

(2007) 08 BOM CK 0087

In the Bombay High Court

Case No : Appeal From Order No. 75 of 2007

Trimurthy Packing Paper and Another

APPELLANT

Vs

Corporation Bank and Others

RESPONDENT

Date of Decision : 07-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 13

Citation : (2007) 6 MhLj 537

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : S.V. Gangapurwala, for the Appellant; S.R. Deshpande, for the Respondent

Final Decision : Allowed

Judgement

R.M. Savant, J.—This appeal challenges the Order dated 31-3-1998 passed by learned Civil Judge, Senior Division, Aurangabad by which order the application M.A.R.J.I. No. 158/1994 filed by the appellants herein came to be rejected.

2. The facts involved in the present appeal are stated thus:

The appellants are the original defendants in Special Civil Suit No. 215 of 1987 filed by the respondent No. 1 Bank against the appellants and the respondents Nos. 2 and 3 for recovery of the loan amount. The appellants filed their written statement in the said suit and resisted the claim of the respondent No. 1 bank. Along with the written statement, the appellants had also filed a counter-claim to the tune of Rs. 4,92,987/-. The respondent No. 1, original plaintiffs, led evidence and the witnesses were also cross-examined on behalf of the appellants/defendants. Thereafter, the case was posted for evidence of the present appellants/defendants but the defendants were absent. The adjournment application made on their behalf came to be rejected. Thereafter, learned Civil Judge, Senior Division, Aurangabad vide his judgment and order decreed the said suit on 2-2-1994.

3. The original defendants Nos. 1 and 2 i.e. the present appellants and the respondents Nos. 2 and 3 herein filed Misc. Application requiring judicial inquiry (M.A.R.J.I. No. 158/1994) for setting aside the said ex parte decree passed by learned Civil Judge, Senior Division, Aurangabad. It was the case of the appellants herein and the respondents Nos. 3 and 4 that the said suit was posted for evidence on 8-11-1993 but on account of the fact that their Advocate was not well, an adjournment application was filed. The Court after obtaining the reply of the other side had rejected the said application of the appellants. The suit was thereafter posted on 10-1-1994 for arguments but on account of the fact that the elder sister of the Advocate of the applicants in the said application had expired, the said Advocate had, therefore, proceeded to Kolhapur and returned to Aurangabad on 9-1-1994 and, therefore, the said Advocate had no knowledge about the hearing of the case which was fixed on 9-1-1994. Thereafter, the applicants Nos. 2 and 3 to the said application had been to Hyderabad in January, 1994 for some work and in view of the local disturbances they could not return to Aurangabad in time. Therefore, the Advocate of the applicants had filed adjournment application which was rejected by the said Court. The applicants in the said application came to Aurangabad on 10-2-1994 and when they met their Advocate, they came to know that the said suit was decreed ex parte against the applicants. Thereafter, they have applied immediately for certified copies of judgment and decree and filed said application M.A.R.J.I. No. 158/94.

4. The said application of the appellants/defendants was opposed by the respondent No. 1 Bank/original plaintiff. It was inter alia contended on behalf of the respondent No. 1 Bank that the decree which is being sought to be set aside is not an ex parte decree and hence present application under Order 9, Rule 13 of the CPC was not tenable. It was contended on behalf of the respondent No. 1 Bank that the entire approach of the appellants was to delay the recovery of the amount. It was further contended that time was granted to the appellants/defendants for adducing evidence by levying cost of Rs. 1200/- by order passed on Exhibit 236. The said cost was also not deposited by them during the course of the trial. Even thereafter, the applicants had sought adjournment in the said suit on various grounds. The respondent No. 1 further contended that during the period from 8-11-1993 till 10-1-1994 the applicants could have arranged for adducing evidence. However, they have failed to do so. The respondent No. 1 further contended that in spite of the decree being against them, which was passed in the year 1994, the applicants had not taken any steps for challenging the same.

5. The learned Civil Judge, Senior Division, Aurangabad considered the said application M.A.R.J.I. No. 158/94 and by his order dated 31-3-1998 rejected the said application. The learned Judge has inter alia held that the said decree was not an ex parte decree as the appellants/defendants had filed their written statement. The issues were framed and the learned Civil Judge, Senior Division has given a finding on each and every issue considering the evidence on record. The learned Judge was, therefore, of the view that the decree passed in the said

suit could not be set aside under Order 9, Rule 13 of the Code of Civil Procedure.

