

THE HON'BLE SRI JUSTICE RAGHVENDRA SINGH CHAUHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

A.S.No.1843 of 2018

Order (Per the Hon'ble Sri Justice M.Satyanarayana Murthy) :

The defendants in O.S.No.39 of 2012 on the file of XIV Additional District and Sessions Judge, Ranga Reddy district at L.B. Nagar, preferred this appeal aggrieved by the decree and judgment of trial court granted in favour of the respondents-plaintiffs for the relief of cancellation of sale deed dated 11.11.2011 and granting permanent/perpetual injunction, while declaring document dated 11.11.2011 bearing No.5045 of 2011, as null and void.

2. It is the case of the appellants that the respondents-plaintiffs filed suit for various reliefs, including declaration of document bearing No.5045 of 2011 dated 11.11.2011 executed by defendant Nos.4 and 5 in favour of defendant Nos. 1 to 3 on 12.01.2012, as illegal and for cancellation of the same and other reliefs, but the appellants-defendants filed written statement denying the right of the plaintiffs to claim the reliefs raising several contentions, but the trial court after framing the issues, recorded the evidence of PWs.1 and 2, marked Ex.A1 to A20 and later the suit was posted for appellants-defendants' evidence and it was closed as the defendants failed to adduce evidence in support of their claim and later they filed I.A.Nos.190 and 191 of 2017, for re-opening of evidence of the appellants and the same were allowed, subject to cross examination of the witnesses, but they failed to comply with the directions and later filed I.A.Nos.692 and 693 of 2017 and I.A.Nos.382 and 383 of 2018, for re-opening of evidence and recalling of witnesses, but those petitions were dismissed and the matter was carried in revision, which ended in dismissal against the appellants. Therefore, the

trial court passed decree and judgment on merits, considering the oral evidence of PWs.1 and 2 and Ex.A1 to A20.

3. Aggrieved by the decree and judgment, the present appeal is filed on the ground that no sufficient opportunity was afforded to the appellants-defendants and that the I.As. filed for re-opening of evidence of PW1 and PW2 were allowed but due to reasons beyond their control, they could not cross-examine the witnesses even after re-opening the evidence of PW1 and PW2. Therefore, there are no lapses on their part in adducing evidence and cross examining the witnesses already examined before the trial court and thereby passing a decree and judgment against the appellants granting the relief claimed by the respondents herein, is illegal and requested to set aside the decree and judgment passed by the trial court.

4. During hearing, the counsel for the appellants Mr.Venkateswarlu Pothapragada contended that two remedies are available when the decree is passed by the lower court, one is to prefer an appeal under Order XLI Rule 1 of C.P.C. and invite decision or to seek remand of the suit, if the decree and judgment are passed under Order XVII Rule 2 of C.P.C., therefore, the appellants are entitled to question the decree by way of appeal, requested to pass appropriate orders. At the end, he also requested to set aside the decree and judgment and examine the matter under the powers conferred on the court by Order XLI Rule 23A of C.P.C., whereas the counsel for the respondents Mr.Hamsa Raj supported the decree and judgment of the trial court while contending that decree and judgment would not fall within Order XVII Rule 2 and thereby the decree and judgment of the trial court cannot be interfered while exercising power under Order XLI Rules 23 and 23A of C.P.C. or Rule 31 and requested to dismiss the appeal.

5. As seen from the decree and judgment challenged before this court in this appeal, the suit was filed for various reliefs as stated above i.e. for declaration that the unregistered sale deed dated 10.03.1976 is invalid and not enforceable under law and for cancellation of document No.5045 of 2011 executed by D4 and D5 in favour of D1 to D3 as void and not binding on the plaintiffs and grant of perpetual injunction based on the title, the respondents set up in the suit, as null and void, whereas the defendants pleaded that these documents were valid and no relief can be granted. However, to substantiate this contention of the respondents, they examined PWs. 1 and 2 and marked Ex.A1 to A20 but they were not cross examined by these appellants-defendants, also failed to adduce any evidence in support of their claim. Therefore, the trial court disposed of the suit on merits instead of disposing of the suit under Order XVII Rule 2 of C.P.C.

