
(1999) 09 PAT CK 0030
In the Patna High Court
Case No : Civil Revision No. 1102 of 1998

Sri Sri 108 Narshing Bhagwan Thakurbari	APPELLANT
Vs	
Tej @ Tek Narain Singh	RESPONDENT

Date of Decision : 29-09-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1(c), 151
Criminal Procedure Code, 1973 (CrPC) — Section 144, 145

Citation : (1999) 09 PAT CK 0030

Hon'ble Judges : P.K. Deb, J

Bench : Single Bench

Advocate : Ajay Kumar Mathur and Mr. Radha Raman Verma, for the Appellant;

Final Decision : Allowed

Judgement

P.K. Deb, J.—This revision petition has been preferred by the above named petitioner against the order dated 30.3.1998 passed by then District Judge, Bhagalpur in Misc. Case No. 75/96 filed under O. 13, Rule 1(c), C.P.C. dismissing the appeal not maintainable and affirming the order dated 13.9.1996 passed by Sub-Judge-I, Bhagalpur in Misc. Case No. 4/95 whereby the petition filed under O. 9, R. 13 C.P.C. read with S. 151, C.P.C. had been rejected.

2. Title Suit No. 406 of 1986 was filed by the opposite party and the petitioner was defendant in that suit. The opposite party sought for a declaration that the plaintiff had got indefeasible title and right along with possession over the suit land and also prayed that the survey entry made in the name of the defendant in the record of right was right and the same should be rectified. The defendant-petitioner is a general body in the name and style of Sri Sri 108 Narsingh Bhagwan, Lalmatiya Thakurbari, Bhagalpur. According to the petitioner in the year 1995 one Dilsukh Rai Marwari had purchased a Mango orchard at Lalmatiya and after purchase he established a temple of Sri Sri 108 Narsingh Bhagwan known as Lalmatiya Thakurbari in the middle portion of the aforesaid land. The Thakurbari was open to all worshippers of Nathnagar. One Raj Bhadur Dilip

Narayan Singh had purchased certain Jamindari interests of Dilsukh Marwari and Dilip Narayan Singh wanted to take possession of the Thakurbari and its surroundings under Ss. 144/ 145 of the Code of Criminal Procedure. In that proceeding the Magistrate held that the temple and its properties are public properties. Dilip Narayan Singh being aggrieved by the order passed under S. 145, Cr.P.C. preferred title suit and subsequently title appeal also but according to the petitioner all those suits ended in favour of the defendant-petitioner Sri Sri 108 Narsingh Bhagwan. The Bhagalpur Municipality for realisation of the arrears of taxes in connection with holding No. 54, filed a suit against Kanhiya Lai Khemka although according to the petitioner the said Khemka was not the owner of the holding but there was decree in favour of the Municipality ex parte and one Bhagwan Prasad Singh purchased in auction the holding No. 54, then the Municipal authorities again filed suit for realisation of arrears of taxes against Khemka with holding No. 54 although the earlier taxes had already been realised by the Municipal authorities. This time also the suit was decreed ex parte and through auction one Satish Prasad Singh purchased the said holding. It is contention of the petitioner that on wrong motion and on wrong proceeding the same holding had been auctioned twice and two different persons had become the auction purchasers. Satish Prasad Singh in second auction purchaser sold the land to different persons but according to the petitioner none of those purchasers could be able to take possession as those auction sales and purchases were only paper transactions. The suit land and houses were recorded in the name of the petitioner and the survey authorities confirmed the same after proper verification. The plaintiff opposite party being one of the purchasers from the said auction purchaser filed the present suit. The defendant-petitioner appeared and instructions were given to the lawyer and the written statement had been prepared but the same could not be filed because of the connivance of the petitioner's-lawyer with the opposite party and then the suit was fixed for hearing under O. 8, R. 10, C.P.C. and the judgment and decree was passed on 16.2.1990 and 3.3.1990 respectively against the defendant. Being aggrieved by the ex parte decree the petitioner filed Misc. Case No. 4/95 before the Sub-Judge-I, Bhagalpur under O. 9, R. 13. C.P.C. read with S. 151, C.P.C. for setting aside the exparte decree. The Sub-Judge-I held that as the judgment was pronounced under O. 8, R. 10, C.P.C. there was no scope of maintaining a petition under O. 9, R. 13. C.P.C. and in support of his contention he had referred to a judgment of this Court as reported in Satya Narayan Sah Vs. Brij Gopal Mundra . Against that order a Misc. case was filed but it appears from the record that regarding the maintainability matter instead of Misc. appeal a Misc. case was registered by the District Judge and ultimately the said Misc. case was dismissed as not maintainable and petitioner was allowed to withdraw the Misc. application. Some anomalous position is there regarding the order passed by the learned District Judge but the moot point remains that the District Judge also held that the ex parte decree prepared on the basis of pronouncement of the judgment under O. 8, R. 10, C.P.C. there remains no scope of filing of petition under O. 9, R. 13. C.P.C.