6. I have heard learned Counsel for the appellants and the learned Counsel for the respondents. The principal submission of the learned Counsel for the appellants is that since no evidence has been led on behalf of the original defendants i.e. the present appellants, the said decree has been passed by resorting to the provisions of Order 9 of the Civil Procedure Code. The learned Counsel relying upon the judgment of the Apex Court reported in Prakash Chander Manchanda and Another Vs. Janki Manchanda, submitted that since the defendants i.e. the appellants abovenamed had remained absent and no evidence was led on their behalf the Court had proceeded ex parte under Order 9 of the CPC as a consequence of which the defendants filed an application under Order 9, Rule 13 of the CPC for setting aside ex parte decree. The relevant paragraphs 6, 7 and 8 of the said judgment are reproduced hereinunder:

6. In some decisions, the High Courts have gone to the extent of saying that even if the trial Court disposes of the matter as if it was disposing it on merits under Order 17, Rule 3 still if the party against whom the decision was pronounced was absent it could not be treated to be a disposal in accordance with Order 17, Rule 3 and the provisions of Order 9 will be available to such a party either for restoration or for setting aside an ex parte decree. Learned Counsel placed before us a number of decisions of various High Courts on this aspect of the matter. But in our opinion in view of the amendment to these two rules which have been made by 1976 amendment of the CPC it is not disputed that to the facts of this case, CPC as amended will be applicable and therefore it is not necessary for us to (go) into that question. Order 17, Rule 2 and Rule 3 as they now stand read:

Order 17, Rule 2 : Procedure if parties fail to appear on day fixed:

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.

Explanation - Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

Order 17, Rule 3 : Court may proceed notwithstanding either party fails to produce evidence, etc.

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding, such default, -

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) if the parties are, or any of them is absent, proceed under Rule 2." It is clear that in cases where a party is absent only course is as mentioned in Order 17(3) (b) to proceed under Rule 2. It is therefore, clear that in absence of the defendant, the Court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any of the modes prescribed under Order 9, Civil Procedure Code. It is therefore clear that after this amendment in Order 17, Rules 2 and 3, CPC there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30-10-1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiffs evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that up to the date i.e. 30-10-1985 when the trial Court closed the case of defendant there was no evidence on record on behalf of the defendant. In this view of the matter therefore the explanation to Order 17, Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17, Rule 2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under Order 9.

7. It is also clear that Order 17, Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not be disputed that the Court when proceeded to dispose of the suit on merits had committed an error. Unfortunately even on the review application, the learned trial Court went on in the controversy about Order 17, Rules 2 and 3, which existed before the amendment and rejected the review application and on appeal the High Court also unfortunately dismissed the appeal in limine by one word.

8. The learned Counsel for the respondent attempted to contend that in this view of law as it now stands an application under Order 9, Rule 13 will be maintainable. However it was suggested that there was also an objection of limitation about the acceptance of that application. It is apparent that the learned trial Court has not considered the application on merits but has only rejected it as not maintainable and that order has been maintained. This objection of the learned Counsel for the respondent is not necessary for us to go into at this stage as in view of the law discussed above, the order rejecting the application as not maintainable, has to be set aside and it will be open to the learned trial Court to consider the application under Order 9, Rule 13 and dispose

it of in accordance with that law and while so doing, it may even examine the objections that may be raised by the respondent.

In view of what has been held by the Apex Court in the judgment cited supra, it was submitted on behalf of the appellants that the impugned order passed by learned Civil Judge, Senior Division holding that the application for setting aside the decree was not tenable could not be sustained.

7. On the other hand, learned Counsel for the respondent No. 1 Bank submitted that since numerous opportunities were given to the appellants/defendants for adducing evidence and since they did not avail of the said opportunity, it cannot be said that the said decree is an ex parte decree. The learned Counsel further submitted that the appellants had filed their written statement and had, therefore, contested the claim of the respondent No. 1 -plaintiff Bank. Learned Counsel relied upon a judgment of a learned Single Judge of this Court reported in Himachal Pradesh Co-operative Marketing and Development Federation Limited Vs. M/s. MAFCO Limited, , Learned Counsel especially relied upon paragraph 14 of the said judgment which is reproduced hereinunder:

14. On the other hand, in the present petition at hand, however, the situation is totally different. The defendants had filed their Written Statement, which was before the Court. The same was considered by the Court; Issues were framed and settled by the Court; Finding against each and every issue was recorded by the Court, after examining the plaintiffs' substantive evidence in the Court and the defendants' contentions, raised in their Written Statement. Thus, the case of the plaintiffs and the case of the defendants was weighed and assessed by the learned Judge on the touch stone of preponderance of probabilities. It was only thereafter that the Judgment was delivered by the learned Judge and decree came to be passed. Such a decree, by any stretch of imagination, cannot be called an "ex parte decree" and therefore, Misc. Application No. 18 of 1984 made by the defendants for setting aside the said ex parte decree (which was not an ex parte decree) was itself not maintainable. The Vth Joint Civil Judge, Senior Division, Pune, was therefore, right in his observation made in para 6 that the Judgment passed by his predecessor, namely, IVth Joint Civil Judge, Senior Division, Pune, was the Judgment on merits, and that the provisions of Order 9, Rule 13 of the CPC for setting aside the ex parte decree were not available to the defendants. He, therefore, rightly dismissed the said Misc. Application by his Order dated 13th August, 1986. No interference is, thus, called for. Hence the following Order:

The learned Counsel submits that the facts of the case in the said reported judgment and the facts involved in the instant case are almost identical as in the said case also though a written statement was filed, issues were framed, no evidence was led on behalf of the defendants and the trial Court in that case after weighing evidence produced by the plaintiff and the contentions raised in the written statement of the defendants had given its finding on the issues framed. Therefore, the learned Single Judge in the said circumstances had come

to a conclusion that the said decree could not be said to be an ex parte decree and the remedy of the applicant therein was by way of an appeal.

