
(1960) 11 MP CK 0006
In the Madhya Pradesh High Court
Case No : C. Rev. No's. 37 and 38 of 1960

Nathulal	Vs	APPELLANT
Shantiial		RESPONDENT

Date of Decision : 08-11-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 12, 151

Citation : (1963) JLJ 756

Hon'ble Judges : V.R. Newaskar, J

Bench : Single Bench

Advocate : S.R. Joshi, for the Appellant; S.W. Fadnis and Waghmare, for the Respondent

Final Decision : Allowed

Judgement

V.R. Newaskar, J.—This revision petition (No. 38 of 1960) is directed against the order passed by the IIInd Additional District Judge Indore striking off the defence of the Petitioner (Defendant No. 1 Nathulal) in exercise of his power u/s 151 Code of CPC under the following circumstances.

2. The Plaintiffs brought the present suit against the Petitioner Nathulal Gopilal and others for enforcement of an anomalous mort gage executed by Defendant No. 1 in favonr of the Ramanand Trust of which Plaintiffs claim to be the trustees. The mortgage was for a consideration of Rs. 28-0-0 and the principal amount was liable to be paid with interest at 9 per annum in three years. The mortgagor Defendant No. 1 had executed a rent-note agreeing to pay rent at Rs. 210 per month for his occupation of the suit premises as a tenant of the mortgagee. The grievance of the Plaintiffs in the suit was that the Defendant No. 1 though in occupation failed to pay rent for a long time and considerable arrears had accumulated. The Plaintiffs after filing the suit therefore applied for appointment of a receiver. The Defendant No. 1 was called upon to show cause against such appointment. At the hearing however the Defendant No. 1 gave an undertaking in writing that he would keep for himself only Rs. 200 P. M. for his expenses out

of the rent realizable from the suit premises any the balance of Rs. 576 p. m. would be deposited in Court This undertaking was given on 8-12-1956 and was to be operative from 1-1-1957. The Defendant however failed to make the agreed deposit. Thereupon the Plaintiffs applied again for the appointment of a receiver. The trial Court after giving a hearing to the Petitioner ordered the appointment of a receiver. The Court in para 7 of the order observed:

I had given one more chance to Defendant No. 1 to deposit the amount of rent recovered by him. (vide order sheet dated 31-8-1959

and in para 13 he observed:

In regard to the matter of contempt, I think the Defendant No. 1 has not kept his undertaking given to this Court. His defence is therefore struck off

3. The present petition is directed against the order striking off the defence of Defendant No. 1. It is contended by Mr. Joshi on his behalf that the order striking off defence of the Petitioner under the circumstances amounts to material irregularity on the part of the lower Court in the exercise of its jurisdiction.

4. It is no doubt true that the jurisdiction u/s 151 Code of CPC is very wide but it is also well established that the resort to it should be had only in exceptional cases and that too where there are no specific provisions elsewhere in the Code pertaining to the subject matter of the order. In the present case all that the Plaintiff mortgagee desired was the appointment of a receiver. The Defendant No. 1 did certainly agree to make a certain deposit but without any agreement to have his defence cancelled in case he failed to do so. The Court thereupon withheld the making of an order appointing a receiver. When it found that the deposit was not being made it appointed the receiver. There is in this case really not a matter of contempt in the sense of flouting a positive order of the Court to do a certain thing. The undertaking was intended to protect the possession of Defendant No. 1 and was really an offer made by himself. When that undertaking was not stuck to the protection was rightly withheld and the receiver was appointed instead" But further order was in the nature of penalty and smelt of a vindictive order which a Court of law was not expected to pass in a situation Such as this Power u/s 151 C.P.C are meant for meeting the ends of justice and not for short circuiting a litigation. Plain-tiffs in this case seek to enforce their mortgage. Every order could be made to enable the Plaintiff to obtain full relief, of course, subject to what the Defendant has to say. The mortgage was for Rs. 28,000 and the arrears of rent had accumulated. But it is equally clear that from the Court's order that the house fetched a rent of Rs. 776 or thereabout per month. If the Court wanted the Defendant to be prevented from delaying the disposal of the suit it could have fixed the case early and after hearing it from day to day disposed it of. Striking off of a defence is an extreme measure and the Code itself has provided for it only under Order 11 Rule 21 and probably under Order 9 Rule 12 Code of CPC It is no doubt true that these powers are not exhaustive and in appropriate cases the Court could invoke that power to strike

off the defence of a recalcitrant Defendant. But in the present case the subject matter under consideration was ancillary to the suit viz., the appointment of a receiver. Complete relief to the Plaintiff could be given with respect to it by making such an order. Further order maiming the Defendant with reference to his defence was really not called for in the interest of justice for which alone the power could have been invoked. The action of the Court in striking out the defence under the circumstances is materially irregular as even after directing the appointment of a receiver it put an end to the Defendant's power to meet the Plaintiff's case on merits.

5. Reliance was placed on behalf of the opponent Plaintiffs upon the decisions reported in AIR 1932 Mad 263 East Indian Railway Company Vs. Jit Mal Kallo Mal, E.I. Rly Co. v. Jit Mal, AIR 1924 All 17 ; Gauri Shankar v. Manki Kumar and AIR 1928 262 (Oudh) .

The first three cases are considered in the Division Bench case of the Madras High Court consisting of Somayya and Rajamannar JJ. in R.T. Ramayya Servai Vs. R. Sama Ayyar and Others, , Their Lordship-expressed doubt whether apart from the provisions contained under Order 11 Rule 21 the Court has power to strike off the defence. They expressed their disagreement with the view of Sundaram Chetty, J in AIR 1932 Mad 263 and distinguished the two Allahabad cases on the ground that in the first mentioned provisions of Order 11 Rule 21 were directly applicable whereas in the second Allahabad case the order for striking off the defence was passed in pursuance of the Defendant's own agreement that in case he failed to deposit certain costs of adjournment his defence might be struck off. The decision in AIR 1928 262 (Oudh) is explainable on the basis of provisions under Order 9 Rule 12 Code of CPC. In that case the contesting Defendant was required by the Court to appear before it. The Defendant, in spite of several opportunities, failed to comply. His defence was consequently cancelled. This was rightly held supportable on the terms of Order 9 Rule 12 Code of CPC though Section 151 was also referred to.

6. On the whole I am not persuaded to hold that the order in question did not involve material irregularity in the exercise of jurisdiction on the part of the trial Court.

7. The same reasoning will apply in the case of Revision Petition No. 37 of 1960 as the matter is between the same parties and the material facts are almost the same except the fact that the other suit (Civil Suit No. 1 of 1956) related to a mortgage of a different date and for different amount.

8. I would therefore set aside the order and send back the cases to the trial Court for their trial and disposal from the State where they were when the impugned order was passed. The Petitioners are entitled to get their costs of both these petitions from the other side.