

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No.993 of 2006

Order reserved on: 3-10-2016

Order delivered on: 7-10-2016

Neharu, S/o Vidhyadhar Kolta, aged about 46 years, R/o Village Bijana, Police Station Tamnar, Tah. Gharghoda, District Raigarh (C.G.)

---- Appellant/
(Defendant No.1)

Versus

1. Smt. Lata Bai, D/o Vidhyadhar Kolta, aged about 43 years, R/o Village Bijana, at present R/o Village Tapariya, Police Station Tamnar, Tah. Gharghoda, District Raigarh (C.G.)
(Plaintiff)

2. Jageshwar, S/o Jai Kolta, aged about 40 years,
(Defendant No.2)

3. Parshu, aged about 43 years, S/o Jai Kolta,
(Defendant No.3)

4. Malti Bai, widow of Late Sahdeo, aged about 62 years,
(Defendant No.4)

Defendants No.2 to 4 are residents of Village Bijna, Police Station Tamnar, Tah. Gharghoda, District Raigarh (C.G.)

5. The State of Chhattisgarh, through the District Collector Raigarh (C.G.)
(Defendant No.5)
---- Respondents

For Appellant:	Mr. Amit Sharma, Advocate.
For Respondent No.1:	Mr. Pushpendra Kumar Patel, Advocate.
For State/Respondent No.5:	Mr. Avinash Singh, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Feeling aggrieved against the judgment and decree dated 31-7-

2006 passed by the first appellate Court in Civil Appeal 1-A/2006, defendant No.1 / appellant herein has filed this appeal under Order 43 Rule 1(u) of the CPC.

2. The suit filed by respondent No.1 herein / plaintiff was by order dated 14-11-2005 directed to be fixed for evidence on 12-12-2005 and on that date, the plaintiff was required to examine his witnesses, but on that date (12-12-2005), the plaintiff and his witnesses were absent. Application under Order 17 Rule 1 of the CPC was filed seeking adjournment as the plaintiff remained busy in thrashing paddy and that application was rejected by order dated 12-12-2005. Defendant No.1 has also pleaded that he does not want to adduce evidence and the case was fixed for 13-12-2005 and 19-12-2005. The trial Court dismissed the suit holding that no evidence has been adduced by the plaintiff and also dismissed the suit as barred by limitation. On appeal being preferred by the plaintiff, the first appellate Court interfered with the judgment and decree of the trial Court holding that the trial Court could not have proceeded under Order 17 Rule 3 of the CPC instead, it could have proceeded under Order 17 Rule 2 of the CPC and allowed the claim remanding the matter to the trial Court afresh against which this miscellaneous appeal has been preferred.
3. Mr. Amit Sharma, learned counsel appearing for the appellant / defendant No.1, would submit that the trial Court is absolutely justified in proceeding under Order 17 Rule 3 of the CPC as on

12-12-2005, the date was fixed for recording plaintiff evidence but miserably, they failed to adduce evidence. Therefore, the trial Court was absolutely justified in proceeding under Order 17 Rule 3 of the CPC. The appellate Court has committed legal error in holding that the matter falls within the ambit of Order 17 Rule 2 of the CPC.

4. On the other hand, Mr. Pushpendra Kumar Patel, learned counsel appearing for the plaintiff / respondent No.1 herein, would support the impugned judgment.
5. I have heard learned counsel for the parties, given thoughtful consideration to the submissions made herein and also gone through the record available with utmost circumspection.
6. The question of law that is required to be considered is whether in the given fact situation of the present case, the trial Court is justified in holding that the provisions of Order 17 Rule 3 of the CPC would apply which was reversed by the first appellate Court in appeal.
7. In order to consider the plea raised at the Bar with regard to applicability of the provisions contained in Order 17 Rules 2 and 3 of the CPC, it would be appropriate to reproduce the provisions contained in Order 17 Rule 2 and Rule 3 of the CPC which 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."

8. A careful perusal of Order 17 Rule 2 of the CPC would show that 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 indicated in Order 9 or the Court is empowered to make such order as it thinks fit. Whereas, under Order 17 Rule 3 of the CPC, 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 granted, 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.

