
(1978) 01 PAT CK 0001
In the Patna High Court
Case No : Civil Revision No. 654 of 1974

Ram Dhir Prasad and Another	Vs	APPELLANT
Ram Sewak Lal and Others		RESPONDENT

Date of Decision : 16-01-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 18 Rule 16, Order 9 Rule 6

Citation : AIR 1978 Patna 218 : (1978) 26 BLJR 577

Hon'ble Judges : S. Ali Ahmed, J; Lalit Mohan Sharma, J

Bench : Division Bench

Advocate : Raj Kishore Lal and Sudarshan Choudhary, for the Appellant; Ramji Sharan, K.K. Sharan and Anjani Kumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

1. This application in revision u/s 115 of the Civil P. C. has been referred to Division Bench for hearing. The point involved is whether an ex parte decree, passed in a suit, in which special witnesses have been examined under Order XVIII, Rule 16, Civil P. C., can be set aside under the provisions of Order IX, Rule 13, Civil P. C. The suit was filed in the court of Subordinate Judge, first court, Arrah in 1966 and later was transferred to the court of Additional Subordinate Judge. 3rd Court. In 1969, three witnesses were examined on behalf of the defendants, who are opposite party in this case, as special witnesses with Court's permission under Order XVIII Rule 16, C. P. C. In 1972, the case was ready for hearing, but as the defendants did not appear, an order was passed on the 10th of July, 1972, that the suit would be taken up on the next day for ex parte trial. On 11-7-1972, the ex parte hearing was taken up and was finished and on 13th July, 1972, the suit was decreed. On 20th July, 1972, the defendants filed an application under Order IX, Rule 13 for setting aside the ex parte decree and on the 7th March, 1974, the prayer was granted by the impugned order. The plaintiffs have filed the present revision application alleging that the petition under Order IX, Rule 13, C. P. C. was not maintainable.

2. On behalf of the petitioners, it has been contended that as the defendants had examined some witnesses in the year 1969, the hearing of the case must be held to have started then, and that being the position, the decree passed in the suit cannot be described to be an ex parte decree so as to attract the provisions of Order IX. It is accepted that on the 10th and 11th July, 1972, orders had to be passed under Order XVII, Rule 2, but it is said that it was open to the Court to have decided the suit on merits under that provision instead of proceeding ex parte and in the present case it should be assumed that the court below did so, and consequently it could not, later entertain an application under Order IX, Rule 13,

3. The provisions of Order IX, Order XVII and Order XVIII appear to be relevant to the point under consideration. The consequence of non-appearance of a party is dealt with in Order IX, Order XVII contains the provisions relating to adjournments while Order XVIII deals with the hearing of the suit and examination of witnesses. If the defendant does not appear when the suit is called for hearing, the Court is authorised under Order IX, E. 6 to proceed ex parte. Rule 2 of Order XVII provides that if the parties or any of them fail to appear on the date of hearing of the suit, the court may proceed in accordance with the procedure as laid down in Order IX "or make such other order as it thinks fit". The latter portion of Rule 2 has been construed by the learned counsel for the petitioner to empower the Court to decide on merits even in absence of the defendant, if it so chooses to do.

4. Mr. Ramji Sharan, learned counsel, appearing for the opposite party, on the other hand, has challenged this interpretation and has argued that in such a case, the Court can either proceed under Order IX or can adjourn the suit, but it is not open to it, to give a decision on merits except as contemplated by Order IX. After considering the arguments of the learned counsel and examining the language of Order XVIII, Rule 16 and certain other provisions of the Code, we are of the view, that, it is not necessary in this case to decide the precise scope of the power of the Court under Order XVII, Rule 2 of the C. P. C. Assuming (without deciding) in favour of the petitioner that it is open to a Court under Order XVII, Rule 2 to decide a suit on merits without proceeding under Order IX, it cannot and has not been suggested that the Court has no power to dispose of the suit in a mode indicated by Order IX. In the present case, the Court passed a clear order on 10-7-1972 that the hearing of the suit would be taken up on the next day ex parte. The judgment dated 13th July, 1972 also indicates that the Court followed the procedure as laid under Order IX for disposing of the suit. It is, therefore, manifest that the mode as prescribed under Order IX was followed in the present case.

5. Rule 8 of Order IX states that if it is proved that summons was duly served, the Court may proceed ex parte in absence of the defendant "when the suit is called on for hearing", We assume (without deciding) again in favour of the petitioner that if the hearing of the suit had started in 1969, the Court below

could not have proceeded ex parte, but the question is as to whether it can be said that the hearing started by examination of special witnesses under Order XVIII, Rule 16. The question is, therefore, to consider the effect of the examination of special witnesses,

6. Provisions of Rule 16 of Order XVIII are in the following language :--

"(1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit,"

Defence witnesses in the present case were examined in 1969 under the above Rule. On this point, Mr. Ramji Sharan referred to Order XVIII Rule 2 which states that "on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having right to begin shall state his case and produce his evidence in support of the Issues which he is bound to prove. The other party shall then state his case and produce his evidence....." He rightly said that when hearing of a suit starts, the parties state their respective cases; and as provided by Order XVII, Rule 1 (2) when the hearing of evidence has once begun, the hearing of the suit has to be continued from day to day till all the witnesses are examined. In the present case the suit was not called out in court, for hearing, and as is usual in cases where special witnesses are permitted to be examined, an order only to that effect was recorded and steps were accordingly taken by the parties. Unless a suit is taken up by the court for hearing and the parties are permitted to state their cases, the hearing of the suit cannot be said to have started. By merely moving an application before the Court for examination of special witnesses and by getting those witnesses examined, the suit cannot be held to have been heard. The last portion of Sub-rule (3) of Order XVIII, Rule 16, as quoted above, permitting the evidence, so taken to be read at the hearing of the suit also supports the conclusion. The scope of Rule 16 is very wide and orders can be passed "at any time after the institution of the suit." This means that an application, in appropriate facts and circumstances, may be moved by the plaintiff even where the defendant has not filed his written statement and issues have not been framed. If the presence of the witnesses at a later stage, when the trial of the suit starts, is not going to be possible, steps may be taken under the Rule. Of course an order for this purpose cannot be passed in violation of the principles of natural justice and provisions of service of

notice by the Court in this regard is made under Sub-rule (2). But the fact that the application of the rule is not confined to cases ready for hearing also indicates that by examination of special witnesses It cannot be suggested that the hearing of the suit starts. We, therefore, hold that the hearing of the suit did not start in the year 1969 when the defendants examined three witnesses.

7. The learned counsel for the petitioners next argued that since the ex parte decree was passed by Mr. M. G. Prasad, the presiding officer of Additional Subordinate Judge, 3rd Court, Arrah, the application under Order IX, Rule 13 could have been allowed only by him. He was then the Second Subordinate Judge at Arrah and the application was heard and allowed by Mr. Naresh Kumar Sinha, Presiding Officer of the Additional Subordinate Judges" 3rd Court, We do not find any substance in this contention and hold that it was only the Additional Subordinate Judge, 3rd Court, which could have entertained and allowed the application, irrespective of the question as to who was actually the Presiding Officer.

8. In the result, we do not find any merit in the civil revision application which is accordingly dismissed with costs. Hearing fee is assessed at Rs. 50/-.