
(2008) 08 RAJ CK 0057
In the Rajasthan High Court

Shri Nirmal Kumar Dugar

APPELLANT

Vs

Bhanwar Lal alias Bhonri Lal (Deceased) through Shri
Narendra Kumar Saini

RESPONDENT

Date of Decision : 07-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23A, Order 43 Rule 1(u)

Citation : (2008) 4 RLW 3601

Hon'ble Judges : Narendra Kumar Jain, J

Bench : Single Bench

Judgement

Narendra Kumar Jain, J.—Heard learned Counsel for the parties. Briefly stated the facts of the case are that plaintiff-appellant Nirmal Kumar Dugar filed a suit for eviction and recovery of arrears of rent in respect of rented premise, against defendant-respondent Bhanwar Lal alias Bhonri Lal on the grounds of default in making the payment of monthly rent and denial of title. During the pendency of the suit, the sole defendant Bhanwar Lal died and his legal heir i.e. his son Narendra Kumar Saini was substituted in his place. A notice of the application under Order 22 Rule 4 CPC was served upon the legal representative of deceased defendant but legal representative did not appear in spite of service of summon, therefore, ex-parte order was passed against him in the case. The plaintiff examined PW-1 Nirmal Kumar and PW-2 J.P. Saxena. The trial court recorded a finding that the defendant committed default in making the payment of rent but he is entitled to get the benefit of first default under Sub-section (6) of Section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, (for short, "the Act of 1950") therefore, no decree of eviction can be passed on the ground of default in making the payment of rent.

2. So far as another ground i.e. denial of title is concerned, the counsel for the plaintiff did not press that issue before the trial court therefore no decree was passed on that ground also.

3. The trial court decreed the suit of arrears of rent for a sum of Rs. 1,656/-, and

further directed to pay the monthly rent at the rate of Rs. 46/- along-with interest at the rate of 6% per annum. Being aggrieved with the refusal to pass a decree of eviction on the ground of default, the plaintiff preferred an appeal before the first appellate court, who, vide its judgment and decree dated 31st May, 1999 allowed the appeal and set-aside the judgment and decree passed by the trial court and remanded the matter to the trial court with a direction to afford an opportunity to the defendant to file its written-statement and to both the parties to lead their evidence and to decide the matter afresh. The first appellate court was of the view that although the summon sent to legal representative under Order 22 Rule 4 CPC was served upon him but thereafter no summon of suit was served upon the defendant, therefore, the trial court committed an illegality in passing the decree of arrears of rent ex-parte against the defendant. Being aggrieved with the order of remand passed by the first appellate court, the plaintiff has preferred this miscellaneous appeal under Order 43 Rule 1(u) read with Order 41 Rule 23A of the CPC.

4. The learned Counsel for the appellant contended that even as per the finding of the trial court as well as the first appellate court, it is clear that soon after the death of deceased defendant Bhanwar Lal, the application was filed for substitution of his legal representative and notice of that application was issued to his legal representative Narendra Kumar Saini and the same was served upon him but he failed to appear in response thereto. He contended that there was no necessity to give any fresh notice of the suit. He referred Form No.6 of Appendix-B, CPC, related to Order 22 Rule 4 CPC wherein it is mentioned that in case the party concerned fails to appear then the suit will be heard and determined in his absence. He, therefore, contended that the first appellate court committed an illegality in setting-aside the judgment of the trial court only on this ground alone, therefore, the order of remand passed by the first appellate court be set-aside and the case be remitted back to the first appellate court to decide the appeal on merits.

5. The learned Counsel for the respondent contended that although a copy of summon under Order 22 Rule 4 CPC was served upon the defendant but a copy of the application was not sent which is clear from the postal receipt available on the file. He pointed out that only Rs. 8/- was paid towards postal registration charges and a presumption should be drawn that copy of the application was not sent and only a summon was sent. He contended that although the first appellate court has not considered this aspect of the matter but he has a right to defend the order of the first appellate court under Order 41 Rule 33 CPC on other grounds also.

6. I have considered the submissions of learned Counsel for the parties and examined the impugned judgments passed by both the courts below.

