

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO 101/2007**

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6th March, 2014

ROHTAS SINGH & ANR

.....Appellants

Through: Mr. Rakesh Tikku, Sr. Adv. with Mr.
Amit Panigrahi, Adv.

VERSUS

BHATERI DEVI & ORS.

..... Respondents

Through: Ms. Gita Dhingra, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Order 43 Rule 1 sub-Rule (d) CPC impugning the judgment of the appellate court which has dismissed the application of the appellants-defendants under Order 9 Rule 13 CPC. Suit filed was a suit for possession and mesne profits and decreed by the judgment dated 11.1.2002.

2. The facts of the case are that the appellant no.2 was the defendant no.2 in the suit. Defendant no.2 is the daughter of respondent no.1 herein, the plaintiff no.1 in the trial court. There were five other plaintiffs i.e plaintiff no.2 to 6 and they were the sons and daughter of plaintiff no.1 Smt.

Bhateri Devi. The suit was a suit for possession and damages with respect to two rooms and two sheds on the ground floor of the property no. 117 (New) Village Bharola, New Sabzi Mandi, Azadpur, Delhi shown in the site plan as Ex. P-7. It is not in dispute that plaintiffs were the owners of the suit property. The right to remain in occupation of the suit property was claimed by the defendants on the ground that defendant no.1 (who is the husband of defendant no.2 and defendant no.2 being a daughter of plaintiff no.1-Smt. Bhateri Devi as already stated above) was the tenant in the suit premises at a rent of Rs. 300/- per month. The suit was initially filed in the original side of this Court. Parties completed their pleadings. Issues were framed. Plaintiffs completed their evidence. Both the defendants also appeared in the witness box as DW-1 and DW-2 and led their evidence. At this stage, the defendants who were to comply with the interim order of payment of rent during the pendency of the proceedings on account of having failed to do so, their defence was struck off by the Court vide order dated 19.5.2000. Appellants applied for setting aside of this order of striking off the defence, and at that stage, the suit was transferred to the District court on account of enhancement of the pecuniary jurisdiction of this Court. In the presence of the parties, on 29.3.2001 an order was passed by this Court for the parties to appear before the learned District Judge on 23.4.2001. The suit was not

listed before the District Judge on 23.4.2001 but it was listed three days later on 26.4.2001. On 26.4.2001 no one appeared for the parties before the District Judge and the matter was adjourned to 4.7.2001. On 4.7.2001, counsel for the plaintiffs appeared but no one appeared for the appellants-defendants and the case was adjourned to 23.8.2001. On 23.8.2001 once again no one appeared for the appellants-defendants, and therefore, the application for recalling of the order dated 19.5.2000 by which defence was struck off, was dismissed in default and the case was listed for final arguments on 19.9.2001 in view of the fact that both the parties had led their evidence. The suit was ultimately decreed for possession and mesne profits by the judgment of the trial court dated 11.1.2002. Trial court held that there was no tenancy in favour of the defendant no.1-appellant no.1, husband of appellant no.2-defendant no.2 because there was absolutely no document whatsoever to prove the issue of tenancy. In execution of this judgment and decree, plaintiffs-respondents took possession of the suit property and thereupon the subject application under Order 9 Rule 13 CPC was filed, and which has been dismissed by the impugned judgment of the court below dated 4.6.2002.

3. By the impugned judgment, the trial court has in substance held that it was incumbent upon the appellants-defendants to make enquiries of the listing of the suit if the same was not listed before the District Judge on 23.4.2001, and it was not open to the appellants/defendants to not take any action for finding out the details of the suit and its listing, which was decreed at a much later date by the judgment dated 11.1.2002. The application under Order 9 Rule 13 CPC was filed by the appellants/defendants on 30.5.2002.

4. Before me, learned senior counsel for the appellants urged the following aspects:-

(i) Once the suit was not listed before the District Judge on 23.4.2001, appellants thereafter need not have made enquiries of the suit and need not have appeared in the suit, but it was the duty of the trial court to issue notice to the appellants for appearing in the suit.

