

(1972) 03 OHC CK 0002

In the Orissa High Court

Case No : Miscellaneous Appeal No. 94 of 1967

Nanak Chand Khandelwalla and Others

APPELLANT

Vs

Fakir Chand Khendelwalla and Another

RESPONDENT

Date of Decision : 14-03-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Citation : (1972) 38 CLT 519

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : R.N. Sinha and S.N. Sinha, for the Appellant; S. Mohanty, for the Respondent

Judgement

R.N. Misra, J.—The Defendants in a Money Suit applied under Order 9 Rule 13 of the CPC to set aside the ex parte decree passed against them and for rehearing the suit. That petition having been dismissed by the learned trial judge, they are in appeal before this Court.

2. The Money Suit (M.S. No. 7 of 1965) was filed on 8-2-1965 in the Court of the Subordinate Judge, Baripada. The Defendants entered appearance on 28-8-1965 and took six adjournments for filing written statement. On 21-12-1965 as they did not file the written statement or take steps they were set ex parte. On 21-1-1966 they asked for recalling the ex parte order and to accept the written statement. The learned trial judge accepted the written statement. On 12-4-1966 the Defendants were again set exparte. That order was vacated on 30th of April, 1966 upon application. After the suit was made ready for trial initially both parties took adjournments. On 3-11-1966 the Defendants wanted time. The case was finally adjourned to 24th of January, 1967 for peremptory hearing. On that day the Plaintiff was ready but the Defendants wanted time. The petition for adjournment was rejected and the suit proceeded ex parte. On 28th of January, 1967 the ex parte decree for Rs. 9, 500/- with interest was passed.

3. On 16-2-1967 the Defendants applied under Order 9 Rule 13, Code of Civil

Procedure. M.J.C. No. 19 of 1967 was registered. In that proceeding the Petitioner took time on three occasions. Finally the case was posted to 24-6-1967. The learned Subordinate Judge did not accept the plea of the Defendant-Appellants for further adjournment and dismissed the petition. On 14-7-1967 an application u/s 151, CPC was made for restoring the miscellaneous case under Order 9, Rule 13, Code of Civil Procedure. This appeal was filed on 12-9-1967. The miscellaneous case before the trial Court was dismissed on 23-9-1967 for default.

4. Mr. Sinha, learned Counsel for the Appellants contends that the learned trial judge should have confined his consideration to the date of default namely, 24-1-1967 and should not have been prejudiced against the Appellants by taking into consideration their previous conduct in the litigation. It is next contended that the doctor had been summoned through Court and had not appeared. The learned trial judge should have accepted the application for adjournment wherein it had been indicated that the only male Appellant looking after the litigation was suffering from dysentery and fever. It is also contended that the amount in the litigation is quite substantial and in as much as the interest of a minor is involved the Court should have taken a more liberal view of the matter.

5. There is no dispute about the position that under Order 9 Rule 13, CPC sufficient cause for the default on the material date has to be considered and the Court should not be prejudiced by past conduct. On the 24th of June, 1967 there was no further material placed before the Court apart from the petition of the counsel to justify the absence of the Appellants or their not being ready to proceed with the case. The petition filed that day is to the following effect:

The humble petition of the Advocate Shri K.C. Pradhan begs to submit that the aforesaid case has been fixed to today for hearing. But none of the Petitioner has turned up today. The Petitioner Is informed by one of the relatives of the Petitioner that Nanak Chand Khandelwalla is suffering from dysentery with fever and his only witness Dr. U.N. Bindhani had gone to Calcutta and had not returned. Under the circumstances the Petitioner wants only one adjournment. Out of the other Petitioners one is widow and the others are minors and Nanak Chand was looking after the case....

Mr. Sinha contended that the doctor had been summoned through Court and as such the learned Subordinate Judge should not have dismissed the petition on 24-6-1967 when the doctor had not appeared. This contention does not seem to be supported by the record. On 22-4-1967 the case was adjourned to 13-5-1967 at the instance of the Appellants. On 8-5-1967 dusti summons were taken for the doctor. On the 13th of May, however, the Appellants again applied for time and the case was ultimately adjourned to 24-6-1967. For this day no summons had been taken. The learned trial judge found that there was no material to support the allegations made in the petition for adjournment. The two material allegations were that Nanak Chand Khandelwalla was suffering from dysentery with fever and the doctor had gone to Calcutta and had not returned. The

Appellants came to this Court against the order rejecting the miscellaneous case.

Before this Court there is no material at all to justify the allegations of the Appellants. If the Appellants had proceeded with the miscellaneous proceeding before the learned Trial Judge which they had instituted u/s 151, CPC evidence in support of the two allegations could have been given. Instead of doing so they came before this Court in this appeal. The plea taken seems to be in accord with the Full Bench decision of the Patna High Court in the case of Doma Choudhary and Others Vs. Ram Naresh Lal and Others, . The correctness of that decision was disputed before this Court and his Lordship the present Chief Justice in the case of Kunjabehari Das v. Chanchala Das and Ors. 1965 C.L.T. 769 held:

...It is conceded by Mr. Mohapatra that the consensus of opinion of the various High Courts of India is that the provisions of Order 9, Code of Civil Procedure, have no application to a proceeding under Order 9. If that be so, there is no provision in the Code, either Express or by necessary implication, which would conflict with exercise of inherent jurisdiction by the Court in the matter of restoration. Existence of an alternate remedy by way of appeal has nothing to do with the exercise of the inherent powers by the Court in the matter of granting restoration before whom the proceeding was dismissed for default. Thus this is a contingency in respect of which there is no specific provision in the Code. It is well known that the Code is not exhaustive. The powers of the Court u/s 151, Code of Civil Procedure, can, therefore, be invoked for restoration of a proceeding under Order 9 dismissed for default. This aspect of the matter was not considered in the Patna Case and could-not have been precisely examined until the matter was authoritatively pronounced by a series of Supreme Court decisions. On the aforesaid reasoning I have no hesitation in holding that Doma Choudhary and Others Vs. Ram Naresh Lal and Others, was wrongly decided. The decisions of this Court which followed the aforesaid Patna Full Bench cannot be accepted as correct....

In the aforesaid view of the matter I think the Appellants did not pursue proper remedy and came in appeal before this Court without any material to support the contentions raised in their petition for adjournment on the 24th of June, 1967.

6. Merely because the amount in dispute is substantial, I can have no jurisdiction to interfere with the discretion of the learned trial judge in the matter of dealing with the proceeding under Order 9 Rule 13, Code of Civil Procedure. It has not been established as a fact that Nanak Chand was ill and, therefore, there was sufficient cause for the Appellants not to be ready with the miscellaneous case on its date of hearing. I would accordingly decline to interfere in the matter. The miscellaneous appeal is dismissed. In the circumstances, however, I would direct both parties to bear their own costs.