Learned Counsel for the respondents also relied upon another judgment of a learned Single Judge of this Court reported in Vijay Prabhakar Salunke Vs. Kamini S. Dadarkar, . The facts of the said case were slightly different than the facts in the instant case, as in the said case the applicant had apart from filing an application under Order 9, Rule 13 of the CPC had also filed an appeal and, therefore, the learned Single Judge has held that recourse to two forum was not permissible and hence held that application under Order 9, Rule 13 was not maintainable. Paragraph 9 of the said judgment is relevant and is reproduced hereinunder:

I, Turning to the facts of the present case, the appeal has not yet been decided. The appeal is pending on the file of the District Judge, Alibag, and the same is being prosecuted by respondent No. 1. This fact is brought on record by the petitioner by filing an affidavit dated 2-3-2001, wherein a positive statement is made on oath that the appeal is still pending, as on date, on the file of the District Judge, Alibag. The learned Counsel for the petitioner placed reliance on the judgment of the Apex Court in the case of Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, , wherein the Apex Court observed as under:

The legislature has, however, thought it fit to provide that when an appeal has been preferred against an ex parte decree, the disposal of an appeal on any ground excepting the solitary ground of disposal of the appeal by withdrawal of the same by the appellant, will create a bar to the maintainability of an application under Order 9, Rule 13. By specially providing in the Explanation that the disposal of any appeal from the ex parte decree on any ground than the solitary ground of withdrawal of the appeal by the appellant, the legislative intent is made manifestly clear that in all the other cases of the disposal of the appeal on any other ground than the ground of withdrawal of the appeal, there will be a bar to the maintainability of the application under Order 9, Rule 13 and no application will lie under Order 9, Rule 13 for the setting aside of an ex parte decree.

Considering the above law recognised by the Apex Court in the above judgment and taking into account the fact that respondent No. 1 has already invoked appellate jurisdiction of Appellate Court, during the pendency of the application under Order 9, Rule 13 and that he is still prosecuting the appeal, the application under Order 9, Rule 13 of the CPC setting aside ex parte decree was not maintainable. The impugned order thus is liable to be set aside on this short count, holding that application under Order 9, Rule 13, CPC was rendered untenable, no sooner the jurisdiction of the appellate forum was invoked by the respondent No. 1 and consequent failure on his part to withdraw the appeal. "In the wake of these facts on record, the application for setting aside ex parte decree could not have been allowed by the trial Court.

8. I have given my anxious consideration to the rival contentions. In the instant case, it is to be borne in mind that though the written statement was filed on behalf of the appellants/defendants on account of the fact that they had remained absent, no evidence was adduced on their behalf as also no arguments were advanced. The case is, therefore, squarely covered by the judgment of the Apex Court cited supra. The Apex Court has in terms held that in such case the Court can dispose of the suit by resorting to any of the modes prescribed in Order 9 of the CPC by taking recourse to Order 17(2) of the Civil Procedure Code. If the said suit is disposed of under any of the modes prescribed under Order 9, the Apex Court in the said circumstance has held that an application under Order 9, Rule 13 of the CPC would be maintainable for setting aside the said ex parte decree. In the teeth of the judgment of the Apex Court, in my view, the order of the trial Court rejecting the said application cannot be sustained. The trial Court has proceeded on a basis that the appellants/defendants were not diligent in their approach. The trial Court came to a conclusion that the said decree was not an ex parte decree only on account of the fact that a written statement was filed on behalf of the appellants/defendants. The fact that the suit has been disposed of by resorting to the modes prescribed under Order 9 of the CPC has not been considered by the trial Court.

9. Insofar as the two judgments of the learned Single Judges of this Court cited supra on behalf of the respondent No. 1 bank are concerned, it appears that in the judgment reported in 2000(2) M.L.J. 317, the judgment of the Apex Court was not cited before the learned Single Judge. In the said circumstances, the learned Single Judge probably came to a conclusion that since written statement was filed on behalf of the applicant therein, the decree could not be said to be an ex parte decree. The said judgment with respect cannot be relied upon in view of the Apex Court judgment cited supra.

Insofar as the second judgment cited on behalf of the respondent No. 1, facts involved in the said judgment are distinguishable from the facts involved in the present case. In the said judgment, the applicant had apart from filing an application under Order 9, Rule 13 of the CPC had also filed an appeal and, therefore, the learned Judge had held that in view of the amendment to the Civil Procedure Code, a recourse to two remedies was not permissible. A reading of the said judgment also makes it clear that the judgment of the Apex Court cited supra was not cited before the learned Single Judge.

10. In view of the law laid down by the Apex Court in the judgment cited supra, the above Appeal from Order would have to be allowed. The impugned order dated 31-3-1998 would have to be set aside and the Application M.A.R.J.I. No. 158/1994 is restored to file and the learned Civil Judge, Senior Division, Aurangabad to consider the same on its own merits and in accordance with law. Appeal allowed.