
(1997) 01 P&H CK 0184
In the Punjab And Haryana At Chandigarh
Case No : C.R. No. 381 of 1997

Kiddy Palace and Others

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 28-01-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 9 Rule 7

Citation : (1997) 2 CivCC 311 : (1997) 116 PLR 574 : (1997) 2 RCR(Civil) 362

Hon'ble Judges : B. Rai, J

Bench : Single Bench

Judgement

B. Rai, J.—M/s Kiddy Palace and other defendants have filed this Revision Petition challenging the order, dated November 14, 1996 passed by the Civil Judge, Junior, Division, Amritsar, whereby their application under Order IX, Rule 7, Code of Civil Procedure, was dismissed.

2. Facts are that the State Bank of India plaintiff respondent filed a suit for recovery of 78,468/- only inclusive of interest recoverable up to 31.1.1996 from the defendants with a further prayer to pass a preliminary decree under Order XXXIV, Rule 4, Code of Civil Procedure, with regard to the property mortgaged as detailed in the body of the plaint. On being served with summons the defendant petitioners filed an application for production of relevant documents to the plaintiffs to enable the defendants to prepare the written statement to be filed. The application was disposed of by the learned Civil Judge on 14.5.1996 and the case was adjourned to 27.5.1996, for filing the written statement. On the adjourned date, the written statement could not be filed and the case was adjourned to 10.6.1996 subject to payment of Rs. 25/- as costs. On 10.6.1996, the Presiding Officer having been transferred, was not there and the case was adjourned to July 16, 1996. The previous costs imposed were paid. On July 16, 1996 the case was transferred to another Court which further adjourned the case to August 9, 1996 for filing the written statement subject to payment of costs of Rs. 35/-. On June 9, 1996, though written statement was ready but it could not

be filed as defendants 3 and 4 were out of station because of death in their family and, as such, could not sign the written statement. The Court passed an order striking off the defence for not filing the written statement and the case was adjourned to September 14, 1996 for ex-parte evidence of the plaintiff. The costs of Rs. 35/- were paid. An application under Order IX, Rule 7, Code of Civil Procedure, was filed by the defendants for setting aside the ex-parte proceedings and for seeking permission to file written statement, on the ground that the written statement could not be filed because defendants 3 and 4 were not available being out of station on account of death in their family and, as such, could not sign the written statement. Para 4 of the said application, as reproduced in the Grounds of Revision, reads as under :-

"4. That on 9.8.1996, the written statement could not be filed for getting the same signed and verified from the parties i.e. the defendants Nos. 3 and 4 were out of station in connection with death of the near relative. The cost was demanded and paid without reservation of right and as such there does not exist any ground or cause of action for striking off the defence of the defendants/applicants. The written statement" could not be filed for the reasons stated above and the reasons were beyond the control of the defendants and as such it is a fit case in which the order for striking off the defence of the defendants may be waived out and an opportunity be given to the defendants to put in written statement in this case and necessary orders in this regard may kindly be passed and this application may kindly be accepted in the interest of justice, equity and fair play."

3. The learned Civil Judge took note of the absence of defendants 3 and 4 being out of station but cause for that absence was not taken note of. Consequently, the application was dismissed.

4. I have heard the learned counsel for the petitioners and have gone through the impugned order. It was argued by the learned counsel for the petitioners that no doubt the written statement could not be filed on May 27, 1996 and the case was adjourned to June 10, 1996 for filing written statement subject to payment of Rs. 25/- as costs. On June 10, 1996 the Presiding Officer had been transferred. As such, the written statement could not be filed. The costs of Rs. 25/-, however, were paid and the case was again adjourned to July 16, 1996 subject to payment of Rs. 35/- as costs. The costs of Rs. 35/- were paid. However, written statement could not be filed because of the absence of defendants 3 and 4 on account of the death in their family and they were not available for signing the written statement. According to the learned counsel, it was a genuine and reasonable ground for not filing the written statement. That aspect, however, was not considered by the learned Civil Judge, Junior Division, Amritsar, and the defence of the defendants was struck off; and the case was adjourned to September 14, 1996 for ex-parte evidence of the plaintiff. On the same day, i.e., on September 14, 1996, an application under Order IX, Rule 7 of the Code stating therein that the written statement could not be filed on account

