
(2007) 02 MP CK 0064
In the Madhya Pradesh High Court

Mahalaxmi Traders and Another	Vs	APPELLANT
Sudarshan Industries		RESPONDENT

Date of Decision : 13-02-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 9 Rule 13, Order 9 Rule 6

Citation : (2007) 2 MPLJ 174

Hon'ble Judges : W.A. Shah, J

Bench : Single Bench

Final Decision : Allowed

Judgement

W.A. Shah, J.

This Civil Miscellaneous Appeal at the instance of the defendants haven MJN taken up being aggrieved by order dated 18-9-2006 passed by learned Second Additional District Judge, Ujjain rejecting thereby application filed under Order IX Rule 13 of the CPC ("Code" hereafter) arising out of Civil Suit No. 11-B/04.

It is not disputed that the plaintiff/respondent filed Civil Suit No. 11-B/04 against the defendants/appellants in the Court of Second Additional District Judge, Ujjain for realization of Rs. 3,50,000,00 on 5-9-2003. The suit was resisted by the defendants/appellants. After framing of issues as the Trial of the said suit proceeded and recording of the evidence of respondent was over the suit stood fixed up for 29-8-2006 for the evidence of appellants. That day a witness of appellants, named Shyamlal could not remain present allegedly due to death of his Aunt, therefore, application was moved for adjournment and also affidavits of two other witnesses, Gopal and Babulal were filed in the evidence, by the appellants. The learned Trial Judge, however, dismissing the said application, closing the right of the appellants to adduce evidence fixed up the case for final hearing for 8-9-2006. The appellants challenged the said order by filing Writ Petition No. 5468 of 2006. This Court disposing of the writ application vide order dated 12-9-2006 directed as under:

(i) That, the petitioner shall submit the appropriate application before the Court below on the next date of hearing and will keep the witnesses, Shyamlal, Gopal and Babulal present in the Court.

(ii) If such application is submitted then the learned Court below shall consider the same sympathetically and will allow the petitioners to adduce their evidence.

It is also not disputed that on 8-9-2006 the defendants/appellants had moved an application for adjournment mentioning that their writ petition mentioned above was pending consideration and their arguing Counsel was unwell, therefore, pressed for adjournment. The learned Trial Court, however, heard final arguments of the learned Counsel for the plaintiff/respondent and reserving judgment for 18-9-2006 directed that the written arguments from the side of defendants/appellants may be filed till penultimate day to judgment. The written arguments so demanded were but not filed.

Still further there is no controversy that on the day fixed for judgment it was delivered and after the delivery of judgment the defendants/ appellants presented to the Court below the said order of this Court passed in the above writ petition. The learned Court below in the circumstances expressed its inability to provide any relief to the defendants/appellants. Thereafter, they filed application under Order IX Rule 13 of the Code.

In the application filed under Order IX Rule 13 of the Code for setting aside the decree dated 18-9-2006 passed in Civil Suit No. 11-B/04, it was asserted by the defendants/appellants that the appellant No. 2 who was looking after the proceeding on 18-9-2006 when was on way to Court from his home State Rajasthan had fallen late due to traffic jam. By the time he could manage to reach the Court, its judgment had been passed disposing of the matter.

The learned Court below summarily rejected the above application observing that it did not contain proper statement of facts and the defendants/appellants were not vigilant in bringing to its notice High Court's order in the above writ application. It also further found that in the circumstances provisions of Order IX Rule 13 of the Code were not attracted. Hence, this appeal.

Having heard the learned Counsel for the parties for final disposal at the motion hearing stage, I have gone through the record of the case. I find that the manner in which the proceedings under reference were conducted by the learned Court below clearly have imprints of an ex parte adjudication and not of a decision inter parte. My reasons for the same are set out as under:

1. As has been seen above that on 29-8-2006 when an Advocate other than arguing Counsel made application for time for evidence of defendants the Court below refused the prayer, but did not record satisfaction in terms of explanation to Order XVII Rule 2 of the Code that the evidence of defendants on record was sufficient for disposal of the suit. It is imperative for the Court to record its satisfaction in this perspective when it intends to use the provisions of the said

explanation and in the absence of recording of such satisfaction application of explanation is not attracted. In this connection beneficial reference with reverence is made to B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and Others, .

2. When the Court below acted in the manner under scan, it clearly did not act under Order XVII Rule 3 (a) of the Code which empowers the Court to decide the suit forthwith. At the cost of repetition, I may say that the Court below had not decided the suit on 29-8-2006 but had adjourned it that day closing defendants' evidence and fixed it for final arguments for 8-9-2006.

3. Even on 8-9-2006 the learned Court below after hearing the plaintiff's Counsel directed that the arguing Counsel of the defendants may put in written final arguments and those were never presented.

4. The Counsel who made adjournment requests on 29-8-2006 and 8-9-2006 had only made appearance for the limited purpose of seeking adjournments and those appearances were not for conduction of trial as he was acting only under limited authority.

In view of the above matter the adverse proceedings under reference were deemingly under Order XVII Rule 2 read with Order IX Rule 6 of the Code, therefore, remedy under Order IX Rule 13 of the Code has not been excluded.

Earlier it has been noticed that the learned Court below did not hold factual inquiry into the alleged cause which prevented the defendants from appearance when the suit was called on for hearing, therefore, the case, in the facts and circumstances deserves to be remanded.

Accordingly, the appeal deserves to be allowed and the order impugned has got to be set aside. The appeal is, therefore, allowed and the impugned order is set aside. Case is remanded to the Court below for disposal according to law. Parties are directed to appear before the Court below on 23-2-2007.

Before parting with the order, it is to be mentioned that the learned Court below for no reason failed to register the application which was filed under Order IX Rule 13 of the Code. Therefore, where the case is received on remand the Court below must also register it appropriately as per the provisions of Rule 372 of the M.P. Civil Court Rules.