

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.280 of 2002

Kejuram (Dead) Through legal representatives

(Plaintiff)

i. Smt. Roop Bai (Died and deleted)

ii. Radheshyam Yadav, aged about 59 years

iii. Paras Ram Yadav, aged about 46 years

iv. Balmukund Yadav, aged about 44 years

v. Ashok Yadav, aged about 34 years,

vi. Gopal Yadav, aged about 32 years

ii to vi are sons of Late Keju Ram Yadav, R/o Village Darai, Post Office Baijalpur, Tah. and Distt. Kawardha (C.G.)

---- Appellants

Versus

1. Pachkaud, S/o Nandlal (Dead) Through LR Bodhani, W/o Jiwrakhan Yadav, Occupation Agriculturist, R/o Village Kathiya, P.S. Bemetara, Tah. Berla, Distt. Durg.

2. Ratan Lal (Dead) Through LRs

2(a) Chitrarekha Yadav, aged about 47 years, W/o Shri Johan Yadav, R/o Village Gadha Bhata, Tehsil & District Bemetara (C.G.)

2(b) Uttara Yadav, aged about 44 years, W/o Shri Narayan Yadav, R/o Village Baragaon, Tehsil & District Bemetara (C.G.)

2(c) Laxmi Yadav, aged about 42 years, W/o Shri Santram Yadav, R/o Village Navagaon, Tehsil & District Bemetara (C.G.)

2(d) Usha Yadav, aged about 40 years, W/o Shri Ramji Yadav, R/o Village Bahera, Tehsil & District Bemetara (C.G.)

2(e) Chandrakala, aged about 38 years, W/o Shri Ramchand Yadav, R/o Village Mohlai, Tehsil & District Bemetara (C.G.)

2(f) Anupriya Yadav, aged about 36 years, (Widow) D/o Late Shri Ratanlal Yadav, R/o Village Marjadpur, (Near Village Barharbod, Odisha), Tehsil & District Bemetara (C.G.)

3. Lakhanlal, aged about 40 years

4. Satruhanlal, aged about 32 years,

5. Bharatlal,

Sl.No.3 to 5 are S/o Late Shri Pachkaud, Occupation Agriculturist, R/o Vill. Marjadpur (Near Village Baharbod Odiya), Tah. Bemetara, Distt. Durg (C.G.)

6. State of Madhya Pradesh (now State of Chhattisgarh), Through District Collector Durg (C.G.)

(Defendants)
---- Respondents

For Appellants:	Mr. P.K.C. Tiwary, Senior Advocate with Mr. Ashutosh Trivedi, Advocate.
For Respondent No.4:	Miss Sharmila Singhai, Advocate.
For Respondent No.6 / State: -	Mr. Vimlesh Bajpai, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

16/01/2019

1. The substantial question of law involved, formulated and to be answered in this plaintiff's second appeal is as under: -

“Whether the lower appellate Court was justified in holding that the appeal, as instituted against dismissal of the claim, is not maintainable?”

(Parties hereinafter will be referred as per their status and ranking shown in the plaint before the trial Court.)

2. The appellant/plaintiff filed a suit for declaration of title, partition and possession in which on 21-9-1998, the trial Court directed the plaintiff to furnish certain particulars which the plaintiff said to have not complied with leading to dismissal of suit for non-compliance of order dated 21-9-1998 passed directing to file better particulars, under Order 6 Rule 5 of the CPC against which the plaintiff preferred first appeal before the first appellate Court that was dismissed on the ground that the appeal is not maintainable, as the order rejecting the plaint for non-furnishing of particulars would not amount to decree under Section 2(2) of the CPC feeling aggrieved against which this second appeal has been preferred and substantial question of law has been framed which has been set-out in the opening paragraph of this

judgment.

3. Mr. P.K.C. Tiwary, learned Senior Counsel appearing for the appellants / LRs of the plaintiff, would submit that the decision relied upon by the first appellate Court i.e. Smt. Chamarin v. Mst. Budhiyarin and another¹ was expressly overruled by the Full Bench of the Madhya Pradesh High Court in the matter of Budhulal Kasturchand v. Chhotelal Kastoorchand and others², therefore, the impugned decree is liable to be set aside.
4. Miss Sharmila Singhai, learned counsel appearing for respondent No.4 / defendant No.4, would support the impugned order.
5. I have heard learned counsel for the parties and considered their rival submissions and also went through the records with utmost circumspection.
6. The question is whether the dismissal of a suit for non-furnishing the particulars ordered under Order 6 Rule 5 of the CPC by the Court amounts to a decree and was appealable under Section 96 of the CPC?
7. In Smt. Chamarin (supra), the Division Bench of the M.P. High Court has clearly held that rejection of plaint on the ground not falling under Order 7 Rule 11 of the CPC does not amount to decree and further held that order dismissing suit for failure of the plaintiff to submit particulars as envisaged under Order 6 Rule 5 of the CPC would not be a decree, as it would amount only to dismissal for default. Their Lordships of the Division Bench further observed as under: -

“9. ... It would, therefore, appear that where the Court does not deal judicially with the subject-matter of the suit there is no adjudication within the meaning of sub-section (2) of Section 2 of the Code and as such the order does not

1 AIR 1975 MP 74

2 1976 MPLJ 734

amount to a decree within the meaning of the said sub-section.

