
(1988) 12 MP CK 0006
In the Madhya Pradesh High Court
Case No : M.P. No. 175 of 1988

Kailash Kumar and Another	Vs	APPELLANT
Seventh Additional Judge to the Court of Dist. Judge, Indore and Others		RESPONDENT

Date of Decision : 01-12-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 7
Constitution of India, 1950 — Article 227

Citation : AIR 1989 MP 237 : (1989) MPLJ 48

Hon'ble Judges : S.K. Dubey, J;A.G. Qureshi, J

Bench : Division Bench

Advocate : R.G. Waghmare and R. Saboo, for the Appellant; P.M. Bapna, for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

The petitioners, who are tenants, by this petition under Articles 226/227 of the Constitution of India have prayed for quashing of order dated 8-2-1988 passed by the 8th Additional Judge to the Court of the District Judge, Indore, in Civil Misc. Appeal No. 16/87. Whereby the Appellate Court refused to set aside the ex parte decree dated 23-4-1987 in Civil Suit No. 9-A/87, passed by the 7th Civil Judge, Class II, Indore.

2-3. Brief facts leading to this petition are that the respondent No. 3 filed a suit for ejectment from the suit premises. The case was fixed for filing written statement on 8-4-1987, but the petitioners did not appear hence, the Court ordered to proceed ex parte against the petitioners defendants. On 9-4-87, the petitioners' counsel appeared in the Court Where he came to know that the case has already been ordered to proceed ex parte against the defendants. The petitioners through their counsel filed an application under Order 9, Rule 7 of the CPC on 9-4-87 pleading the cause for non-appearance on 8-4-87, that by clerical

mistake and oversight, the date of the case in the diary of the counsel was noted as 9-4-87 instead of 8-4-87. This application was fixed for hearing on 21-4-87. The defendants' counsel did not appear as he was busy in another Court, hence the Court dismissed the application under Order 9, Rule 7, CPC, holding that the cause shown in the application is not a good cause for setting aside the ex parte order. Thereafter, the Court fixed the case for recording ex parte evidence on 23-4-87. After recording of the evidence and hearing of arguments, the case was reserved for judgment on 24-4-87. On 24-4-87 an ex parte judgment and decree was passed against the petitioners. The petitioners filed an application on 2-5-1987 under Order 9, Rule 13, CPC for setting aside the ex parte decree, which was contested. The trial Court after holding an enquiry, vide order Annexure C, dismissed the application, holding that even if there was a sufficient cause for non-appearance on 8-4-87, but no sufficient cause has been shown and proved for non-appearance on 21-4-87. Against this order, the petitioners preferred an appeal under Order 43, Rule 1(d) of the C.P.C. The Appellate Court vide its order Annexure 1, dismissed the appeal, holding that though there was a sufficient cause to defendants for non-appearance on 8-4-87, when the trial Court ordered to proceed ex parte in the absence of the defendants. But as the defendants did not appear on 21-4-87, when the application under Order 9, R, 7, C.P.C was fixed for hearing nor the defendants appeared on 23-4-87, which was the date of hearing nor sufficient cause for absence of these two dates has been pleaded and proved for the absence on 21-4-87 and 23-4-87, therefore, the Appellate Court though held that the order of the trial Court in rejecting the application under Order 9, Rule 13, C.P.C is cryptic, affirmed the order of the trial Court of rejecting the application under Order 9, Rule 13, C.P.C.

Shri R. G. Waghmare, Senior Advocate with Shri R. Saboo Advocate, contended that the Courts below misdirected themselves and exceeded their authority in not setting aside the ex parte decree, when the two Courts found that there was sufficient cause for non-appearance on 8-4-87, which was the date for filing of the written statement and the Court ordered to proceed ex pane first. This date was wrongly noted in the diary as 9-4-87 instead of 8-4-87. Shri Waghmare submitted that the petitioners were not bound to plead and prove the sufficient cause for their non-appearance on 21-4-87 and 23-4-87, when their application under Order 9, Rule 7, C.P.C. was fixed for hearing and was dismissed for their absence, holding that no good cause has been made out. As the petitioners wanted to be relegated to the position as on the dale of 8-4-87 and not thereafter because in the absence of their written statement, though they were entitled to participate in the proceedings, in that case the petitioners would have accepted all that has gone before and be content to proceed from the stage at which the petitioners would have come in. The learned counsel placed reliance on the Single Bench decisions of this Court in *Margaret v. Bhopal Construction Co. Ltd.* 1960 MPLJ 158 and AIR 1948 362 (Nagpur) .

Shri P. M. Bapna, learned counsel appearing for the respondent No. 3 the plaintiff, supported the orders of the Courts below and contended that the

findings on sufficient cause have been arrived at after appreciation of evidence and material on record, hence such findings cannot be interfered in the writ jurisdiction under Articles 226/227 of the Constitution of India. Learned counsel placed reliance on a Division Bench decision of this Court in *Kalian Prasad v. Amarsingh* (1978) 1 MPWN 163 and the decisions of the Apex Court in *Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala*, ; *Venkatlal G. Pittie and Another Vs. Bright Bros. (Pvt.) Ltd.*, and *Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram*, .

