

(2002) 03 BOM CK 0103

In the Bombay High Court

Case No : Civil Revision Application No's. 402 and 512 of 1994

Smt. Anjirabai Moon

APPELLANT

Vs

Sukhdeo Thool, Chandrashekhar Thool, Kumari Aruna, Smt. Anjirabai alias Sonabai, Shridhar alias Siddharth and Others

 Smt. Chandrabhagabai Bahadure Vs Sukhdeo Thool, Chandrashekhar Thool, Kumari Aruna, Smt. Anjirabai alias Sonabai, Shridhar alias Siddharth and Others

RESPONDENT

Date of Decision : 19-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 8 Rule 10, Order 9 Rule 13, Order 9 Rule 6, Order 9 Rule 6(1)

Citation : (2002) 4 BomCR 572 : (2002) 3 BOMLR 621 : (2002) 3 CivCC 301 : (2002) 2 MhLj 907 : (2002) 4 RCR(Civil) 508

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Advocate : None, for the Appellant; D.K. Dubey and S.P. Hedao, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—The Counsel for the applicants is absent. Heard Shri Dubey, learned Counsel for the non-applicant nos. 5, 6 and 8.

2. The civil revision applications are directed against the common judgment and order dated 30.12.1993 passed by the Joint Civil Judge, Senior Division, Nagpur in M.J.C. No. 99/1991 arising out of Special Civil Suit No. 1/1987 as well as M.J.C. No. 100/91 arising out of Special Civil Suit No. 2/1987 whereby delay in filing applications by the defendants/non-applicants under Order IX Rule 13 of the CPC was condoned and judgments and decrees passed in the above referred respective suits were set aside subject to costs of rupees three hundred fifty in each case.

3. The applicants have assailed the impugned judgment and order mainly on the

ground that the trial Court failed to consider that on 29.10.1990, the trial Court passed "no written statement" order and thereafter judgments and decrees were passed in the suits on 28.2.1991. The trial Court failed to consider that the judgments and decrees were passed under Order VIII Rule 10 of the CPC and the only remedy, which was available to the non-applicants, was by way of appeal. It is the contention of the applicants that since trial Court did not make an order that the suits shall be heard ex parte as contemplated under Order IX Rule 6(1) (a) of the Code of Civil Procedure, the provisions of Order IX Rule 13 of the CPC are not attracted and, therefore, same cannot be invoked by the non-applicants and hence, the trial Court ought to have rejected the applications moved by the non-applicants under Order IX Rule 13 of the Code of Civil Procedure.

4. Another ground which is raised by the applicants is that the provisions of Order IX Rule 13 of the CPC can be said to be attracted only when the Court proceeds ex parte against the defendants and passes ex parte judgment and decree under Order IX Rule 6 of the Code of Civil Procedure. However, if the trial Court decides not to proceed ex parte, but proceeds without written statement and delivers judgment, then the only recourse which is available to the aggrieved party is to file an appeal and application under Order IX Rule 13 of the CPC is not maintainable. The applicants have also raised a ground that the trial Court wrongly held that judgments and decrees dated 28.2.1991 passed by the trial Court in the above referred suits are the ex parte judgments and decrees and, therefore, arrived at a wrong conclusion that the applications under Order IX Rule 13 of the CPC are maintainable and hence, the impugned judgment and order passed by the trial Court is not sustainable in law.

5. On the other hand, Shri Dubey, learned Counsel for the non-applicant nos. 5, 6 and 8, have supported the impugned judgment and order and contended that para 3 of the judgment dated 28.2.1991 passed by the trial Court in Special Civil Suit No. 1/1987 clearly reveals that the suit was proceeded ex parte against the defendants as they were duly served with the suit summons and remained absent when the suit was called out. It is contended that this is not the case where trial Court proceeded to pass judgment under Order VIII Rule 10 of the Code of Civil Procedure. The learned Counsel submits that on 29.10.1990, the suits were fixed for filing written statements by the defendants. However, as the written statements were not filed by the defendants on 29.10.1990, it was open for the trial Court to pronounce judgments in view of provisions of Order VIII Rule 10 of the Code of Civil Procedure. However, the trial Court adjourned the matters and allowed plaintiffs in both the suits to adduce evidence by way of affidavits on 4.1.1991. It is contended that on 11.1.1991, the plaintiffs adduced evidence by way of affidavits and witnesses of the plaintiffs also filed affidavits in this regard. The defendants remained absent on 11.1.1991. The trial Court on the basis of evidence adduced by the plaintiffs and their witnesses on affidavits, finally delivered ex parte judgments and decrees on 28.2.1991. It is contended that the provisions of Rule 2 of Order XVII of the CPC are attracted in view of the facts and circumstances of the present case. It is submitted that since non-

applicants/defendants failed to appear before the trial Court on the day fixed for hearing of the suits, the trial Court was entitled to proceed to dispose of the suit in one of the modes prescribed by Order IX or make such other order as it deemed fit.

