

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.01.2014

+ **FAO(OS) 62/2014**

SH S S BRAR

.... Appellant

versus

SMT GULNER ZIA

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sunil Satyarthi and Mr Raman Gandhi

For the Respondent : None

CORAM:-

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No. 1564/2014

The exemption is allowed subject to all just exceptions.

FAO(OS) 62/2014 & CM No. 1563/2014

1. This appeal is directed against the order dated 16.12.2013 passed by a learned Single Judge of this court in I.A No. 19373/2013 in CS(OS) No. 1888/2009. The said application was filed purportedly under Order IX Rule 9 of the Code of Civil Procedure, 1908. By virtue of the said application, the appellant / plaintiff sought recall of the order dated

29.10.2013 whereby the suit filed by the appellant was dismissed by noticing that despite repeated opportunities, the appellant / plaintiff had failed to lead evidence.

2. Before the learned Single Judge it was contended on behalf of the appellant / plaintiff that the application under Order IX Rule 9 CPC sought to recall the order dated 29.10.2013 on the ground that the order ought to be construed as one dismissing the suit for non-prosecution and for that reason the provisions of Order IX CPC would apply. It was contended on behalf of the appellant / plaintiff, before the learned Single Judge, that the order dated 29.10.2013 could not be construed as an order under Order XVII Rule 3 CPC, inasmuch as, the court had not actually decided the case on merits notwithstanding the fact that there was no evidence led by the appellant / plaintiff. Several decisions had been relied upon by the appellant / plaintiff before the learned Single Judge. Even before us, the learned counsel appearing for the appellant placed reliance on the following decisions:-

1. **Rukmansa Rajansa Hosmani v. Shankargouda Basangouda;** AIR 1941 Bombay 83 (DB)
2. **Moolchand Chhabra v. Laxminarayan Chhabra;** AIR 1988 NOC 45 (CAL) (DB)
3. **B. Janakiramaiah Chetty v. A.K. Parthasarathi and others;** AIR 2003 SC 3527

3. The learned Single Judge found that the decisions relied upon by the appellant / plaintiff were all distinguishable on facts and that those judgments were in the context of non-appearance by one of the parties to

the suit. The learned Single Judge observed that the order dated 29.10.2013 had been passed in the presence of the learned counsel for the parties and, therefore, could not be regarded as a case of non-appearance by one of the parties. The learned Single Judge, further, observed that the suit was for specific performance and that the plaintiff, not having led any evidence, the essential ingredients of the suit could not be proved by the appellant / plaintiff only on the basis of documents on record. It was further observed in the impugned order that the documents which had been exhibited had to be proved by leading evidence and as there was no evidence in support of the case of the appellant / plaintiff, the averments in the plaint could not be regarded as having been proved. Consequently, the learned Single Judge came to the conclusion that the order dated 29.10.2013 was not an order on dismissal of a suit for non-prosecution but was clearly an order on the merits of the case in terms of Order XVII Rule 3 CPC. Consequently, the learned Single Judge held that the application under Order IX Rule 9 CPC was misconceived and the same was dismissed as such.

4. At the outset, we may observe that we are in agreement with the conclusion arrived at by the learned Single Judge. Admittedly, this is not a case of non-appearance of any of the parties. Therefore, Order XVII Rule 2 CPC would not apply. We agree with the learned Single Judge that this is a case which would fall clearly under Order XVII Rule 3 CPC. We make it further clear that it would actually fall under Order XVII Rule 3(a) CPC. In order to explain this, it would be necessary to set out the

provisions of Order XVII Rule 2 CPC and Order XVII Rule 3 of the Code of Civil Procedure, 1908. They read as under:-

“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.

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.”

5. On a plain reading of Order XVII Rule 2 CPC it is evident that it relates to a situation where parties fail to appear on a date fixed. This is clearly not the case in the present matter. Even the explanation which has been appended to Order XVII Rule 2 CPC is predicated on two conditions- (a) where the evidence or a substantial portion of the evidence

of any party has already been recorded; and (b) such party fails to appear on any date to which the hearing of the suit is adjourned. If these two conditions are fulfilled then, the court may, in its discretion, proceed with the case as if such party was present. This is, obviously, a deeming provision based on the satisfaction of the above-mentioned two conditions. In the present case neither the evidence or a substantial portion of the evidence of the appellant / plaintiff had been recorded nor did he fail to appear on 29.10.2013. Therefore, none of the conditions set out in the explanation to Order XVII Rule 2 CPC would come into operation. In any event, there is no need for this deeming provision to be looked into, inasmuch as, the appellant / plaintiff was not absent on 29.10.2013 and was present, inasmuch as, his learned counsel was present and ready for hearing on that date.

