

(1964) 01 GAU CK 0003
In the Gauhati High Court
Case No : Civil Revision No. 50 of 1963

Muzammal Hussain and Others

APPELLANT

Vs

Changanlal Jain

RESPONDENT

Date of Decision : 29-01-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 13, 115

Citation : (1964) 01 GAU CK 0003

Hon'ble Judges : G. Mehrotra, C.J

Bench : Single Bench

Advocate : K. Majumdar, for the Appellant; D.K. Sarma and C. Bhattacharjee, for the Respondent

Judgement

G. Mehrotra, C.J.—This is a revision u/s 115, CPC on behalf of the Plaintiff challenging the order of the Subordinate Judge granting an application for setting aside an ex parte decree passed on the 20th February, 1963. The suit came up for hearing on the 21st December, 1962. On that date a joint application was made for adjournment of the case as there was some talk of compromise. On 20th February, 1963 the Plaintiff appeared with his witnesses but as the Defendant was not there, it was ordered that the suit should proceed ex parte. Then the evidence on behalf of the Plaintiff was taken and the following order was passed:

Examined one P.W. Claim prima facie made out. Suit decreed ex parte for ejectment and recovery of Rs. 1110 against the Defendant with costs.

On the same day later on at 11-45 A.M. the counsel for the Defendant made an application for an adjournment of the case on the ground that the parties have entered into the agreement and as the Defendant was under the impression that the agreement will be given effect to, he could not come prepared with his witnesses. This petition was kept on the record. After this, an application was filed by the Defendant on 22-2-63 for setting aside the ex parte decree

reiterating the grounds on which he had sought the adjournment in the case on the earlier date. The parties examined witnesses and the Court came to the conclusion that the Defendant was misled by the proposed compromise talk and had thus sufficient cause not to be ready with witnesses on the date of hearing. The learned Subordinate Judge on the 20th May 1963 allowed the application and set aside the ex parte decree on payment of certain cost.

2. The contention of the Petitioners is that the ex passed by the trial Court on the 20th February 1963 was one under Order 17 Rule 3, CPC and not under Order 17 Rule 2 so as to attract the provision of Order 9 Rule 13, CPC The remedy of the Defendant was to file an appeal. Mainly it is urged that when the Defendant was present in Court the decree cannot be an ex parte decree at all. There is nothing in Order 17 Rule 2 which says that an ex parte decree cannot be passed when the Defendant is physically present. Order 17 Rule 2 provides as follows:

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

The failure to appear does not necessarily mean the physical absence of the Defendant. If the Defendant asked for an adjournment on the ground that he is not prepared with the witnesses and the adjournment is refused and he did not participate in the proceedings, it cannot be said that he was present and the order necessarily was not one under Order 17 Rule 2. In every case it will depend upon the interpretation of the order passed by the judge on the adjourned date of the hearing as to whether the order is one under Order 17 Rule 3 or one under Order 17 Rule 2, Code of Civil Procedure. It cannot be said that in the present case the order which was passed on the 20th February, 1963 was not one under Order 17 Rule 2 but was one under Order 17 Rule 3.

3. The Petitioners have relied upon the case of "Mst. Gigi Agarwallini v. Baleswar Tewari" AIR 1961 Gau 99. That case has exhaustively dealt with all the cases on the point. It is laid down in that case that in each case the question will depend upon the interpretation of the decision of the Court. If the finding is that the order was one under Order 17 Rule 3 the remedy of the party will be by way of appeal. But if the order is interpreted to be one under Order 17 Rule 2, the remedy of the Petitioner is to make an application for setting aside the ex parte decree. At page 100 of the report it is observed by the Court as follows:

It is admitted by both sides that if the decree dated 25th January 1960 would come under Order 17 Rule 3 of the CPC on merit, the remedy would be by way of an appeal and not by an application under Order 9, Rule 13 as is available in case of disposal under Rule 2 of Order 17 of the Code of Civil Procedure.

Then the conditions under which Order 17 Rule 3 will be attracted are set out. It was again observed at page 101 of the report as follows:

It would be clear, therefore, that the decision was in consideration of the circumstances of this particular case and not that the view held in *Brojendra Nath Ganguly Vs. Promatha Bhusan Dev and Others*, was negated. In the circumstances of the present case the decree was passed on the basis of the evidence that is already on record.

4. Dealing with the case of *Brojendra Nath Ganguly Vs. Promatha Bhusan Dev and Others*, the learned single Judge observed as follows at page 100 of the report:

The learned Judges in that case discussed the various rulings of several High Courts in India and came to the conclusion that in a case where there was no material on record the proper procedure to be followed would be that laid down in Rule 2, but if there are materials on record the Court ought to proceed under Rule 3 of Order 17. In the present proceeding applying the principle of this case, I hold that there was sufficient justification for proceeding under Order 17, Rule 3 of the CPC and the judgment is one coming within the said rule, and, therefore, the application for setting aside the ex parte decree under Order 9, Rule 13 of the CPC was incompetent and it ought to have been accordingly rejected.

It is, therefore, clear from the reading of that judgment that the finding of this Court was that there was justification for proceeding under Order 17 Rule 3 in that case and, further, that the judgment was one passed under Order 17 Rule 3 and not under Order 17 Rule 2. In the present case the point was never taken before the Court below that the order passed on the 20th February 1963 was one under Order 17 Rule 3 and not under Order 17 Rule 2 and the order on the face of it purports to be an ex parte order and not on merits at all. In cases where the order is clearly one under Order 17 Rule 3, there is no difficulty in holding that the remedy is by way of appeal. But in cases where the order on the face of it is one under Order 17 Rule 2 and purports to be an ex parte order, it is difficult to hold that the order should be treated as one under Order 17 Rule 3. In the present case I do not think that in the face of it, the order was one under Order 17 Rule 3. It was clearly an order under Order 17 Rule 2 and thus the provisions of Order 9 Rule 13, CPC will attract. The revision has no force and it is rejected. But in the circumstances the parties will bear their own costs.