6. Learned Counsel Shri Dubey states that in view of the above referred facts, the trial Court proceeded to pass ex parte judgments and decrees in view of the provisions of Order IX Rule 6 of the CPC and delivered ex parte judgments and decrees on 28.2.1991. It is contended that since trial Court passed ex parte judgments and decrees after following procedure contemplated by Order IX Rule 6 of the Code of Civil Procedure, the non-applicants/defendants were entitled to move applications under Order 9 Rule 13 of the CPC for setting aside ex parte decrees and the trial Court after taking into consideration the facts and law involved in the present case, was justified in passing the impugned judgment and order, which is sustainable in law.

7. It is further contended by learned Counsel Shri Dubey that the grounds raised by the applicants in the revisions that the trial Court did not pass order under Order IX Rule 6(1)(a) of the CPC is incorrect in view of the above referred facts. It is contended that judgment and decree dated 28.2.1991 passed by the trial Court in Special Civil Suit No. 2/1987 clearly reveals that the suit was proceeded ex parte and, therefore, provisions of Order IX Rule 6 of the CPC were very much attracted and the trial Court was justified in passing the impugned judgment and order in both these suits.

8. I have considered the contentions canvassed by the learned Counsel and perused the relevant provisions of the Code of Civil Procedure. From the above facts, it appears that though defendants were duly served with the suit summons, they remained absent on the day fixed for hearing and, therefore, suits proceeded ex parte against the defendants. Rule 2 of Order XVII of the CPC contemplates that where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. The plain reading of provisions of Rule 2 of Order XVII of the CPC makes it clear that on the day to which hearing of the suit is adjourned, if parties to the suit fail to appear on that day, the Court is entitled to dispose of the suit in one of the modes provided under Order IX of the Code of Civil Procedure. In the instant case, since defendants failed to appear on the appointed day in spite of service of summons, the trial Court was entitled to dispose of the suits in one of the modes provided in Order IX of the Code of Civil Procedure.

9. One of the modes provided under Order IX Rule 6 of the CPC contemplates that where plaintiff appears and defendant does not appear when the suit is called for hearing and if it is proved that the summons was duly served, the Court is entitled to make an order that the suit shall be heard ex parte. In the instant case, the trial Court passed an order contemplated under Rule 6(1)(a) of

Order IX of the CPC and postponed hearing of the suits to a future date. It appears that in spite of service of summons, the defendants remained absent on the date fixed for hearing and, therefore, trial Court passed ex parte judgments and decrees in both the suits on 28.2.1991.

10. On the backdrop of the above referred facts, it can safely be held that the judgments and decrees passed by the trial Court are ex parte in nature and, therefore, applications under Order IX Rule 13 of the CPC were maintainable and the impugned judgment and order passed by the trial Court is just and proper and sustainable in law. The grounds raised by the applicants in the present revisions are misconceived and devoid of substance. The ex parte judgments and decrees passed by the trial Court cannot be treated as judgments and decrees under Order VIII Rule 10 of the Code of Civil Procedure. This is not the case where trial Court pronounced the judgments on the basis of the fact simplicitor that defendants failed to file written statements. It is no doubt true that the trial Court was legally entitled to pronounce the judgments on the basis of pleadings in the plaints where the defendant fails to file written statement within the time fixed by the Court under Order VIII Rule 10. However, in the instant case, the trial Court has not adopted the course contemplated under Order VIII Rule 10 of the Code of Civil Procedure. On the other hand, the plaintiffs were given opportunity to adduce evidence by filing affidavits and the matters were adjourned to a future date. Since defendants failed to appear before the trial Court on the relevant date, the trial Court was entitled to dispose of the suits in one of the modes provided under Order IX in view of provisions of Rule 2 of Order XVII of the Code of Civil Procedure. The trial Court disposed of the suits by passing ex parte judgments and decrees by adopting procedure contemplated under Rule 6 of Order IX of the CPC on 28.2.1991.

11. The judgments and decrees passed by the trial Court on 28.2.1991 in view of the above referred position on facts and law undoubtedly would be ex parte judgments and decrees and the non-applicants/defendants were, therefore, entitled to file applications for setting aside ex parte decrees under Order IX Rule 13 of the CPC and the trial Court was justified in entertaining the same and passing the impugned judgment and order. The grounds which are raised by the applicants in the circumstances, therefore, cannot be sustained.

12. For the reasons stated hereinabove, no case is made out for interference. Hence, both the civil revision applications are dismissed. Interim relief stands vacated. No order as to costs.