(ii) The trial court has wrongly held that the application under Order 9 Rule 13 CPC is not maintainable because the application was not only maintainable, but in any case heading of the application should not have defeated the application which could have been treated under Section 151 CPC for setting aside of the ex parte proceedings which had commenced in

terms of the order of the District Judge dated 23.8.2001, finally culminating into the ex parte judgment on 11.1.2002.

(iii) There was no requirement of filing an application for condonation of delay as held by the court below inasmuch as, application under Order 9 Rule 13 was maintainable and appellants could within 30 days of the date of knowledge of the ex parte judgment file the subject application under Order 9 Rule 13 CPC.

5. In support of the aforesaid arguments, reliance is placed on behalf of the appellants upon the following judgments:

(i) ***State of U.P. and another Vs. Sunil Kumar Bajpai and another 1990 All. L.J 330.*** This judgment is in support of the proposition that appellant should have been issued notice by the court once the matter was not listed before the District Judge on 23.4.2001 and hence the appellants were justified in their absence by not appearing in the suit till the filing of the application under Order 9 Rule 13 CPC on 30.5.2002.

(ii) ***M/s. Kashmir Government Arts Emporium Vs. Firm Indian Arts & Hand Printers 16 D.L.T.(1979) 91(SN).*** This judgment was relied upon to hold that the application under Order 9 Rule 13 CPC if the same was not

maintainable under that provision, the powers under Section 151 CPC could have been invoked for granting the reliefs as prayed for in the application of setting aside ex parte judgment and decree and also dismissal of the application for recalling of the order for striking off the defence.

(iii) ***Inder Singh Bejwa Vs. Corporation of Calcutta, AIR 1969 Calcutta 418 (V 56 C 71)***. This judgment is relied upon for the proposition that no application for condonation of delay was required to be filed inasmuch as Article 123 of the Limitation Act, 1967 applied and an application under Order 9 Rule 13 CPC was filed within 30 days of the date of knowledge in this case. This judgment was also relied upon for the proposition that once the delay was otherwise explained, delay should have been in fact condoned.

6. The arguments urged on behalf of the appellants are totally misconceived and actually the conduct of the appellants shows that they have been less than fair in their dealings with the respondents-plaintiffs, besides being guilty of strategizing in order to delaying the disposal of the suit for possession in which they had no valid defence of an alleged tenancy. Though ordinarily there is no need for referring to the ex parte judgment on merits while dealing with an application under Order 9 Rule 13 CPC, since both the parties had otherwise led evidence in the suit and which evidence

has been considered by the trial court while passing the judgment on merits on 11.1.2002, I reproduce the relevant findings with respect to the fact that there is no tenancy in favour of the appellant no.1-defendant no.1 as under:-

“Issue No.1

9. Onus to prove this issue was partly upon the plaintiff and partly upon the defendants. The plaintiffs were under an obligation to prove the fact that the defendant was a licensee in respect of the suit premises since the year 1979, whereas the defendant has pleaded his tenancy and therefore, respective onus to prove their status in respect of the suit property was upon both the parties. In discharge of the onus the plaintiffs had produced and examined three witnesses named above. PW-1, sh. Chand Ram has deposed on all the material facts consistent to the claim made in the plaint and had proved the documents Ex. P-1 to P-16, in his examination in chief dt. 18.5.93 and 9.9.94, respectively. Ex. P-1 is the special Attorney of his mother Smt. Bhateri Devi, Ex. P-2 is the certified copy of the suit filed by the defendant No.1 against his mother, Ex. P-3 is the certified copy of the written statement filed by his mother in that suit, Ex. P-4 is the certified copy of the proceedings in that suit, Ex. P-5 is the certified copy of the undertaking given by smt. Bhateri Devi, the plaintiff No.1, ex. P-6 is the certified copy of the order of The said Court, Ex. P-7 is the siteplan of the suit property, Ex. P-9 is the death certificate of Sh. Bhim Singh, who expired on 4.6.75, Ex.P-10 is the copy of the legal notice sent by postal receipt Ex.P-11, Ex.P-12 is the certificate of posting, Ex.P-13 is the notice received from defendant No.1. The original Bahi maintained by them at the time of marriage of defendant No.1 and copies of the entry in that regard is Ex.P-15 and true translation of the said entries are Ex.P-16. Before proceeding on cross-examination it has been submitted by the ld. counsel for the defendant that the defendant dos not claim any right in the first floor of the property in question and the defendant has not threatened to dispossess the plaintiffs from the first floor of the said property at any time. PW-2 Sh. R.R. Nagpal is the Architect who had stated that he has prepared the site plan as Ex.P-7 at the instruction of Sh. Chand Ram, one of the plaintiffs and proved the signature at point ‘X’ thereon. PW-3, Sh.

