
(2009) 11 RAJ CK 0027
In the Rajasthan High Court

Prem Nidhi Sharma

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 17-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 13
Constitution of India, 1950 — Article 227

Citation : (2010) 1 WLN 246

Hon'ble Judges : Narendra Kumar Jain, J

Bench : Single Bench

Judgement

Narendra Kumar Jain, J.—Heard the learned Counsel for the petitioner.

2. The plaintiff-petitioner filed a suit for declaration and permanent injunction in the trial court with a prayer that he was entitled for 5 marks for NCC, which were not added in the total marks and a merit list was prepared, which was wrong on part of the defendants, therefore, the defendants be directed to add 5 marks for NCC and revise the merit list and to consider the case of the petitioner for appointment on the post of Teacher Gr. III.

3. It is relevant to mention that an application for temporary injunction was also filed along with the plaint. The District Judge while deciding tin-matter relating to temporary injunction held that plaintiff is not entitled for 5 marks for NCC. Being aggrieved with the same, a writ petition was filed before this Court, but the same was dismissed.

4. It appears that subsequently the original suit was taken up by the trial court and in absence of defendants No. 2 & 3, their written statement was closed and case was fixed for plaintiff's evidence. The plaintiff was examined. But no one present on behalf of defendants, therefore, he was not cross examined. Thereafter, the case was not fixed for defendants' evidence, it was fixed for final arguments and after hearing the arguments, the suit was decreed.

5. The applicant/defendants No. 2 & 3 (respondents No. 2 & 3 herein) filed an

application in the trial court under Order 9 Rule 13 C.P.C. for setting aside the ex-parte. The trial court was of the view that the decree was passed after hearing both the parties, therefore, the provisions of Order 9 Rule 13 C.P.C. are not attracted and dismissed the application.

6. Being aggrieved with the same, the defendants No. 2 & 3 preferred an appeal. The first appellate court vide order dated 26.7.2005 allowed the appeal and set aside the order of the trial court dated 8th September, 2003 and consequently also set aside the ex parte judgment and decree dated 29.1.1999 and remanded the matter to the trial court to decide the same afresh after affording an opportunity to lead evidence to both the parties. Being aggrieved with the same, the plaintiff has preferred this writ petition under Article 227 of the Constitution.

7. The submission of the learned Counsel is that Mr. Pandey, Government Counsel appeared on behalf of the defendants and his presence was also marked in the order-sheets of the trial court, therefore, the decree dated 29th January, 1999 cannot be said to be an ex parte decree and trial court was right in rejecting the application of the defendant-respondents No. 2 & 3, the appellate court committed an illegality in reversing the order of the trial court, Therefore, the order of the first appellate court be quashed and order of the trial court be restored.

8. I have considered the submissions of the learned Counsel for the petitioner and examined the impugned order passed by both the courts below and the other documents placed on record with the writ petition. The first appellate court has specifically mentioned in the impugned order that when the written statement was closed, no one was present on behalf of the defendants. So far as presence of Government Advocate is concerned, the appellate court has observed that on some of the dates, he was present but he appeared in the case only on behalf of defendant No. 1 State and not on behalf of defendants No. 2 & 3, who moved an application under Order 9 Rule 13 C.P.C., for setting aside the ex parte decree. It appears from orders passed by both the courts below that no issue was framed in the present case and the case was directly fixed for plaintiff's evidence. Statement of P.W. 1 was recorded, but he was not cross examined by defendants as no one was present on behalf of defendants No. 2 & 3. Thereafter, the case was not fixed for defendants' evidence, but it was fixed directly for final arguments and the judgment was passed in the case. From the order of the trial court dated 29th January, 1999, it appears that presence of one Shri S.C. Pandey counsel for the Government has been recorded in it, but it has not been clarified nor mentioned in the order that on whose behalf he appeared in the case. The appellate court also referred the judgment of Hon'ble Supreme Court in the case of B. Janki Rammaiya Shetty v. A.K. Parathsharthy 2003 (3) D.N.J. 701 SC and considered the provisions of Order 17 Rule 2 & 3 C.P.C. The first appellate court observed that impugned decree dated 29th January, 1999 was an ex parte decree, therefore, trial court was wrong in rejecting the application of defendants No. 2 & 3 moved under Order 9 Rule 13 C.P.C.

9. After considering all the facts and circumstances of the case, reasonings assigned by the first appellate court and also the submissions of the learned Counsel for the petitioner, I am of the view that the first appellate court rightly allowed the application under Order 9 Rule 13 C.P.C. filed by the respondents No. 2 &. The facts as mentioned above clearly show that the written statement of the defendants was closed in their absence. The statement of P.W.1 was recorded in absence of the defendants. The case was not fixed for defendants' evidence. There is no mention in the order to the effect that defendants do not want to lead any evidence. In these circumstances, I find that appellate court rightly set aside the ex parte decree and rightly remanded the matter to the trial court for deciding the suit afresh after affording an opportunity to both the parties to lead their evidence. The order passed by appellate court appears to be just and proper and the same does not call for any interference by this Court under Article 227 of the Constitution of India.

10. In AIR 1975 1297 (SC) , the Hon'ble Apex Court, while considering the scope of Article 227 of the Constitution of India, held that the power of superintendence of High Court under Article 227 of the Constitution of India being extraordinary is to be exercised most sparingly and only in appropriate cases. This power, as in the case of certiorari jurisdiction, cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts. The High Court cannot, while exercising jurisdiction under Article 227 of the Constitution, of India, interfere with findings of fact recorded by the subordinate court or tribunal. Its function is limited to seeing that the subordinate court or tribunal functions within the limits of its authority. It cannot correct mere errors of fact by reappreciating evidence.

11. In view of above discussion, I do not find any merit in this writ petition and the same is accordingly dismissed with no order to cost.

12. The learned Counsel for the petitioner submits that since suit is old one, therefore, a suitable direction may be given to the trial court to decide the suit at the earliest. The prayer appears to be reasonable. Hence, it is directed that trial court shall decide the suit as early as possible but not later than the period of six months from the date of filing the certified copy of this order.