9. The distinction between Order 17 Rule 2 and Rule 3 of the CPC has been considered from time to time by the High Court of Madhya Pradesh also and ultimately, the comparative scope of Rules 2 and 3 of Order 17 of the CPC was referred to the Full Bench consisting of five Judges of that Court. The Full Bench of that Court in the matter of **Rama Rao and others v. Shantibai and others**¹ has considered the ambit and scope of the two provisions. The conclusion of the Full Bench of the High Court of Madhya Pradesh as per the majority view reads thus: -

"As a result of these conclusions, our answers together with the questions referred to us, are stated as under:--

Questions	Answers
(1) If, when a suit is called on for hearing, a party's counsel appears and seeks adjournment but when adjournment is refused he retires saying that he has no instructions whether this will amount to "appearance" of the party whom the counsel represents	
(a) If the counsel had sought adjournment because he was instructed by his client to ask for an adjournment only, and not to proceed with the trial if adjournment be refused?	It will be no appearance of the party and R. 2 of O. 17 C.P.C. alone would be attracted. However, in such a case the defaulting party must show 'sufficient cause' for non-appearance as well as for not fully instructing the counsel.

1 AIR 1977 MP 222

(b) If the counsel feels a necessity to seek adjournment so that he may prepare himself and, on his own, seeks adjournment.	It will be no appearance of the party and R. 2 of O. 17 C.P.C. alone would be attracted.
(2) If, when a case is called on for hearing, the counsel appears (without making any request for adjournment) merely to inform the Court that he has no instructions and, therefore, would not appear, will it still amount to appearance of a counsel for the purposes of O. 9, R. 8, or O. 17, R. 2 C.P.C.	It will be no appearance of the party and R. 2 of O, 17 C.P.C. alone would be attracted.
(3) Whether an application under O. 9 C.P.C. will lie for setting aside the dismissal of a suit in the following circumstances:	
(a) The plaintiff had not been asked to do something and he did not appear when the case was called on for hearing.	Yes. Order 17 R. 2 C.P.C. would alone be attracted.
(b) The plaintiff was asked to do something which he did not do, nor did he appear when the case was called on for hearing.	Yes. Order 17 Rule 2 C.P.C. would alone be attracted.
(4) Whether, in the following situations, the defendant can apply under O. 9 R. 13 C.P.C. for setting aside an ex parte decree:	
(a) When the defendant had not been asked to do something and he did not appear and the Court decided the suit on the basis of the existing material without or after taking any	Yes. Order 17 Rule 2 C.P.C. would alone be attracted.

further evidence on record.	
(b) When the defendant had been asked to do something which he did not do, nor appeared when the case was called on for hearing and the Court decided the suit on the existing material without taking any further evidence for the plaintiff.	Yes. Order 17 Rule 2 C.P.C. would alone be attracted.
(c) When he had been asked to do something which he did not do and did not appear when the case was called on for hearing and therefore, on the same day, the Court took on record ex parte evidence produced by the plaintiff.	Yes. Order 17 Rule 2 C.P.C. would alone be attracted.
(d) When he had been asked to do something which he did not do, nor appeared when the case was called on for hearing and the trial Court adjourned the hearing for recording plaintiff's evidence ex parte and on the next date, after recording plaintiff's ex parte evidence, passed an ex parte decree against him.	Yes. Order 17 Rule 2 C.P.C. would alone be attracted.

10. It has been clearly held in **Rama Rao** (supra) that if the counsel had sought adjournment because he was instructed by his client to ask for an adjournment only, and not to proceed with the trial if adjournment be refused; it will be no appearance of the party and Rule 2 of Order 17 of the CPC alone would be attracted and in such case, the defaulting party must show 'sufficient cause' for non-appearance as well as for not fully instructing his counsel. It

has been further held that if the counsel feels a necessity to seek adjournment so that he may prepare himself and, on his own, seeks adjournment; it will be no appearance of the party and the provisions contained in Rule 2 of Order 17 of the CPC have to be resorted to.

11. Thereafter, the Supreme Court has an occasion to consider the distinction between Order 17 Rules 2 and 3 of the CPC way back in the year 1986 in the matter of **Prakash Chander Manchanda and another v. Janki Manchanda**² in which it has been held that where a party is absent, the only course available, as mentioned in Order 17 Rule 3(b) of the CPC, is to proceed under Rule 2 of Order 17 of the CPC, and observed as under: -

"It is clear that in cases where a party is absent the only course as mentioned in Order 17 Rule 3(b) is 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 one of the modes prescribed under Order 9 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility

2 (1986) 4 SCC 699

of any controversy. In this view of the matter it is clear that when in the present case on October 30, 1985 the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's 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. October 30, 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."