Dharamveer Bhardwaj had proved certified copy of the survey report as Ex.P-8. In the testimony of PW-2 and PW-3 there appears no challenged or contradiction or rebuttal in that regard. On cross-examination of PW-1 there appears no challenged or contradiction on certain facts deposed and the documents Ex.P-1 to P-16, except the document Ex. P-14, which has not been proved on record. Accordingly, by his testimony he has proved that the licence was terminated by notice Ex.P-10, in respect of the suit premises and that the plaintiffs were the owner in respect of the suit premises.

10. To rebut this evidence the defendant had also examined themselves as DW-1 and DW-2. In his statement DW-1 has stated on cross-examination that his marriage took place on 1.3.79 and in his WS he has admitted that the whole family was living in the suit property upto the time of marriage and at the same time no document has been proved by him to prove the renting out the said property to him on any date either before his marriage or after marriage at the rate of Rs.300/- , Rs.400/- or Rs.450/- per month. DW-2, Smt Shakuntla Devi had also stated certain facts, but she had also not proved any document regarding payment of any rent by the defendant No. 1 either before or after her marriage either @ Rs. 300/-, Rs.400/- or Rs.450/- per month as pleaded in the WS. Though in his statement DW-1 has stated that he has taken the said shop on rent at a monthly rent of Rs.300/- and thereafter increased the same at Rs.400/- and then Rs.450/- around 1980 but he himself states that no rent receipt was issued in that regard. DW-2 produced and examined by him has not supported the version regarding payment of rent on any particular date. No other evidence has been produced to prove the payment of the rent in respect of the suit premises to the plaintiff on any particular date for any period since the taking of the said premises allegedly on rent. On cross-examination the witness was confronted with para 4 of the plaint in which he had admitted that the plaintiff and Smt. Shakuntla Devi were living in the property No. 117, before the defendant N0.1 was married with defendant No.2 and that the statement which he made then was correct. In view of this statement I find that the plea taken by him regarding the taking said property on rent is absolutely baseless and false since he himself has admitted that the plaintiffs were living in the suit property till the marriage of defendant No.1 and defendant No.2, whereas the defendant has claimed

that he has taken the said property on rent about two years before his marriage. So, this plea of taking the property on rent is absolutely false and baseless and therefore, in view of that I find that the defendant No.1 bitterly failed to prove the claim of the plaintiff false regarding the granting of licence in favour of the defendant on the ground of son-in-law and that the said licence was revoked by legal notice Ex.P-10. Once the legal notice has been served and admitted by the defendant and reply of the same is also proved as Ex.P-13, but the same has not been specifically challenged and no document against the claim of the plaintiff has been proved to prove himself as a tenant, I find that the plaintiff has established that defendant No.1 was inducted in the said premises as a licensee in the year 1979 because he was the son-in-law of the plaintiff No.1, as he had married with defendant No.2 and that the defendant No.1 as he had married with defendant No.2 and that the defendant No.1 bitterly failed to prove that he was the tenant in the said premises. Accordingly, this issue stands decided in favour of the plaintiffs and against the defendants.