7. The plaintiff-appellant filed a suit for eviction and recovery of arrears of rent in the trial court. The sole defendant died during the pendency of the suit and an application under Order 22 Rule 4 CPC was filed. A notice of that application was

issued to his legal representative, (respondent herein), but, in spite of service thereof, he failed to appear, therefore, the trial court passed ex-parte order and examined the plaintiff's witnesses. The counsel for the plaintiff did not press the ground of denial of title. So far as default in making the payment of rent is concerned, the trial court recorded a finding that the defendant has committed a default but it gave the benefit of first default under Sub-section (6) of Section 13 of the Act of 1950, to the defendant, therefore, no decree of eviction was passed by the trial court, and only a decree of arrears of rent was passed.

8. The first appellate court opined that a notice of application for substitution of legal representative of deceased defendant was served upon his legal representative but he failed to appear before the court and his name was substituted in place of deceased defendant, but thereafter the amended plaint was not sent to the legal representative of the defendant and without giving any fresh notice calling upon him to file his written-statement, the provisional rent was determined and ex-parte evidence was recorded and the case was disposed of, which is contrary to the provisions of law and, consequently the first appellate court set-aside the order passed by the trial court and remitted the case back to the trial court with the aforesaid direction.

9. The record of the trial court was summoned and I have examined the summon/notice which was sent to the legal representative of deceased defendant (the respondent herein). The language of notice sent to legal representative of deceased defendant clearly shows that it was specifically mentioned in it that in case he fails to appear in Court, the suit itself will be heard and determined in his absence, therefore, it was a notice of suit as well as application under Order 22 Rule 4 CPC, both. Form No.6 of Appendix-B relates to summon to legal representatives of a deceased defendant under Order 22 Rule 4 CPC, is reproduced as under:

No. 6

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT

(Order XXII, Rule 4) (Title)

To

WHEREAS the plaintiff...instituted a suit in this Court on the...day of...19.../20...against the defendant...who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said...deceased, and desiring that you be made the defendant in his stead;

You are hereby summoned to attend in this Court on the...day of...19.../20...at.... A.M. to defend the said suit and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this...day of...19.../20....

Judge.

10. The learned Counsel for the respondent does not dispute that the said summon was not served upon the legal representative of the deceased defendant but his objection is that a copy of the application was not sent along-with the summon. This submission has been disputed by the learned Counsel for the appellant and he contended that it is wrong on the part of the learned Counsel for the respondent to say that copy of the application was not sent along-with the summon, in fact the copy of the application was also sent along-with the summon. It is relevant to mention that neither the legal representative of deceased defendant appeared in the Court nor any such objection was taken by him nor any affidavit in support of his contention was filed in the trial court or the first appellate court raising this question. It is also relevant to mention that this objection was not taken before the first appellate court nor this point has been dealt with by the first appellate court nor the decree of the trial court has been set-aside on this ground.

11. On the basis of the submission of the learned Counsel for the respondent it is very difficult to draw a presumption that the postal receipt shows that copy of the application was not sent along-with the summon. The postal receipt indicates that stamp of Rs. 8/- was affixed on the envelope. The application was sent or not along-with the summon cannot be presumed only on the basis of amount of stamp; whether it was deficit or insufficiently stamped, was for the postal authorities to accept or not to accept the envelope but in absence of any specific evidence in this regard and without any affidavit of the legal representative of the deceased defendant in this regard the said contention cannot be accepted. The respondent will have a right to oppose the first appeal on all legal grounds before the first appellate court which are available to him.

12. In view of the above, I am satisfied that the notice of suit as well as application under Order 22 Rule 4 CPC was served upon the legal representative of deceased defendant (respondent herein). There was no necessity to send a fresh summon of the suit along-with the copy of the amended plaint to the substituted legal representative of the deceased defendant.

13. The trial court was right in passing the exparte order against the defendant and proceeding with the suit ex-parte when he failed to appear before it in spite of service of summon. The first appellate court committed an illegality in setting-aside the order passed by the trial court only on the ground that after substitution of legal representative of deceased defendant it was necessary to send amended plaint to the legal representative again. In my view, the judgment of the first appellate court cannot be allowed to be sustained and the same is liable to be setaside.

14. Consequently, the miscellaneous appeal is allowed. The impugned order passed by the first appellate court dated 31st May, 1999 is set-aside and the

case is remitted back to the first appellate court i.e. Additional District & Sessions Judge No.8, Jaipur City, Jaipur with a direction to decide the Regular Appeal No.29/98 afresh after hearing both the parties on merits. Both the parties are directed to appear before the said court on 2nd September, 2008.

15. The costs is made easy. The Registry is directed to send back the record of both the courts below to the first appellate court to whom the case has been remitted back.

16. In view of this order, the stay application, filed with the appeal, also stands disposed of.