6. According to Order XVII Rule 2 of C.P.C., 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 orders as it thinks fit, but the explanation thereto made it clear that 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. But A.P. Amendment to Rule 3 of Order XVII of C.P.C. is relevant at this stage. Rule 3 deals with the procedure to be adopted when any party to whom time has been granted, fails to adduce evidence. But A.P. amendment thereto made it clear that in case where there is default under this rule i.e. Rule 3, as well as default of appearance under Rule 2, the court shall proceed under Rule 2. This amendment came into force w.e.f. 27.04.1961. Therefore, in view of the A.P. amendment to Order XVII Rule 3, if the order is passed on

account of failure of any of the parties who are bound to adduce evidence, the order to be passed is only under Order XVII Rule 2 but not order under Order XVII Rule 3 C.P.C. Therefore, the trial court ought to have passed decree and judgment invoking Order IX, but not on merits invoking explanation to Order XVII Rule 2 of C.P.C.

7. A similar question came up before the Apex Court in B.JANAKIRAMAIAH CHETTY VS. A.K.PARTHASARTHI AND OTHERS¹ wherein it was held that the explanation to Rule 2 of Order XVII of C.P.C. permits the court in its discretion to proceed with the case where substantial portion of 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. In the present case on hand, the suit was posted for defendants' evidence but the defendants failed to examine any witness. Therefore, there is absolutely no evidence on record as on date adduced by the defendants-appellants. In such case, the decree to be passed is under Order IX only but not on merits. A similar question came up before the Apex Court and this Court in PRAKASH CHANDER MANCHANDA AND ANOTHER VS. SMT.JANKI MANCHANDA², RAJKUMAR AND ANOTHER VS. G.ANASUYA³, MANDADI SRINIVASA RAO VS. SHAIK MEHRUNNISA⁴ and DAKA VENKATRAMI REDDY VS. CENTRAL BANK OF INDIA, ONGOLE⁵

8. In all the above judgments, the Apex Court and this Court made it clear that for failure of the defendants, a decree cannot be passed on merits but it must be treated as a decree under Order IX. Here, the trial court proceeded to decide the matter on merits under Rule 3 of Order XVII and the explanation to Rule 2 of Order XVII, as if there is substantial evidence on record adduced by the parties who were absent,

¹ AIR 2003 SC 3527

² AIR 1987 SC 42

³ 1997 (4) ALT 77

⁴ 2013 (3) ALT 217

⁵ 2000 (2) ALD 565

ignoring the A.P. amendment to Rule 3 Order XVII C.P.C., which is extracted hereunder:

“Provided that in a case where there is default under this rule as well as default of appearance under Rule 2 the court will proceed under Rule 2 (27.04.1961).”

9. Thus, from the proviso annexed to Rule 3 of Order XVII of C.P.C., by A.P. Amendment, if default is committed by any of the parties either under Rules 2 or 3 under Order XVII, the court has to proceed under Rule 2 only but not under Rule 3. For application of Rule 3, the following requisites are to be satisfied:

1. The hearing is adjourned on the application of a party to the suit, as distinguished from an adjournment by the court of its own motion;
2. The hearing is adjourned on the application of the party who subsequently makes the default;
3. The adjournment is granted to enable the party to produce evidence or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit; and the party fails to perform any of the acts for which the adjournment was granted within the time allowed by the court. In the end of Rule 3, in view of the addition of the wording ‘the court may, notwithstanding under Rule 2’, the distinction between Rules 2 and Rule 3 is clear and the power to act as laid down therein is discretionary.