(underlining added)

7. So far as the issue of damages is concerned, the same has been dealt with in para 11 of the judgment dated 11.1.2002 which reads as under:-

“ISSUE NO. 2,3 & 4

“11. Onus of prove these issues were upon the plaintiffs in discharge of which the plaintiffs had examined the aforesaid three witnesses and had proved the documents Ex.P-1 to P-16 as already referred. In his examination in chief PW-1 had stated that the premises could fetch about Rs.1,000/- to Rs.1,500/- per month at the time of filing of the suit and that in the year 1986 the rent was increased in the market and this premises could fetch Rs.3000/- per month and at the time of examining this witness he had stated that the said premises could fetch Rs.6,000/-per month as the market rent. On cross-examination there appears no challenge, contradiction or rebuttal in that regard. Therefore, there appears no reason to disbelieve his testimony in that regard. That being so, I find that the plaintiff has also proved by testimony of PW-1 that they

were entitled to the damages @ Rs.1,000/- per month amounting to Rs.6,000/- for the period 7.7.85 to 6.1.86. However, there is also no contradiction or challenge regarding the future damages after 1986 @ Rs.3,000/- per month and accordingly, after the suit has been filed, subject to adjustment of the amount paid by the defendant @ Rs.400/- per month till the February, 2001, under the directions of the Court, without pre-judice to the rights of the parties this claim is proved subject to payment of Court fees for the future damages @ Rs.3,000/- of the plaintiffs and against the defendants.”

8. In view of the aforesaid findings, the suit of the respondents-plaintiffs for possession and mesne profits was decreed by decreeing the relief of possession of the suit property and damages at Rs.6000/- per month up to 6.1.1986 and future damages at Rs.3000/- per month.

9. The main issue in the present case is really as to whether the appellants-defendants have an inherent right not to appear in the suit proceedings and not make any enquiry merely because on one date i.e 23.4.2001, the suit was not listed before the District Judge after its transfer from the original side of this Court. Related with this issue is also the aspect that in the facts of the present case it is not as if the impugned judgment and decree on merits was passed very soon after 23.4.2001, but the same has been passed around 8 months after 23.4.2001 when the suit was not listed before the District Judge.

10. Before proceeding further I must note that application filed by the appellants in the present case would be both under Order 9 Rule 13 CPC and

also to be read with the provision of Order 9 Rule 7 CPC because by the application both the ex parte proceedings by the order dated 23.8.2001 till the passing of the ex parte judgment dated 11.1.2002 was prayed to be set aside and thereafter the ex parte judgment dated 11.1.2002 itself. Appellants were proceeded ex parte on account of their non-appearance and the suit was decided on the basis of the record because evidence of both the parties existed in the suit record. Order 9 Rule 13 CPC strictly will only apply if a person is not served in the proceedings and does not appear in the suit proceedings, however where a person appears in the suit and thereafter fails to appear, and consequently there is an ex parte judgment, the ex parte proceedings have two periods. One period is post the passing of the ex parte judgment and decree and second one is from the stage of proceeding ex parte against the defendants till the passing of the ex parte judgment and decree. For the period post passing of the ex parte judgment and decree, in a way Order 9 Rule 13 will apply because the ex parte judgment and decree will also have to be set aside, however for the period prior to passing of the ex parte judgment and decree really sufficient cause will have to be shown for non-appearance in terms of Order 9 Rule 7 CPC, because admittedly the defendants were served in the suit, had participated in the suit proceedings by filing pleadings and leading evidence. Really the issue is, whether there

exists sufficient cause for non-appearance of the appellants after 23.4.2001 and the appellants are justified in insisting that court should have issued them a court notice merely because on one day i.e on 23.4.2001 the suit was not listed before the District Judge.

11. In my opinion, the contentions urged on behalf of the appellants are misconceived that they are entitled to go into self induced *kumbhkaran* like sleep merely because there was a delay in transfer of the suit record from this Court to District Judge by three days. The suit was to be listed before the District Judge on 23.4.2001, but was actually listed almost immediately thereafter on 26.4.2001. Even if there is a valid reason for non-appearance of the appellants on 26.4.2001, in my opinion, this does not justify any non-appearance for a period from 24.6.2001 till the passing of the judgment and decree dated 11.1.2002 and thereafter till 30.5.2002 when the application under Order 9 Rule 13 CPC was filed. After all no court notice was issued to the appellants who did not appear on 23.4.2001 but yet they made enquiries and appeared subsequently and therefore the appellants/defendants also could have appeared after making enquiries. The difference in the actions of the two parties being guided by the fact that one (ie plaintiff) wanted to avoid any delay in disposal of suit and second (ie