3. Against such order of the District Judge and the Subordinate Judge the present revision petition has been preferred. Although notices were issued to the plaintiff none appeared and the matter has been heard in the absence of the opposite part.

4. The only point to be decided in this revision petition is as to whether the decree passed under O. 8, R. 10, C.P.C. can be construed as an ex parte decree to come within the purview of challenge of the ex parte decree under O. 9, R. 13 of the Code of Civil Procedure. This High Court, it appears from the judgment as referred to in Satya Narayan Sah Vs. Brij Gopal Mundra had consistently held that when defendant appears but does not file written statement being granted adjournments then the decree prepared on the basis of pronouncement "judgment under O. 8, R. 10, C.P.C. cannot be said to be an ex parte decree within the leaning of O. 9, R. 13. C.P.C. But this view of the Patna High Court does not find support on any other High Court rather other High Courts even the Apex Court on an analogy of the ex parte decree had the view that as per the wordings of O. 9, R. 13. C.P.C. any ex parte decree passed under any other provisions besides that of O. 9, C.P.C. can come it in the purview of O. 9, R. 13. C.P.C. because even after pronouncement of the judgment under O. 8, R. 10, C.P.C. the fact remains that it was an ex parte decree in the absence of the defendant. In this connection a Division Bench judgment of the Delhi High Court may be referred to as reported in Gujrat Co-operative Oil Seeds Growers Federation Vs. Smt. Ramesh Kanta Jain, Mr. Justice Jagannadha Rao, the then Chief Justice of the Delhi High. Court (now an Hon"ble Judge of the Apex Court) passed the judgment for an on behalf of the Division Bench holding that O. 9, R. 13. C.P.C. embraces of the ex parte decree passed under any provisions of the CPC and, as such, even if a decree is prepared on failure of the defendant to file written statement and judgment being pronounced under O. 8, R. 10, C.P.C. then also decree remains an ex parte decree and the same can be challenged within the scope of O. 9, R. 13. C.P.C. That was a very short judgment of the Delhi High Court but it had relied on the decisions of the two Supreme Court judgments as reported in Sudha Devi Vs. M.P. Narayanan and Others, and Prakash Chander Manchanda and Another Vs. Janki Manchanda, . Besides the two Supreme Court judgments reliance was also put on the judgments of Kerala High Court reported in M. Manick Peter and Others Vs. K. Surendranathan, and A.K.P. Haridas Vs. V.A. Madhavi Amma and Others, and also that of Karnataka High Court Kuvarp Industries and Another Vs. State Bank of Mysore, and to Madras High Court as reported in N. Jayaraman Vs. Glaxo Laboratories India Ltd., Madras, . Order 8, Rule 10 reads as follows :-

Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce, judgment against him or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up.

