed.

2. Mr. Ramdas raises two contentions:

(a) The suit having been dismissed under Order 10, Rule 4(2), C.P.C., Order 9 has no application;

(b) The order dated 21-6-1967 was passed under Order 17, Rule 3, C.P.C., and as such, Order 9 has no application to it.

Both the contentions require careful examination.

3. Order 10, C.P.C., relates to examination of parties by the Court. Rule 1 is for the ascertainment whether allegations in the pleadings are admitted or denied. Rule 2 prescribes oral examination of the party or companion of the party. Rule 3 lays down that the substance of the examination shall be reduced to writing by the Judge and shall form part of the record. Rule 4 (2) enacts that if such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Mr. Ramdas contends that 21-6-1967 was fixed for examination of the parties. The plaintiff absented himself without lawful excuse and as such the Court pronounced the judgment that the suit was dismissed for default. If his contention that Order 9 has no application to an order under Order 10, Rule 4 (2) is sustainable, it must necessarily be held that the dismissal of the suit on account of non-appearance of the plaintiff for non-examination (examination r) under Order 10 stands on a higher footing than the dismissal of the suit of the plaintiff when the suit is dismissed for default due to absence of the plaintiff and his witness on the date of trial. There is no justification or any provision in the Code for such a construction. Absence of the plaintiff on the date fixed for examination under Order 10, C.P.C., entails dismissal of the suit in the same manner as dismissal of the suit on any other ground due to failure of the plaintiff to be present at the trial.

Mr. Ramdas placed reliance on AIR 1921 Mad 417, K. P. Chengaru Chandu v. P. Chengara Raman Nayar and Sewaram Udaji Vs. Munna Moti and Another, , in support of his contention that Order 9 has no application to the dismissal of the suit under Order 10, Rule 4 (2), C.P.C. Both these decisions are distinguishable. In these cases the plaintiff absented, but his advocate was present in Court, and did not endorse non-instruction. Appearance of the advocate for the party may reasonably be construed as appearance of the plaintiff. In such a case it cannot be stated that the suit was dismissed for default of the plaintiff. Even if such an expression is inadvertently used by the Court, it merely means that the suit was dismissed in presence of both the parties. Obviously, to such a case Order 9 has no application. My view is fully supported by Bhatiley Chunni Lal Vs. Chakerpan and Others, ; Nandan Sahu Vs. Hari Shankar, and AIR 1918 Oudh 429 Sadeshwar Narain v. Qadir Bakhsh. The learned Subordinate Judge rightly held that Order 9 has application for setting aside the order dated 21-6-1967.

4. Mr. Ramdas next contends that Order 17, Rule 3, C.P.C., applies to this case and this case is not governed under Order 17, Rule 2, C.P.C. Order 17, Rule 3, C.P.C., runs thus:

"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

The key to this rule lies in the expression "to whom time has been granted". This expression qualifies the three clauses mentioned in the rule. A bare reference to the order passed on 21-6-1967 would indicate that no time had been granted to the plaintiff for any purpose on that date. The plaintiff was merely directed to appear for examination. Order 17, Rule 3, C.P.C., in terms does not apply. This contention has no force.

5. In the result, the civil revision fails and is dismissed with costs. Hearing fee of Rs. 50.