
(2015) 05 MP CK 0007
In the Madhya Pradesh High Court
Case No : M.A. No. 1067 of 2015

Meena	Vs	APPELLANT
Sunil Singhai		RESPONDENT

Date of Decision : 13-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 7

Citation : (2015) 05 MP CK 0007

Hon'ble Judges : S.K. Gangele, J

Bench : Single Bench

Advocate : A.K. Jain, for the Appellant; Sanjay Agarwal, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.K. Gangele, J.—Heard on admission.

The appellant has filed this appeal against the order dated 24.4.15 passed by III ADJ, Damoh in MJC No. 1/14 by which the trial court rejected the application filed under Order 9 rule 13 of the CPC for setting aside the judgment and decree dated 5.4.14.

2. The plaintiff/respondent No. 1 filed a suit for recovery of possession of a plot and a house. The suit was decree vide judgment dated 5.4.14. On behalf of present appellant/defendant No. 3, Advocate filed his power and he was present on 29.7.09. Thereafter on 4.11.09, the court proceeded ex-parte against the present appellant. Then, the counsel filed an application before the trial court for setting aside the ex-parte proceedings under Order 9 rule 7 of the CPC. The aforesaid application was dismissed by the court on 11.3.14. Thereafter, the judgment and decree was passed by the court. On 2.5.14, the present appellant/defendant No. 3 filed the application under Order 9 rule 13 of the CPC through power of attorney holder Smt. Krishna Arya. She pleaded that she was residing at United States and summon of the suit was never served on her, hence the ex-

parte proceedings against the appellant was illegal.

3. The trial court after considering facts of the case has held that the application filed under Order 9 rule 13 has no merit. The present appellant, with the collusion of other defendants, wants to delay the proceedings. She totally kept mum for a long period of four years and thereafter filed the application, hence there was no ground to entertain the application to set aside the judgment and decree and, dismissed the application.

4. Learned counsel appearing on behalf of the appellant has submitted that the trial court has committed an error of law in dismissing the application filed by the appellant under Order 9 rule 13 of the CPC. The notice of the suit was never served upon the appellant, hence the ex-parte decree against the appellant was illegal. It is further contended by the learned counsel that it was obligatory on the part of the court to issue SPC to the appellant when the counsel pleaded no instructions on behalf of the present appellant. He further contended that the substantial injustice has been caused to the appellant due to ex-parte proceedings, hence the appeal deserves to be allowed.

5. Learned counsel appearing on behalf of respondent No. 1 has contended that the application filed by the appellant through power of attorney holder was not maintainable because no power of attorney was filed before the court. It is further contended by learned counsel that the present appellant had knowledge of the suit. She kept mum for a longer period and permitted to conclude the trial and thereafter when the judgment and decree had been passed in favor of the plaintiff, filed the application. Hence, the trial court has rightly dismissed the application.

6. The present case depicts the sorry state of affairs. On behalf of the appellant/defendant No. 3, Shri S.K. Mehta, Advocate submitted his memo on 29.7.09 and requested the court to grant time to file the Vakalatnama. The court granted time. Thereafter on 24.8.09, again he requested for time which was granted. On 16.9.09, again time was granted. Thereafter on 4.11.09, counsel Shri S.K. Mehta informed the court that he had no instructions on behalf of defendant No. 3, hence the court proceeded ex-parte against him. Thereafter, when the case was fixed on 1.10.13 for final arguments, Mr. S.K. Mehta filed the Vakalatnama on behalf of defendant No. 3 and also filed an application under Order 9 rule 7 of the CPC. That application was dismissed by the court vide order dated 11.3.14. Thereafter when the judgment and decree was passed, the defendant No. 3 again filed an application under Order 9 rule 13 of the CPC for setting aside the judgment and decree. The application had been filed on behalf of defendant No. 3 through Smt. Meena alias Sunita Arya. The fact is that defendant No. 1 Krishna Arya is the mother-in-law of defendant No. 3 and, defendant No. 1 Bhagirat Arya is the father-in-law of defendant No. 3. It is a fact as mentioned by the trial court in the impugned order that no power of attorney was filed by the power of attorney holder. Smt. Krishna Arya claimed that she had power of attorney on behalf of defendant No. 3 and she can institute proceedings.

7. Learned counsel appearing on behalf of the appellant submitted that the counsel filed the application under Order 9 rule 7 of the CPC before the trial court, hence the counsel can file the application under Order 9 rule 13 of the CPC on behalf of defendant No. 3. However, the fact remains that the application under Order 9 rule 13 was filed by the power of attorney holder. In such circumstances it was necessary for the power of attorney holder to file the power of attorney. Because no power of attorney was filed, hence the application was not maintainable.

8. In the present case, it appears that the respondent/defendants No. 1 and 2, with the collusion of defendant No. 3, permitted the proceedings of the case to go on and when the judgment has been passed against them then defendant No. 3 filed an application for setting aside the ex-parte judgment and decree through power of attorney holder. When there was no power of attorney, how the power of attorney holder can file the application under Order 9 rule 13 of the CPC.

9. Apart from this, there is no explanation that why defendant No. 3 came to the court after a long period of four years. She had knowledge of the suit when, on her behalf, the counsel filed the application under Order 9 rule 7 of the CPC then why she did not file any application for setting aside the ex-parte proceedings. It shows that the appellant/defendant No. 3, knowingly permitted to continue the suit proceedings and when the judgment and decree went against the defendants, she, in order to defeat the judgment and decree, filed an application for setting aside the ex-parte judgment and decree which has rightly been dismissed by the trial court. Other defendants No. 1 and 2 contested the suit proceedings and participated in it.

10. Learned counsel for the appellant relied on the judgment of this court in the matter of Pankaj Agarwal and others v. Shakuntala Devi and others-2006 (2) MPLJ-1 and judgment of the Supreme Court in the matter of Rabindra Singh Vs. Financial Commissioner, Cooproration, Punjab and Others, (2008) 3 CLT 571 : (2008) 8 SCALE 242 : (2008) 7 SCC 663 . However, these judgments are distinguishable on facts. He also submitted that it is obligatory on this court to call the record of the case and the appeal be also admitted. In my opinion, the arguments advanced by the appellant's counsel could not be accepted when on the face of the order the appeal is liable to be dismissed. It shall not be proper to waste the time of the court in unnecessary proceedings. Consequently, I do not find any merits in this appeal. It is hereby dismissed at the motion hearing stage. There shall be no order as to the costs.