5. Thus there were two options open to the Court when on adjourned date written statement had not been filed by the defendant. Either the Court can pronounce the judgment on which the decree shall be prepared or he can proceed to make any other order in relation to the suit as it thinks fit. In the form although a pronouncement of judgment is there on merit following a decree thereof the matter remains the same with the decree on the pronouncement of judgment remained ex parte and in the absence of the defendant or his case being put before the Court concerned. The Patna High Court in *Satya Narayan Sah Vs. Brij Gopal Mundra* held that it was not an ex parte decree under O. 8, R. 10, C.P.C. as contemplated under O. 9, R. 13, C.P.C. because the decree is a follow up action on the pronouncement of a judgment but that matter was not considered as to the effect that the pronouncement of judgment although on merits but that was also an ex parte judgment when the defence case was not put forward before the Court itself. Decree is a formality on the basis of judgment being passed under O. 9, R. 13, C.P.C. also the decree is prepared on the basis of the ex parte decree order on merit being passed. Thus there remains a little difference regarding the terming of ex parte decree either under O. 9, R. 13, C.P.C. or under Q.8, R. 10, C.P.C. The provisions of O. 9, R. 13, C.P.C. had not been specifically considered by the Bench of this Court in *Satya Narayan Sah Vs. Brij Gopal Mundra*, O. 9, R. 13, C.P.C. does not contemplate ex parte decree passed under O. 9 C.P.C. The Rule 13 under O. 9 starts with the following words "in any case in which a decree is passed ex parte against defendant....." Thus whenever an ex parte decree is passed under any provisions within the CPC then the defendant has got the right to file a petition under O. 9, R. 13 for setting aside the ex parte decree. The wordings of Rule 13 does not contain the ex parte decree as contemplated under O. 9 along but it widened the scope of any decree passed ex parte in any case. This wording of scope under O. 9, R. 13, C.P.C. had not been considered by this Court in the judgment referred to. In *N. Jayaraman Vs. Glaxo Laboratories India Ltd., Madras*, it has emphasised this point that the use of the words "in any case in which a decree is passed ex parte" in O. 9, R. 13, C. P.C. is wide enough to cover all cases of ex parte decrees no matter for what reason such an ex parte decree has been passed after observing the procedure as contained in O. 9 Rule 6-A. It shall include decree passed under O. 8, R. 10, or under O. 17, R.2 and 3, C.P.C. The full Bench of the Madras High Court had also taken the same view and it was held consistently that the ex parte decree passed under O. 8, R. 10, C.P.C. envisages the aggrieved defendant to seek remedy under O. 9, R. 13, C.P.C. Similar is the view taken by the Andhra Pradesh High Court as reported in AIR 1991 Andh Pra 69 (A.F.O. Asscn., Secunderabad v. M/s Innovation Associates) therein also it was held that the provisions of O. 9, R. 13, C.P.C. can be invoked in any case in which the decree is passed ex parte no matter whether such decree has been prepared on the basis of the pronouncement of the judgment under O. 8, R. 10, C.P.C. It was held that there was no scope to shrink the provisions of O. 9, R. 13, C.P.C. to a particular ex parte decree being passed under O. 9 alone.

