
(2001) 03 KL CK 0017
In the High Court Of Kerala
Case No : O.P. No. 29144 of 1999

St. Joseph's Hospital

APPELLANT

Vs

Jimmy and Others

RESPONDENT

Date of Decision : 20-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 7
Constitution of India, 1950 — Article 226, 227
Consumer Protection Act, 1986 — Section 13, 13(4)

Citation : (2001) 1 KLJ 901

Hon'ble Judges : J.B. Koshy, J

Bench : Single Bench

Advocate : V.C. James and George Mecheril, for the Appellant; A. Mohammed Mustaque and M.K. Sumod, for the Respondent

Judgement

Mr. Justice J.B. Koshy

1. Petitioner is the Director of a hospital. First respondent filed a complaint against the hospital before the Consumer Disputes Redressal Forum, Kannur regarding the treatment of his wife late Simi. A notice was issued on 17-2-1999 to the hospital showing the posting date of the case as 14-4-1999. But 14-4-1999 was declared as a holiday and the case was taken up on 16-4-1999 and the petitioner was declared exparte. Aggrieved by the above, petitioner filed an application for setting aside the exparte order under Order IX Rule 7 of the Code of Civil Procedure. That was rejected by the Consumer Disputes Redressal Forum, Kannur by Ext. P6. Against the above order this writ petition is filed under Arts. 226 and 227 of the Constitution of India. Since the order challenged in this petition is the order of the Tribunal, Art. 227 will only apply in this case. The procedure in respect of a complaint is specifically mentioned in Sec. 13 of the Consumer Protection Act. There is no power for the Forum to declare exparte or pass an order or take a decision exparte under the above Section 13 of the Consumer Protection Act. But power is given to the District Forum to decide the complaint exparte if the opposite party or his agent fails to appear by Rule 4 Sub

Rule 8 of the Kerala Consumer Protection Rules (hereinafter referred to as the Rules) which is as follows:

(8) If during the proceedings conducted under Sec. 13 of the Act, the District Forum fixes a date for hearing of the parties, it shall be obligatory on the complainant and opposite party or its authorised agent to appear before the District Forum on such date of hearing or any other date to which hearing could be adjourned. Where the complainant or his authorised agent fails to appear before the District Forum on such day, the District Forum may in the discretion either dismiss the complaint for default or decide it on merit. Where the opposite party or its authorised agent fails to appear on the day of hearing, the District Forum may decide the complaint ex parte.

So what the Rule says is that if the complainant or the authorised agent fails to appear, the District Forum can dismiss the complaint for default or decide it on merit. It also says that if the opposite party or his authorised agent fails to appear, District Forum similarly can decide the complaint ex parte and if a decision is taken ex parte, the only remedy of the opposite party is to file an appeal. Powers regarding setting aside of an ex parte order as provided under Order 9 of the CPC is not given to the Consumer Disputes Redressal Forum under Sec. 13(4) of the Consumer Protection Act and therefore the view of the Consumer Redressal Forum that no petition will lie under Order 9 of C.P.C. to set aside ex parte decision cannot be questioned as decided by the Supreme Court in *Jyotsna Arvind Kumar Shah and others v. Bombay Hospital Trust* (J.T. 1999 (5) SC 228). In this case no ex parte decision has been taken by the District Forum. It is true that the District Forum has declared the petitioner as ex parte. The power under rule 4(8) is to decide the complaint ex parte. Here the complaint is not yet decided ex parte. When the case called on 16-4-1999 the opposite party was absent and without taking ex parte decision, Forum adjourned the matter. Opposite party is free to attend and agitate in the next hearing date. The word "ex parte" is given the meaning in Black's Law Dictionary (7th Edition at page 597) as without notice to or argument from the adverse party and ex parte proceeding is defined as a proceeding in which not all parties are present or given the opportunity to be heard. Therefore here the District Forum adjourned the matter to a subsequent date without hearing the petitioner. Nothing else happened.

2. The meaning of the expression "ex parte" has been considered by the Supreme Court in *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, . Referring to a judgment of Wallace, J. in *Gokarakonda Venkatasubbiah Vs. Daliparthi Lakshminarasimham*, , the Apex Court opined that "ex parte" only means in the absence of other party. The declaration of ex parte made by the Forum on 16-4-1999 and subsequent date, are only adjournments of the case ex parte and not ex parte decisions or orders. But power is given to the Forum under Rule 4(8) to decide the matter ex parte. This court considered the power of the Industrial Tribunal to declare ex parte under Rule 22 of the Industrial Tribunal

Rules similar to Rule 4(8) of the Rules under consideration in *F.A.C.T. Employees Association v. F.A.C.T. Ltd.*, (1976 KLT 474). Justice Kochu Thomman as he then was observed as follows:

The Tribunal may imagine that the absentee is present, and having done so, it may give full effect to its imagination and carry it to its logical conclusion. The Tribunal has to bear in mind the purposes for which the fiction is created and has to give effect to them. Obviously the intention of Rule 22 is to enable the Tribunal to imagine that a person is present, although he is in fact absent; and to further imagine that, although present, he is unwilling to adduce evidence or argue his case. The Tribunal then has of necessity to pass an award on the basis of the evidence placed before it by the party that in fact participated in the proceedings. This is the object of the fiction expressed by the words "as if he had duly attended.

If an *ex parte* decision is taken, the opposite party can only file an appeal. In the present case no *ex parte* decision is taken. Therefore in subsequent postings opposite party is free to attend and continue with the proceedings. I also note that date of posting was 14-4-1999. But on that day there was no sitting. Therefore the opposite party honestly thought that the next date of posting will be intimated and therefore he awaited notice. Since no notice was received, he enquired on 20-4-1999 and on seeing that he has been declared *ex parte* after posting the case on 16-4-1999 Ext. P3 petition was filed. There is sufficient reason also for non-appearance as the petitioner a lawman was not aware of the usual procedure adopted by the Forum, when the posting date in the notice was declared as a holiday. I may also refer to the decision of the Supreme Court in *New India Assurance Co. Ltd. Vs. R. Srinivasan*, . There the Supreme Court held that the Consumer Disputes Redressal Forum concerned has inherent power and jurisdiction to restore the complaint dismissed for default provided the complainant shows good reasons for non-appearance. In the absence of powers given under Order 9 of CPC I am of the opinion that, if inherent power is applicable in the matter of restoration of a dismissed complaint for default, same power also can be exercised when an *ex parte* decision is also taken in the interest of justice. In any event, in this matter since no *ex parte* decision is taken, I am of the opinion that the petitioner will be free to attend the case on subsequent dates of hearing. Therefore, no further orders are necessary in this original petition. Petitioner is free to attend the proceedings, cross examine the witness, adduce evidence of his defence etc. in the subsequent postings.

The original petition is disposed of accordingly.