12. Where a suit is dismissed for default for one reason or the other, there is no adjudication on merits and the suit is dismissed mainly because the plaintiff has failed to do something which was necessary for the progress of the suit. We do not find any justification for construing the expression 'dismissal for default' narrowly so as to confine it to dismissal for default in appearance only. If that had been the intention of the Legislature, the language of the said sub-section would have been different and it would have been expressly laid down that an order of dismissal for default in appearance would not amount to a decree. Looking to the language of Sub-section (2) of Section 2 of the Code, a wider construction appears to be perfectly justified as adopted by the Madras High Court and Allahabad High Court in the cases referred to above.

13. It, therefore, follows that an order dismissing a suit for failure on the part of the plaintiff to furnish particulars amounts to a dismissal for default and as such does not amount to a decree within the meaning of sub-section (2) of Section 2 of the Code. Such an order is, therefore, not appealable.”

8. The correctness of that decision was doubted and the matter was referred to the Full Bench in **Budhulal Kasturchand** (supra) in which following two questions were referred: -

“(1) Whether it was necessary before the time could be extended under sections 148 and 149 Code of Civil Procedure, that an application should be filed before the period allowed by the Court had run out and whether the Court is clothed with ample powers under section 151, Civil Procedure Code, to give redress in such cases?

(2) Whether the words 'dismissed in default' also refer to default committed in respect of adjournment costs?”

9. The Division Bench decision of the M.P. High Court in **Smt. Chamarin** (supra) has been overruled by the Full Bench of the M.P. High Court in **Budhulal Kasturchand** (supra) in which the question before the Full Bench was whether the dismissal of suit for non-payment of adjournment costs amounted to a decree and was appealable as such. Their Lordships while answering the aforementioned questions observed as under: -

“The second question, to which we have now to advert, is really this: whether the order dismissing a suit for non-payment of adjournment costs is appealable. There is divergence of views on this question also. The view taken in *Chamarin v. Budhiyarin*, 1975 Jab LJ 52 : 1975 MPLJ 82 : (AIR 1975 Madh Pra 74) and *Gauhati Bank Ltd. v. Baliram*, AIR 1950 Assam 169 is that word “default” in Section 2(2), CPC which defines ‘decree’ is comprehensive enough to include non-payment of costs or any other default, and it is not restricted to default of appearance. Therefore, an order dismissing a suit for non-payment of costs is excluded from the definition of decree so that it is not appealable. Contrary view has been taken in *Abbas Sujjat Ali v. Raza Azam Shah*, 27 MPLC 27 : (AIR 1941 Nag 223); *Radhabai v. Purnibai*, 29 MPLC 254 : ILR (1943) Nag 613: (AIR 1943 Nag 149). In the former case, the plaintiff had been given two opportunities to furnish further particulars but he did not comply with the order. Thereupon, the trial Court discharged the defendants. Mr. Justice Vivian Bose held that the order of dismissal amounted to a decree and hence an appeal lay from it. It was further observed that no fresh suit could be brought on the same cause of action. We respectfully concur in the latter view.”

10. Finally, Their Lordships of the Full Bench answered the questions so posed by observing as under: -

“22. We are, therefore, of the view that an appeal lies from an order dismissing a suit for default of payment of costs.

23. We will answer the two questions, which arise for our legal opinion, thus :—

(1) So long as the Court does not record a formal order disposing of the suit or proceedings, it continues to have the jurisdiction to extend the time granted to a party for performing an act, notwithstanding it having already expired, (the only exception being a conditional decree.)

(2) An order dismissing a suit for default in payment of costs is appealable as a decree. The word “default” in section 2 (2) of the Code of Civil Procedure refers only to non-appearance of parties as specifically referred to in Order 9 and in Order 17, Rule 2, Civil Procedure Code. It does not include any other default. Obviously enough, the word “default” in Order 17, Rule 3, Civil Procedure Code is, having regard to its context, wide enough to apply to every default referred to in the earlier part of the Rule. It is permissible under the rules of interpretation of statutes that the same word occurring in an enactment in different sections can be construed to have different imports according to the context.”

11. The Full Bench decision of the M.P. High Court in Budhulal Kasturchand (supra) has been relied upon and followed by the M.P. High Court in the matter of M.P. State Co-operative Land Development Bank Ltd., Bhopal v. J.L. Choukse³.
12. Thus, it has clearly been held that appeal shall lie from an order dismissing a suit for non-furnishing the particulars ordered under Order 6 Rule 5 of the CPC. In the instant case, suit has been dismissed for default of non-compliance of the order granted under Order 6 Rule 5 of the CPC. Therefore, in the considered opinion of the Court that would amount to decree and first appeal under Section 96 of the CPC would be maintainable.
13. Accordingly, the impugned decree is set-aside and the matter is remitted to the first appellate Court to consider the appeal on merits and pass order without being prejudiced by its earlier order. The first appeal was filed on 15-12-1999. Parties are directed to appear before the said Court on 11-2-2019 and the appeal shall be decided within 45 days from the date of receipt of a copy of this order. No further notice would be necessary from that Court.
14. Before parting with the record, this Court takes serious exception to the order of the first appellate Court placing reliance by the said Court upon the judgment rendered in Smt. Chamarin (supra) which stood overruled by the larger Bench much prior to the date of delivery of judgment by the appeal court. The judicial officers presiding the appeal court are expected to be circumspect and vigilant in relying upon the judgment(s) and should not rely upon the judgment which has already been overruled, as it unnecessarily enhances the judicial age of litigation resulting in harassment of parties to lis and loss of

3 AIR 1980 MP 204

judicial time of court as well. I hope and trust that the judicial officers presiding the appeal court will take note of and in future, would not rely upon the overruled judgments.

15. Record be sent back to the first appellate Court.

16. The second appeal stands finally disposed of. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma