

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 451 of 2017

Asha Devi W/o Ramdulare, Aged about 45 years, Occupation House Wife, R/o Village Gorakhnathpur, P.S. Bishrampur, Tahsil and District Surajpur, Chhattisgarh

---- Appellant

Versus

1. Parvinder Kaur W/o Tavinder Singh Soodan, Aged About 28 Years Caste Sikkha, Occupation House Wife, R/o Vishrampur, Tahsil Surajpur, District Surajpur, Chhattisgarh, Chhattisgarh.
2. Tavinder Singh Kaur Soodan S/o Niranjan Singh, Aged About 30 Years Occupation Driver, R/o Vishrampur, Tahsil Surajpur, District Surajpur, Chhattisgarh, District : Surajpur, Chhattisgarh
3. Ramdulare S/o Ramsurat, Aged About 51 Years Occupation Service, R/o Village Gorakhnathpur, P.S. Bishrampur, Tahsil And District Surajpur, Chhattisgarh, District : Surajpur, Chhattisgarh
4. State Of Chhattisgarh, Through The Collector, Surajpur, District Surajpur, Chhattisgarh, District : Surajpur, Chhattisgarh

---- Respondents

For the Appellant :- Mr. Ashok Shukla, Advocate
For the Respondent No. 1 & 2. :- Mr. Keshav Prasad Gupta, Adv.
For the State : Mr. Avinash Singh, PL.

Shri Justice Prashant Kumar Mishra
Hon'ble Smt. Justice Vimla Singh Kapoor,

Order on Board By
Prashant Kumar Mishra, J.

01.12.2018

1. The trial Court has dismissed the appellant/plaintiff suit for declaration of permanent injunction by invoking the provision under Order 17 Rule 3 CPC, therefore, since the merit of the matter is yet to be examined by trial Court as the parties have

not led their evidence thus far, we are not advertent to the facts of the case. Sufficient it would be to state that the suit was fixed for recording the evidence for the first time on 03.12.2013. The plaintiff failed to produce evidence for four years, though on some dates interim applications were moved by one or the other party to the suit.

2. On 09.03.2017 appellant/plaintiff produced the affidavit of one of his witnesses under Order 18 Rule 4 CPC, but when the cross-examination began, the defendant's counsel moved application under Order 17 Rule 1 CPC and the matter was adjourned for recording of evidence of plaintiff witnesses on 25.04.2017. On the said date the Court was vacant as the Presiding Officer was transferred in between. On 09.05.2017 also the Presiding Officer was on leave, therefore, the matter was again posted for further order.
3. On 07.07.2017 plaintiff counsel moved application for adjournment of the case which was allowed on payment of cost of Rs. 500/-. On 09.08.2017 the Presiding Officer was on leave and thereafter, the matter was posted for further orders on 17.08.2017 and then for recording the evidence on 25.08.2017. On this date, the plaintiff again failed to produce his evidence and instead instructed his counsel to seek adjournment by moving an application under Order 17 Rule 1 CPC. Noticing that the suit is pending for more than five years and the case was posted for the first time for recording evidence on 03.12.2013 the trial court rejected the application for adjournment and proceeded under Order 17 Rule 3 CPC by closing the evidence of

the plaintiff. Since the defendant also did not produce any evidence the matter was posted for judgment on 26.08.2017 and thereafter on 28.08.2017.

4. It is argued that on the date when the trial Court proceeded under Order 17 Rule 3 CPC, neither the plaintiff or his witnesses nor the defendant was present, therefore, the trial Court could not have proceeded under Order 17 Rule 3 (clause-a) of CPC. Reliance is placed on **2003 AIR SCW 2148 B. Janakiramaiah Chetty vs. A.K. Parthasarathi** and **2002 AIR SCW 2675 Mohandas and others vs. Ghisia Bai and others.**
5. Learned counsel for the respondent/defendant would support the impugned judgment and decree.
6. In the matter of Mohandas and others (Supra), the Supreme Court held thus in paragraph 2 and 3.

2. Learned counsel appearing for the appellants urgent that the facts and circumstances of the case show that in fact the suit was dismissed under Order XVII, Rule 2 and not under Order XVII, Rule 3. Order XVII Rule 2 provides - 'where, on any way 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 by Order IX or make such other order as it thinks fit'. Order XVII, Rule 3 provides - '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'.

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 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.

7. We have referred to the record of the trial Court in the preceding paragraph to highlight that on the relevant date the plaintiff or his witnesses were not present. Similarly, the defendant was also not present, therefore, it is not a case where the trial Court could have proceeded under Order 17 Rule 3 (clause -a) of CPC. The said clause would attract only when the parties are present but fails to produce the evidence. In such a case, clause-b of Rule 3 of Order 17 CPC would apply but under the said clause the Court is required to proceed under Order 17 Rule 2 CPC,

whereunder the Court can proceed to decide the case on merit only when a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any date to which the hearing of the suit is adjourned. In such eventuality, the Court has been empowered to proceed with the case, in its discretion, as if, such party were present. In the case at hand, recording of evidence of the plaintiff's witness has not yet begun, therefore; the Court could not have proceeded under Rule 2 by treating that the plaintiff was present.

8. In our considered opinion, the trial Court wrongly proceeded under Order 17 Rule 3 CPC to decide and dismiss the suit on merits. The impugned judgment and decree, therefore, deserves to be and is hereby set aside and the matter is remitted back to the trial Court for decision afresh on merit.
9. The parties shall appear before the trial Court **18/12/2018** and on the said date the trial Court shall fix the date for recording the evidence of the plaintiff in the second week of January 2019. If on the said date, the plaintiff fails to produce his witnesses the trial Court shall impose cost of Rs. 25,000/- on the plaintiff. If on the adjourned date, the plaintiff again fails to produce his witnesses the trial Court shall impose cost of Rs.50,000/- on the plaintiff.
10. The trial Court shall thereafter fix the matter for recording evidence of defendant's witnesses in the second week of February, 2019. The defendant shall produce the entire witness on one day failing which, the trial Court shall impose cost of Rs. 25,000/- on the defendant. If on the adjourned date, the

defendant again fails to produce his witnesses the defendant shall pay cost of Rs.50,000/-. The trial Court shall decide the suit on or before 15th March, 2019. If the parties cooperate and the trial Court is in position to decide the suit on an earlier date, the trial Court would be at liberty to do so with the consent of the party.

Sd/-

Judge

Prashant Kumar Mishra

Sd/-

Judge

Vimla Singh Kapoor