10. Rules 2 and 3 are not mutually exclusive. Amendment to Rule 3 now makes it clear that even in case of default within the meaning of Rule 3, there can be no decision on merits unless both the parties are present. In the absence of both or either, the court is to fall back upon Rule 2. Rule 2, no doubt still authorizes the court 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. But an explanation had been added to explain and guide as to what would be such other order. The guidelines incorporated are that the party absent shall not be treated as absent, but shall be deemed to be present if his evidence or the substantial portion of

his evidence had already been recorded. The words 'to make such other order' can no longer be interpreted to mean that the court would still be entitled to proceed under Rule 3 for the purpose of disposing of the suit on merits in such a way as to deny the remedy under Order IX Rule 13 to the defendant where he was absent and had not adduced any evidence earlier.

11. Therefore, to proceed under Rule 3 of Order XVII of C.P.C., the absent party must adduce evidence or substantial portion of the evidence. Otherwise, the court cannot proceed under Rule 3 of Order XVII of CPC to decide the suit on merits. But A.P. amendment by way of proviso to Rule 3 takes away the right of the court to decide on merits even under Rule 3 and the court is bound to proceed under Rule 2.

12. In PRAKASH CHANDER MANCHANDA (2 supra), the Court held as under:

"It is clear in cases where a party is absent only course is as mentioned in O.17(3) (b) to proceed under R.2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under R.2. Similarly the language of R.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 O.9. The explanation to R.2 gives a discretion to the Court to proceed under R.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 O.17 R.2 in any one of the modes prescribed under O.9 Civil P.C. It is therefore clear that after this amendment in O.17 R.2 and 3 Civil P.C. there remains no doubt and therefore there is no possibility of any controversy".

13. In B.JANAKIRAMAIAH CHETTY (1 supra), the Apex Court held as under"

"The discretion conferred under Rules 2 and 3 of Order XVII of CPC is that the power to proceed to decide on merits is permissive and not mandatory. The explanation to Rule 2 is in the nature of deeming provision, when under given circumstances, the absentee party is deemed to be present. Thus, the Apex Court also laid down certain essential

requirements to decide the matter on merits, exercising power under explanation to Rule 2 of Order XVII of CPC and observed that the explanation to Rule 2 of Order XVII of CPC permits the court in its discretion to proceed with a case where substantial portion of 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. As the provision itself shows, discretionary power given to the court to be exercised in a given circumstances. For application of the provision, the court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned”.

14. This court in EKKALADEVI DEVAIAH VS. BOJJA LAXMI AND OTHERS⁶ reiterated the same principle. Therefore, the decree and judgment of the trial court shall be treated as a decree under Order IX but not on merits. Therefore, the remedy available to the appellants is under Order IX but not under Order XLI Rule 1 and even otherwise, though remedy is available by way of appeal, this court cannot decide the appeal in the absence of any evidence on behalf of defendants-appellants and cross-examination of PWs.1 and 2. Therefore, the appeal cannot be allowed at this stage, as there is no evidence adduced by these appellants-defendants and PWs. 1 and 2 were not cross examined, putting their case by way of suggestion to any of the witnesses. One of the requests made by the counsel for the appellants is to allow the appeal and remand the suit to trial court. But Order XLI Rule 23 attracts only when suit was disposed of based on preliminary issue but 23A permits the court to remand the case to trial court in any other case. In the present facts of the case, this court cannot exercise the power under Order XLI Rule 23 or 23A of C.P.C. to remand, except to dismiss the appeal. However, the appellants are entitled to file an appropriate application before the trial court, as the judgment of the trial court is only on one of the methods permitted under Order IX i.e. exparte decree in terms of Order XVII Rule 2 C.P.C. Hence, we find no grounds to interfere with the judgment.

⁶ 2017 (5) ALT 101

15. In the result, the appeal is disposed of invoking Order XLI Rule 11 of C.P.C., without sending notice to the trial court, granting liberty to the appellants to file appropriate application, as the decree and judgment is only an *ex parte* decree in terms of Order XVII Rule 2 C.P.C. r/w. proviso to Rule 3 of Order XVII of C.P.C. (A.P. amendment).

16. Miscellaneous applications if any, stand disposed of.

(RAGHVENDRA SINGH CHAUHAN,J)

(M.SATYANARAYANA MURTHY, J)

Date: 11th December, 2018

msb