of the fact that some death had occurred in the family of defendants 3 and 4 was made by the defendants. They had gone out of station and were not available to sign the written statement. That was a good cause to set aside the ex-parte proceedings and to permit the defendants to file the written statement. According to the learned counsel, this aspect was not considered by the learned Civil Judge, Junior Division, Amritsar and refused to set aside the ex-parte proceedings and to allow the defendants to file the written statement, whereby the defendants were deprived of the opportunity to contest the suit filed by the plaintiff - respondent and, as such, it has resulted into grave injustice to the defendant petitioners. Rule 7 of Order-IX, Code of Civil Procedure, reads as under :

"7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance. - 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 non-appearance, 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."

A plain reading of this provision would show that it is not penal in nature. It vests the Court with discretion to afford an opportunity to the defendant to place his case and evidence before the Court to have the cause effectively adjudicated upon. In case the defendant is proceeded ex-parte on account of non-appearance before the Court and subsequently if at or before the adjourned date of hearing defendant appears and assigns good cause for his non-appearance or for not filing the written statement, the Court may direct him to join the proceedings and to answer the claim of the plaintiff by filing the written statement on terms set out by the Court as to costs or otherwise, especially when no limitation for filing the written statement has been prescribed. In the instant case, the defendants did not file the written statement on the appointed date. Even on subsequent two adjourned dates, the written statement was not filed despite the fact that adjournments were granted for the purpose subject to the payment of costs. It is pertinent to note that the defendants did not make default in payment of costs and on the same day, i.e. August 9, 1996 when the defence was struck off, an application under Order IX, Rule 7 of the Code was filed showing cause for not filing the written statement which when viewed in the light of the provisions of Rule 7 of Order IX of the Code, was a good cause. Provisions relating to striking off defence for not filing the written statement are contained in Rule 10 of Order VIII, Code of Civil Procedure, which came up for consideration in Sada Ram Vs. Delhi Development Authority, . The learned Judge observed that where no period of limitation is prescribed by law, the discretion of the Court is wide enough to allow a defendant to file a written statement, subject to adjustment of equities by payment of costs etc., even if the defendant is negligent in not filing the written statement in time.

5. A reference may also be made to a decision in Ramesh Chandra Bhattacharyya

Vs. Corporation of Calcutta and Others, wherein Order VIII, Rule 10, Code of Civil Procedure, came to be considered. It was held as under:-

"On perusing the R. 10 of Order 8 carefully, I have no doubt in my mind that R. 10 gives discretion to the Trial Court to permit the defendant to file written statement at any stage prior to the pronouncing of judgment. Under R. 10 the court can either pronounce judgment against the defendant for his failure to file written statement or pass any order as it thinks fit. When such a discretion is given the court can very well exercise its discretion even at the stage when the ex-parte hearing was concluded and the court had fixed a date for delivery of judgment."

6. In the instant case, the cause shown by the defendants for not filing the written statement was just, proper and good cause, where the learned Civil Judge should have exercised the discretion in a liberal manner. The facts and circumstances of the case call for to say that the learned Civil Judge was not justified in striking off the defence of the defendants. Though the defendants were negligent in filing the written statement, in view of the totality of facts and circumstances of the case and in the interest of justice opportunity ought to have been granted to file the written statement compensating the opposite party with costs.

For the reasons recorded above, the Revision Petition is allowed subject to payment of Rs. 1,500/ as costs, the impugned order is set aside and the trial Court is directed to grant one opportunity to the defendants to file the written statement and to proceed to decide the case in accordance with law.