12. Similar is the proposition laid down in the matter of **Mohandas and others v. Ghisia Bai and others**³. In the case before the Supreme Court, the case was fixed for evidence, counsel for the plaintiff sought adjournment which was rejected and then the counsel moved an application under Order 17 Rule 1 of the CPC on the ground that the plaintiff is seriously ill and, therefore, the case may be adjourned. The said application was also rejected and the trial Court dismissed the suit under Order 17 Rule 3 of the CPC. Thereafter, an appeal was preferred and the Supreme Court held that the order of dismissal of suit was not passed under Order 17 Rule 3 of the CPC, but it was passed under Order 17 Rule 2 of the CPC, which is apparent from the following observation made in paragraph 3 of the report: -

"3. In the present case what we find is neither the plaintiff-appellant nor his witnesses were present on 7th May, 1994. Therefore, the case has to be dismissed under Order XVII, Rule 2. Even Rule 3

3 AIR 2002 SC 2436

itself provides that if the parties or any of them absent, the Court shall proceed to decide the suit under Order XVII, Rule 2. In view of the said legal position, we are of the view that the view taken by the Court below was erroneous and deserves to be set aside. We, therefore, set aside the judgment under appeal and sent the case back to the trial Court to decide the matter in accordance with law."

13. The Supreme Court again in the matter of **B. Janakiramaiah Chetty v. A.K. Parthasarathi and others**⁴ considered the scope and ambit of the Explanation to Order 17 Rule 2 of the CPC and held that the Explanation attached to Order 17 Rule 2 is in the nature of a deeming provision and held as under in paragraphs 9 and 10 of the report: -

"9. In Rule 2, the expression used is "make such order as it thinks fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the 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

4 (2003) 5 SCC 641

mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present.

10. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The court while acting under the Explanation may proceed with the case if that prima facie is the position. The court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need, for adjourning the suit or deferring the decision."

14. This Court also in the matter of **Kishore Jain v. Vishambhar Satnami and others**⁵ has held that when the case was fixed for recording of the plaintiff's evidence but the plaintiff and his witnesses remained absent, then the trial Court should proceed under Order 17 Rule 2 not under Order 17 Rule 3 of the CPC and observed as under: -

"In the light of the dictum of the Supreme Court in the above referred case and in the light of the judgment of High Court of M.P. in Rama Rao's case (supra) to which I am in respectful agreement and in view of the fact that the plaintiff and his counsel were absent as aforesaid, I have no hesitation to hold that learned trial Court has dismissed the suit under Order 17 Rule 2 of C.P.C. and not under Order 17 Rule 3(a) of C.P.C. and therefore, the order is not appellable."

15. Now, I shall proceed to examine the facts of the case in the light

5 2010(3) C.G.L.J. 15

of the law laid down by Their Lordships of the Supreme Court and the M.P. High Court as above mentioned.

16. Admittedly, by order dated 14-11-2005, the trial Court fixed the case for evidence of both the parties on 12-12-2005, but on that day neither the plaintiff was present nor his witnesses were present and on behalf of the plaintiff, an application under Order 6 Rule 17 of the CPC was filed and another application under Order 17 Rule 1 of the CPC was also filed with a copy to the opposite party. The application under Order 17 Rule 1 of the CPC states that the plaintiff is busy in thrashing of paddy and, therefore, hearing of suit be adjourned which was rejected holding that sufficient opportunity has already been given to the plaintiff and neither the plaintiff nor his witnesses were present. The defendants also made a statement that they do not want to lead evidence and the case was fixed for final argument. Ultimately, on 19-12-2005, the suit was dismissed.

17. Thus, on 14-11-2005, neither the plaintiff nor his witnesses were present and, therefore, the trial Court could have proceeded under Order 17 Rule 2 of the CPC as provided under Order 17 Rule 3(b) of the CPC which clearly provides that if the parties are, or any of them is, absent then the Court shall proceed to decide the suit under Order 17 Rule 2 of the CPC also as held by the Supreme Court in **Prakash Chander Manchanda** (supra) and **Mohandas** (supra). The Full Bench of the M.P. High Court in **Rama Rao** (supra) has held that when counsel has sought

adjournment in absence of the plaintiff and his witnesses, it will be no appearance of the party and Rule 2 of Order 17 of the CPC would alone be attracted and in such a case, the defaulting party must show 'sufficient cause' for non-appearance as well as for not fully instructing the counsel. Therefore, the trial Court ought to have proceeded under Order 17 Rule 2 of the CPC, as provided under Order 17 Rule 3(b) of the CPC.

18. In the circumstances, the first appellate Court is justified in holding that the trial Court ought to have proceeded under Order 17 Rule 2 of the CPC by virtue of the provisions contained in Order 17 Rule 3(b) of the CPC and rightly reversed the judgment and decree of the trial Court. I do not find any jurisdictional error in the order passed by the first appellate Court holding that the trial Court ought to have proceeded under Order 17 Rule 2 of the CPC and the judgment and decree passed by the first appellate Court are hereby affirmed.

19. As a fall out and consequence of the aforesaid discussion, the miscellaneous appeal deserves to be and is accordingly dismissed leaving the parties to bear their own cost.

Sd/-
(Sanjay K. Agrawal)
Judge