
(1999) 08 MP CK 0090
In the Madhya Pradesh High Court
Case No : C.R. No. 1065 of 1997 (I)

Siddhu

APPELLANT

Vs

Gorelal and Another

RESPONDENT

Date of Decision : 11-08-1999

Acts Referred:

Citation : (2000) 2 MPJR 86

Hon'ble Judges : Shambhoo Singh, J

Bench : Single Bench

Advocate : R.C. Chhazed, for the Appellant; A.S. Kutumble, Advocate for non applicant No. 1 and Ku. Sharma, Advocate for State, for the Respondent

Final Decision : Allowed

Judgement

Shambhoo Singh, J.

This revision is directed against the order dated 29.7.97 passed by A.D.J. Narsinghgarh in Misc. civil appeal no. 2/96 whereby the order passed by Civil Judge, Class-II on 20.3.96 in M.C.J. No. 17/95 dismissing civil suit no. 121 A/91 filed by applicant-plaintiff was confirmed.

The facts of the case, in brief, are that on 5.5.95 civil suit no. 121 A/9 was fixed for evidence of the plaintiff. On this date, neither the plaintiff nor his witnesses were present in the Court, however, the counsel for the applicant made an application for adjournment on the ground that the plaintiff was suffering from fever and was not in a position to attend the Court. The trial court observed that more than 10 adjournments had been granted to the plaintiff for producing his witnesses. He was deliberately indulging in delaying tactics and dismissed the suit. The applicant-plaintiff made an application under Order 9 Rule 9 C.P.C. for restoration of the suit which was registered as M.J.C. No. 17/95. It was dismissed by the Trial Court vide its order dated 20.3.96 holding that the suit was dismissed under Order 17 Rule 3 C.P.C., therefore, application under Order 9 Rule 9 C.P.C. was not maintainable. The applicant filed Misc. appeal no. 2/96 but

that too was dismissed vide impugned order dated 29.7.97 holding that the suit was dismissed under Order 17 Rule 3 on 5.5.95 and, therefore, application under Order 9 Rule 9 C.P.C. was not maintainable. Hence, this revision.

The short question for decision is whether the dismissal order passed on 5.5.95 was passed under order 17 Rule 3 C.P.C. or Order 17 Rule 2. Order 17 Rule 3 C.P.C. applies where time was granted by the Court at the instance of the party either to produce evidence or to cause the attendance of the witnesses and default was committed by the party in performing the act for which time was granted and the party was present or deemed to be present. Therefore, the question is whether on 5.5.95 the plaintiff should be deemed to be present.

Shri Chhazed, LC for the applicant, submitted that making of application for adjournment of the case by the counsel of the applicant does not amount the appearance of the plaintiff. On the other hand, Shri Kutumble, LC for the non-applicant, submitted that the counsel for the applicant not only appeared in the case but participated in the proceeding and made application for adjournment and after dismissal of the same, he left the court, therefore, it must be deemed that the plaintiff appeared through his counsel.

I considered the arguments advanced by counsel for both sides and perused the record. This court has considered "the appearance of the party through counsel" in various decisions. This Court in 1995 M.P.L.J. 13, Mahila Jagannathi Vs. Naga and Others, Mahilla Jagannath wd/o Sitaram v. Naga s/o Dhudllal and others, 1997 (2) M.P.W.N. 89, Rajee Enterprises (M/s.) v. State Bank of India, following full bench decision of this Court in case of 1977 22 M.P.L.J. 364, Ramarao Marotirao and others v. Shantibai wd/o Madhorao & others, held that mere filing of an application for adjournment without participating in the proceedings would not amount to an appearance within the meaning of Order 17 Rule 3 of the C.P.C. in the present case, the counsel for the applicant appeared and made an application for adjournment on the ground of illness of the plaintiff and thereafter he did nothing. On the basis of making of adjournment application, it cannot be held that the counsel was instructed by the applicant-plaintiff to participate the proceedings, there is nothing to indicate that the counsel had taken any step in furtherance of the progress of the suit. Under such circumstances, it cannot be deemed that the applicant was present at the time of hearing. The courts below observed that more than to adjournments were granted to the plaintiff for producing his evidence, but this fact cannot be considered in this case. It would be considered in M.J.C. filed under Order 9 Rule 9 C.P.C. whether there was sufficient cause for the absence of the applicant in the Court when the case was called for hearing.

In my opinion, the orders passed by courts below suffer from illegality, impropriety and incorrectness. There has been failure of justice, therefore, the revision petition is allowed subject to payment of Rs. 500/- as cost to the non-applicant/defendant. The revision petition is allowed. The impugned orders are set-aside the matter is sent to the Trial Court with a direction that it shall decide

the application of the applicant filed under Order 9 Rule 9 C.P.C. on merits. Parties shall appear before the Trial Court on 6.9.99.