defendants/appellants) wanted to delay the disposal of the suit. There is no dispute that the suit was transferred by this Court in the presence of both the parties with direction to both the parties to appear on 23.4.2001 before the District Judge. Therefore, appellants cannot claim ignorance with respect to the suit file having been transferred to the District Judge. The issue is only of a date and this issue is related to the issue of sufficient cause for non-appearance i.e an entitlement of appellants to insist that court notice has to be issued and they need not have made any enquiries for months and months together of listing of the suit. I cannot agree with such arguments urged on behalf of the appellants because no legal provision is cited before me that merely because a case is not listed on one day, the defendants in the suit have a right not to appear in a suit at all for all times in future till court notices are served upon them. There is no such rule which could be pointed out to me and nor is there any provision in CPC which requires issuing of court notice to the parties merely because a suit is not listed wrongly on a particular date when it ought to have been listed. As I have already stated above, appellants may have some case if within a few days of the suit wrongly being not listed an ex parte judgment and decree is passed, however, in the present case, the ex parte judgment and decree was passed much later after 23.4.2001 i.e on 11.1.2002, and in which period appellants-

defendants were duty bound to make enquiries as to further listing of the suit like the respondents/plaintiffs did. Obviously, no enquiries were made by the appellants because as stated above it was part of their strategy to delay the disposal of the suit for possession and mesne profits in which they had no valid defence and proof of the appellant no.1/defendant no.1 being a tenant in the suit property.

12. The judgment which is relied upon by the appellants in the case of *Sunil Kumar Bajpai (supra)* is not applicable because the said judgment was dealing with a specific rule of Allahabad High Court, and in any case, para 23 (4) of the judgment makes it clear that when a person does not have any information of the transfer, only in those cases, a person has no right to appear. In the present case, the order of transfer of the suit was passed in the presence of the counsel for the parties and therefore appellants were not ignorant of the order of transfer. Appellants are actually only claiming an inherent right not to appear merely because the suit was not listed on a specific date on 23.4.2001. I cannot agree with this argument because any diligent litigant is bound to make reasonable enquiry if the suit is not listed in court and such litigant will only have a valid grievance if the suit is immediately decreed after the date on which the matter is wrongly not listed

i.e litigant cannot have a valid grievance if the suit is decreed after many many months of the date on which the suit ought to have been listed, and the defendants thereafter deliberately do not make enquiries of listing of the suit on various subsequent dates.

13. The judgment in the case of *M/s. Kashmir Government Arts Emporium (supra)* relied upon by the appellants lays down the proposition of law which is not disputed however, I am for the purpose of passing of this judgment taking the fact that heading of the application is immaterial and the trial court ought to have treated the application as an application both under Order 9 Rule 13 read with Order 9 Rule 7 and Section 151 CPC. Even if that be so, however, yet I still hold that even taking the application as correctly filed and there being no delay, appellants had to show sufficient cause for their non-appearance but they have failed to do so. In fact I have already observed that non-appearance is part of ploy and strategy for continued illegal possession in the suit property in which they had no right.

14. The judgment in the case of *Inder Singh Bejwa (supra)* also cannot benefit the appellants because the proposition of law contained therein is not disputed that once sufficient cause is shown ex parte proceedings can be set aside, however in the present case I am not convinced that there is sufficient

cause for setting aside of the ex parte proceedings pre the ex parte judgment and the period post the passing of the ex parte judgment dated 11.1.2002.

15. In view of the above, there is no merit in the appeal, and the same is therefore dismissed with costs of Rs.50,000/-. Costs shall be paid within a period of six weeks from today. Amount which is deposited by the appellants in this Court be released to the respondents-plaintiffs in appropriate satisfaction of money decree which has been passed in their favour. Amount will be released to the respondents-plaintiffs in equal shares as so prayed by the counsel for the respondents-plaintiffs.

MARCH 06, 2014
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VALMIKI J. MEHTA, J.