6. Therefore, it is not Order XVII Rule 2 CPC which would apply but Order XVII Rule 3 CPC which would be applicable to the present case. Order XVII Rule 3 CPC sets out certain defaults which permit the court to take recourse to any of the two alternatives mentioned therein. The defaults, *inter alia*, include the situation where a party to a suit to whom time has been granted fails to produce his evidence. This is exactly what has happened in the present case. The plaintiff had been given repeated opportunities to lead his evidence but he had failed to do so. Insofar as, the two alternatives that were available to the court notwithstanding such default are concerned, one of them has been prescribed in clause (a) of Rule 3 of Order XVII CPC and that is that the court may proceed to decide the suit forthwith. However, this can only be done if the parties

are present. In the present case, the parties were clearly present on 29.10.2013. The other alternative of proceeding under Rule 2 of Order XVII CPC is provided in clause (b) of the said Rule 3 but, that is available only if the parties are, or any of them is, absent. This is not the case here. Both the parties were present on 29.10.2013. Therefore, it would be Order XVII Rule 3(a) CPC that would apply.

7. The learned counsel for the appellant / plaintiff, as mentioned above, had placed reliance on three decisions. Insofar as the decision of the Bombay High Court in the case of **Rukmansa Rajansa Hosmani** (*supra*) is concerned, that was clearly a case under Order XVII Rule 2 CPC as would be evident from the following words appearing in the said decision:-

“In my view this case fell within R.2 only, and the learned Judge had no material before him to justify him in disposing of the plaintiff’s case on merits by dismissing that part of the claim which was not admitted.”

The observations of the Division Bench of the Bombay High Court on the interpretation of Order XVII Rule 3 CPC were *obiter* remarks and are not in any event binding on this court, apart from the fact that they were made only in the context of the facts of that case.

8. With regard to the Division Bench decision of the Calcutta High Court in **Moolchand Chhabra** (*supra*) it may be straightway observed that the facts therein were entirely different. In that case, the Advocate for the plaintiff had requested for an adjournment inasmuch as the Senior

Advocate engaged by the plaintiff was not available. In that context the Division Bench of the Calcutta High Court came to the conclusion that the presence of the plaintiff and his counsel in the court would not constitute their appearance within the meaning of Order IX Rule 8 CPC and, therefore, on dismissal of the suit, an application under Order IX Rule 9 CPC would be maintainable. The facts of the present case are entirely different. We may also observe that insofar as the Calcutta case is concerned, it had been noted in the decision that the plaintiff had done all that was required for him to do to prosecute the case. The court observed that the plaintiff in that case had not only engaged an Advocate on Record but had also engaged two other lawyers to conduct his suit and that at the material time, except the Advocate who appeared on behalf of the Advocate on Record, none of the other lawyers were present and the Advocate concerned was not ready to proceed with the suit. Consequently, it was deemed that the suit was not disposed of on merits but for non-prosecution. These facts are clearly distinguishable from the facts obtaining in the present matter. This is so because the learned counsel for the appellant / plaintiff was clearly present on 29.10.2013 and was ready with the matter.

9. The decision of the Supreme Court in ***B. Janakiramaiah Chetty*** (supra) is also of no use to the appellant / plaintiff. That case was also one where the defendant Nos. 1 to 3 were absent. This is evident from paragraph 12 of the said decision. The Supreme Court analyzed Order XVII Rule 2 CPC and Order XVII Rule 3(b) CPC. It was not concerned

with the case under Order XVII Rule 3(a) CPC. This would be evident from the following extract:-

10. In Rule 2, the expression used is “make such order as it deems fit”, as an alternative to adopting one of the modes directed in that behalf by Order IX. Under Order XVII, Rule 3(b) only course open to the Court is to proceed under Rule 2. When a party is absent explanation thereto gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes. Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two Rules, however is that in the former any party has failed to appear at the hearing while in the latter the party though present has committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The explanation is in the nature of a deeming provision when under given circumstances, the absentee party is deemed to be present.”

(underlining added)

10. We have already pointed out that in the present case Order XVII Rule 2 did not apply. Nor did the explanation to Order XVII Rule 2 CPC

apply. Order XVII Rule 3(b) CPC also did not apply. This is because of the fact that the parties were present and none of the parties were absent on 29.10.2013. Consequently, the only provision that would apply would be Order XVII Rule 3(a) CPC. Dismissal of the suit under that provision would amount to a dismissal on merits and not on account of non-prosecution or for default of the appearance of any of the parties.

11. Therefore, the learned Single Judge, in our view, was right in holding that the application under Order IX Rule 9 CPC was wholly misconceived inasmuch as Order IX CPC itself was not applicable as the order dated 29.10.2013 was an order on merits and operated as decree. For these reasons, the appeal has no merit. The same is dismissed but, with no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JANUARY 27, 2014
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