The Kerala High Court also took the same view as reported in *A.K.P. Haridas Vs. V.A. Madhavi Amma and Others*, . It was held by Kerala High Court that O. 9.R 13, C.P.C. covers all ex parte decrees passed under any provisions of the CPC - no matter either it was passed under O. 8, R. 10, C.P.C. or under O. 17.Rr.2 and 3. It is true that the decree passed on pronouncement of judgment is an appealable one under S. 96 of the Civil Procedure Code, but only because there is a remedy for challenging the ex parte decree under O. 8. R. 10, C.P.C. by way of regular appeal, it cannot be said that there is no application of under O. 9, R. 13. C.P.C. On the ground of maintainability rather both the remedies are inclusive and not mutually exclusive. In an ex parte decree passed under the provisions of O. 9, C.P.C, also appeal is maintainable under S.96 of the C.P.C. The same analogy can be brought for making the remedies mutually inclusive under O. 8, R. 10. C.P.C. or the ex parte decree passed under O. 17.Rr. 2 and 3, C.P.C. In this connection the observations and findings of the Apex Court is also against what have been decided by our High Court (1986) 4 SCC 669 *Prakash Chander Manchanda v. Janki Manchanda* may be referred to. Therein their Lordships held that even an ex parte decree being passed following the procedure as contemplated under O. 17.Rr,2 and 3. C.P.C. then also such ex parte decree comes within the purview of application under O. 9, R. 13. C.P.C. When a defendant fails to appear before the Court even after filing of the written statement and on failure of the defendant his evidence could not be recorded and the defendant's case was closed and the Court passes a judgment and decree following the procedure under O. 17.Rr. 2 and 3, C.P.C. The position under O. 17.Rr.2 and 3, C.P.C, definitely stands on a much higher degree position than that of O. 8, R, 10, C.P.C. inasmuch as in the decree passed under O. 17.Rr. 2 and 3, C. P.C., there was already defence case on record although no evidence could be led by the defendant for his default, but in the procedure under O. 8, R. 10, C.P.C. the defence case was totally absent as there was no written statement filed by him and in such position the ex parte decree passed under O. 8, R. 10 stands on a higher footing than that of the ex parte decree under O. 17, Rr.2 and 3. C.P.C. for embracing the application of O. 9, R. 13. C,P.C. for setting aside the ex parte decree. A recent judgment of the Orissa High Court may also be referred on the subject in issue i.e. *Narendra Patra Vs. Shiba Narayan Taldi and Another*, . By referring to the decisions of the Kerala High Court, Madras High Court, Karnataka High Court it was held by Hon''ble Mr Justice G.B. Patnaik (his Lordship is now sitting as a Judge of the Apex Court) that the provisions of O. 9, R. 13 is wide enough to include all ex parte decrees passed in any case under the provisions of Civil Procedure Code. It was held that the ex parte decree passed under O. 17.Rr.2 and, 3 and O. 8, R. 10, C.P. C. cannot be treated differently from any other ex parte decree liable to be set aside under O. 9, R. 13. C.P.C. Under O. 17, R. 2. C.P.C. a judgment is pronounced on the basis of the materials on record only on the absence of the evidence of the defendant for his default and the Apex Court held that such decree prepared on pronouncement of judgment under O. 17 R. 2, C.P.C. is an ex parte decree to attract the provisions of O. 9, R. 13. C.P.C. Thus where in a suit already the defence case is before the

"our but due to the absence of the defendant on the adjourned date of defence evidence there is pronouncement of judgment and the decree is prepared then the same decree is held to be an ex parte decree under O. 17, R. 2, C.P.C. to attract the provision of O.9, R. 13, C.P.C. as held by the Apex Court, Then the decree prepared under O. 8, R. 10 of C.P.C. on the pronouncement of the judgment when there was no defence case before the Court then in that case decree prepared on pronouncement of the judgment under O. 8, R. 10. C.P.C. :an in no case be said to be not an ex parte decree to embarrass the provision of O. 9, R. 13,C.P.C.

6. I have carefully gone through the judgment of our High Court as referred above and also the other judgments of this Court as referred to in that judgment but it could be found that nowhere the judgments of other High Courts as referred above had been considered by any of the Benches of this Court while pronouncing the judgment to the effect that any decree passed under O. 8, R. 10 do not attract the provisions of O. 9, R. 13. C.P.C. for setting aside the ex parte decree. I am conscious about the mandate of being bound by the judgment of this Court but when it could be found that the judgment of this Court as referred above had never considered the judgment of different High Courts "some are Division Bench judgments and that of the Apex Court, then I feel I am competent enough to distinguish from the judgment passed by a single Bench of this Court as referred above. On the discussion made above I am of the firm view that a decree passed under O. 8, R. 10, C.P.C. is an ex parte decree and the same can be assailed of for the purpose of setting aside under O. 9, R. 13. C.P.C. although such ex parte decree can also be assailed under S. 96 of the Civil Procedure Code.

7. Thus the revision petition is hereby allowed, the orders passed by the District Judge and that of the Sub-Judge-I are hereby set aside and the matter is sent back to Sub-Judge I, Bhagalpur for deciding Misc. Case No. 4 of 1995 on merits.