After hearing the learned counsel we are of the opinion, that this petition deserves to be allowed and the impugned order (Annexure-C) deserves to be quashed. The law is well settled that under Article 227 of the Constitution of India, the powers are not appellate and the findings of fact arrived at after appreciation of evidence and record, cannot be interfered in the supervisory jurisdiction, even if a different view is possible or even if the findings are erroneous either on facts or on law unless the Tribunals or the Subordinate Courts have exceeded their limits of jurisdiction. See *Mohd. Yunus Vs. Mohd. Mustaqim and Others*, . But, in the present case the Courts have exceeded their jurisdiction while deciding the application under Order 9, Rule 13, C.P.C. and both the courts considered that the defendants were bound to plead and prove the sufficient cause for their non-appearance on 21-4-87 and 23-4-87, which were the dates of hearing. In our opinion and in an application under Order 9, Rule 13, CP.C, the sufficient cause for non-appearance is to be seen on the date when the ex parte order was passed and the case proceeded ex parte against the defendants i.e. in the present case on 8-4-87 and not on 21-4-87 and 23-4-87. As the defendants-petitioners wanted to be relegated to the position, which they occupied on 8-4-87 and wanted to set the hands of the clock backwards. There is no dispute for the proposition that when once an ex parte order is passed, the defendants are entitled to take part in the further proceedings after accepting the proceedings, which have taken place up to the stage of the passing of the order ex parte against them. See the cases of the Apex Court in *Sangram Singh Vs. Election Tribunal, Kotah*, *Bhurey Lal Baya*, and *Om Prakash v. Amarjit Singh*, (1988) 2 MPWN 113. The application of the petitioners under Order 9, Rule 13, CP.C. was to set aside the ex parte decree. In an application under Order 9, Rule 13, CP.C a defendant has to show the sufficient cause for his non-appearance on the date when the ex parte proceedings were first taken, if he wants to be relegated to the position its existing when the ex parte order was passed entitling the party to file its written statement, lead evidence etc. It is not enough to show the sufficient cause on the date when the ex parte decree was passed. See the case of *Margaret v. Bhopal Construction Co.* (1960) MPLJ (Notes) 158 (Supra). Moreover, rejection or dismissal of an application under Order 9, Rule 7, C.P.C. is no bar to the hearing of an application under Order 9, Rule 13, C.P.C. as no finality is imparted to such orders as the court refuses to permit the defendant to "set the clock back". An order passed on an application under Order 9, Rule 7, C.P.C. does not amount to res judicata because it does

not put an end to the litigation nor does it involve the determination of any issue in controversy in the suit. See *Arjun Singh Vs. Mohindra Kumar and Others*, and AIR 1948 362 (Nagpur) . Therefore, after an enquiry on an application under Order 9, Rule 13, C.P.C, if the court finds that there was sufficient cause for non-appearance on the date when the case first proceeded ex parte, the ex parte decree can be still set aside notwithstanding the fact that the application under Order 9, Rule 7, C.P.C. has been dismissed and the whole proceedings can be reopened so as to enable the petitioners to file the written statement to lead evidence in support of the case and to cross-examine the plaintiffs witnesses. Hence, in our opinion, the courts clearly erred and exceeded in their limits of jurisdiction in not setting aside the ex parte decree on the ground that the petitioners have not shown the sufficient cause for their non-appearance on 21-4-87, when their application under Order 9, Rule 7, C.P.C was fixed for hearing, and thereafter on 23-4-87 when the case was fixed for ex parte hearing. The courts did not act within the limits of their authority and exceeded their jurisdiction by holding that the petitioners have not shown and proved sufficient cause of subsequent dates. The conduct of a party on earlier dates prior to passing of ex parte order and thereafter is not relevant unless some misconduct is attached to a party, the Appellate Court having held that there was sufficient cause for the non-appearance of the petitioners or their counsel as because of the clerical mistake or oversight, their counsel wrongly noted the date in the diary as 9-4-87 instead of 8-4-87 for filing the written statement, and no inaction, mala fides or misconduct was found by any of the Courts against the petitioners. In such circumstances, when a sufficient cause for non-appearance was made out when the Court first proceeded ex parte, the Appellate Court ought to have set aside the ex parte decree so as to place the petitioners at the stage of filing of the written statement and the petitioners ought to have been relegated to the position, which they occupied on 8-4-87.

In the result, the order of the Appellate Court is quashed and the case is remitted back to the Appellate Court for disposing of the appeal in accordance with law after giving an opportunity of further hearing to the parties, if they so desire. The parties shall appear before the 7th Additional Judge to the Court of the District Judge, Indore on 12-12-88. The Appellate Court shall dispose of the appeal within one month from the date of the appearance. No fresh notices shall be issued by the Appellate Court to the parties. No order as to costs.