

(1958) 08 PAT CK 0025
In the Patna High Court
Case No : A.F.O.O. No. 248 of 1955

Union of India (UOI)

APPELLANT

Vs

Mangilal Jain

RESPONDENT

Date of Decision : 22-08-1958

Acts Referred:

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

Citation : AIR 1959 Patna 342

Hon'ble Judges : V. Ramaswami, C.J.;Kanhaiya Singh, J

Bench : Division Bench

Advocate : P.K. Bose and S.K. Sarkar, for the Appellant; Baidyanath Jha, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal is brought on behalf of the defendant, the Union of India, against the order of the Additional Subordinate Judge of Hazaribagh, dated 23-5-1955, dismissing an application under Order 9, Rule 13, Code of Civil Procedure, for setting aside an ex parte decree granted in Money Suit No. 10 of 1952 instituted by the respondent. The ground upon which the lower Court dismissed the application was that there was no sufficient cause made out on behalf of the defendant for not appearing on the date when the suit was called on for hearing. Having heard Counsel for both the parties in the matter and having perused the order of the lower court in the case we are satisfied that the appellant had made out sufficient cause under Order 9, Rule 13, For not appearing in the suit when called upon for hearing.

2. It has been found by the lower court that two important witnesses for the defendant, namely Mr. P.S.R. Murthy and Mr. C.H. Goudin, could not attend court on the date fixed. The case of the defendant was that both these witnesses were ill, and evidence was given by Mr. Murthy to that effect in court. We are also satisfied from the evidence that the other witness, Mr. C.H. Goudin, was also ill and he could not attend court on that ground on the date fixed for giving

evidence on behalf of the defendant. It also appears that important documents relating to consignment had been filed on behalf of the defendant in other courts in connection with certain cases pending at Coimbatore and Daltonganj and for this reason these documents could not be produced at the time of the hearing of the suit. An application was made by the defendant for adjournment of the suit on 31-3-1955, but the application was rejected and the suit was decided ex parte against the defendant. We are opinion, in the circumstances of the case, that the application under Order 9, Rule 13, should have been allowed by the lower court and the money suit should have been restored to the file for being heard and disposed of in accordance with law.

3. An objection was taken on behalf of the respondent that the provision of Order 17, Rule 3, applies to this case and so an application under Order 9, Rule 13, Code of Civil Procedure, was not competent. We do not accept this argument as right. We think that in the circumstances of this case the Subordinate Judge has decided the suit ex parte under provisions of Order 17, Rule 2, and not under the provisions of Order 17, Rule 3, Code of Civil Procedure.

It is not the law that wherever there is default under the provisions of Order 17, Rule 3, the court must decide the suit on merits under the provisions of Rule 3 itself. There is a discretion left in the court even in cases of default under the provisions of Order 17, Rule 3, either to proceed to decide the case on merits or to give an ex parte decree in accordance with the provisions of Order 17, Rule 2, Code of Civil Procedure. That appears to be the ratio of the decision of a Division Bench of this High Court in *Damodar Das v. Raj Kumar Das* ILR 1 Pat 188 : AIR 1922 Pat 485 where there was a default of appearance of the parties within the meaning of Order 17, Rule 2, and there was also default within the meaning of Order 17, Rule 3.

Even in such a case it was held that it was open to the court to grant an ex parte decree under the provisions of Order 17, Rule 2, Code of Civil Procedure, & the ex parte decree was liable to be set aside for sufficient cause by an application made under Order 9, Rule 13, Code of Civil Procedure. In the case of ILR 1 Pat 188 : AIR 1922 Pat 485 the plaintiff was present in court and gave evidence. Afterwards the suit way adjourned for defendant's evidence.

On the adjourned date the defendant's pleader asked for adjournment which was refused and thereafter the defendant's pleader took no part in the trial, though he was present in court. The court thereafter decreed the suit after hearing plaintiff's evidence and arguments. It was held by the High Court in these circumstances that the decree ought to have been set aside for sufficient cause under Order 9, Rule 13, Code of Civil Procedure. In the present case, therefore, we hold that the application under Order 9, Rule 13, was competent for the reasons we have already stated and the application ought to be allowed, the ex parte decree in Money Suit No. 10 of 1952 set aside and the money suit restored to file for being heard and dealt with in accordance with law.

4. We accordingly allow this appeal, set aside the order of the Subordinate Judge of Hazaribagh dated 23-5-1955, and direct that Money Suit No. 10 of 1952 should be restored to file for being dealt with in accordance with law. This order is subject to the condition that the appellant deposits a sum of Rs. 200/- as costs in the High Court payable to the respondent within six weeks from this date.