

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

% *Date of Decision: January 10, 2017*

+ **RSA 10/2017**

ANKUR MUTREJA Appellant

Through: Appellant in person.

versus

GNCTD Respondent

Through: None.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM No.914/2017

1. Exemption allowed subject to all just exceptions.
2. Application is disposed of.

CM No.917/2017

1. For the reasons stated in the application the delay of 125 days in re-filing the appeal is condoned.
2. The application is disposed of.

RSA 10/2017

1. This regular second appeal has been filed by the appellant impugning the order dated 04.07.2014 of the learned Trial Court and dated 30.04.2016 of the learned Appellate Court, whereby his prayer for decreeing the suit under Order XV Rule 2 CPC against defendant No.1/GNCTD has been

declined. Civil Suit was filed against defendants No. 1 to 7. This Regular Second Appeal has been filed impleading only defendant No.1/GNCTD in the civil suit as respondent in this case.

2. The appellant, who is an advocate, has submitted before this Court that defendant No.1/Government of National Capital Territory of Delhi (GNCTD) has failed to appear in Civil Suit No.469/2010. On 4th July, 2014 he requested the Court that the above civil suit filed by him should be decreed under Order XV Rule 2 CPC against defendant No.1 but learned Trial Court declined the relief on the ground that the relief claimed against the defendant No.1 is inextricably linked with the entire dispute and it would be in the fitness of things to dispose of the entire controversy in-toto. Aggrieved by the above order he filed RCA No.162/2016 which has also been dismissed by the first appellate court noting the following:

- (i) It is the case of the appellant that respondent/defendant No.1 neither appeared nor filed any written statement and has been proceeded exparte on 8th February, 2011.
- (ii) The prayer for decreeing the suit against defendant No.1 was made by the appellant/plaintiff to the Trial Court on 4th July, 2014 which has been declined and impugned before the First Appellate Court.
- (iii) Merely because respondent/defendant No.1 is exparte, it does not debar the respondent/defendant No.1 from cross-examining the plaintiff witnesses.
- (iv) The cases which are exparte, the propounder does not get absolved of its duty to establish the relevant facts, which constitute the genesis of his claim, by some credible evidence.
- (v) The absence of the defendant No.1 does not itself justify the presumption that the plaintiff's case is proved.

3. The appellant has contended that when one of the several defendants i.e. defendant No.1/GNCTD is not at issue with the plaintiff on any question of law or fact, learned trial court was duty bound to pronounce a judgment and pass a decree against respondent/defendant No.1 and proceed only against other defendants.

4. The appellant has further contended that in the Civil Suit No.469/2010 filed by him respondent/defendant No.1/GNCTD has preferred not to appear or file the written statement. If there is no written statement it has to be held that parties are not at issue. If parties are not at issue there was no question of leading any evidence by him qua the relief claimed against the respondent/defendant No.1 thus both the Courts below have committed an error by not passing a decree under Order XV Rule 2 CPC against defendant No.1.

5. The appellant has contended that the substantial question of law arising in this case have been referred by him in paragraph 12 of the appeal. The substantial question of law pressed by him is as under:

“12.c. Is a plaintiff obliged to prove his case against a defendant by leading evidence when no issues of law or fact arise between him and the defendant?”

6. I have considered the submission made by the appellant. Order IX Rule 6 (1)(a) CPC provides that where the plaintiff appears and the defendant does not appear when the suit is called for hearing, then the Court may make order that the suit be heard ex parte.

7. Order IX Rule 11 CPC prescribes the procedure in case of non-appearance of one or more of several defendants.

8. The appellant has placed on record the copy of proceedings dated 08.02.2011 before the learned Trial Court. On that date, not only defendant No.1/GNCTD even defendants No.5 and 6 were also proceeded exparte.

9. The appellant/plaintiff invoked the provisions of the Order XV Rule 2 CPC for passing a decree against the respondent/defendant No.1, which reads as under:

“ORDER XV

1. xxxxxxxxxx

2. One of several defendants not at issue – (1) Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.”

10. The contention of the appellant that on failure of the respondent/defendant No.1(GNCTD) the parties are not at issue and decree should have been passed is liable to be rejected. It is settled legal position that the absence of the defendant does not absolve the plaintiff from satisfying the trial court about the validity of his claim. Rather in a case where the defendant has been proceeded exparte the Court has to be more vigilant and satisfy itself that there is cogent and sufficient evidence adduced by the plaintiff to prove his claim.

11. The effect of non-appearance of the defendant or the defendant being exparte has been examined by the Supreme Court in ***Maya Devi vs. Lalta Prasad*** AIR 2014 SC 1356 wherein it was held as under:

“The absence of the Defendant does not absolve the Trial Court from fully satisfying itself of the factual and legal veracity of the Plaintiff’s claim; nay, this feature of the litigation casts a greater responsibility and onerous obligation on the Trial Court as well as the Executing Court to be fully satisfied that the claim has been proved and substantiated to the hilt by the

Plaintiff. Reference to Shantilal Gulabchand Mutha v. Tata Engineering and Locomotive Company Limited (2013) 4 SCC 396 will be sufficient. The failure to file a written statement, thereby bringing Order VIII Rule 10 of the Code of Civil Procedure into operation, or the factum of Defendant having been set ex parte, does not invite a punishment in the form of an automatic decree. Both under Order VIII Rule 10 Code of Civil Procedure and on the invocation of Order IX of the Code of Civil Procedure, the Court is nevertheless duty-bound to diligently ensure that the plaint stands proved and the prayer therein are worthy of being granted.”

12. Both the Courts below have rightly declined the prayer of the appellant to pass a decree when there are other contesting respondents/defendants. The provisions of Order VIII Rule 10 CPC and Order XV Rule 2 CPC have been considered in ***S K Ameer John vs. Executive Officer, Sri Saptharishewara Swamy Devasthanam And Ors. (1994) 2MLJ 623*** and it was held as under:-

“The decision relied upon by learned counsel for the petitioner cannot be stated to be of any help to advance his case, inasmuch as the said decision also really reflects the provisions of the aforesaid orders by stating that under the provisions of order 8, Rule 10 and Order 15, Rule 2, C.P.C., in a case where there are more defendants than one and there is no issue of fact or law arising between the plaintiff and one of such defendants, as in that case, when the first defendant was set exparte, it would be a matter for the Court to consider whether on the facts and circumstances of the case, it could exercise its powers under Order 15, Rule 2, C.P.C. and pass a decree ex parte against such defendants immediately.”

13. Both the Courts below have proceeded against respondent/defendant No.1 as per the procedure prescribed in the Code of Civil Procedure i.e. by proceeding exparte against the GNCTD. A Regular Second Appeal can be entertained only if there arises a substantial question of law. In my opinion

the arguments as raised by the appellant are mis-conceived and no substantial question of law arises inasmuch as the consequences that could have followed on non-appearance of defendant No.1 or failure to file the written statement have already ensued and the trial is proceeding against the other contesting respondents/defendants.

14. Since the instant appeal does not raise any substantial question of law requiring interference by the High Court in exercise of jurisdiction under Section 100 CPC, the appeal is hereby dismissed.

15. The appeal is dismissed with no orders as to cost.

16. ACR and LCR be sent back along with the copy of this order.

CM Nos.915/2017 (Stay), 916/2017 (calling of TCR & ACR)

Dismissed as infructuous.

**PRATIBHA RANI
(JUDGE)**

JANUARY 10, 2017
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