

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 531 of 2018**

Ramkhilawan Parganiha, S/o Prem Singh, aged about 70 Years, Occupation- Agriculture, R/o Village Gondgiri, P.H. No. 36, R.I.C. Anandgaon, Tahsil Berla, District- Bemetara (C.G.)

Presently residing at 83, Rajendra Nagar, Janta Colony, Ravigram, Raipur (C.G.)

---- Appellant

Versus

1. Lalit Kumar, S/o Prem Singh, aged about 60 Years, Occupation- Agriculture, R/o Village Gondgiri, Tahsil Berla, District- Bemetara (C.G.)
2. The State of Chhattisgarh, through Collector, Bemetara, District- Bemetara (C.G.)

---- Respondents

For Appellant : Mr. Malay Kumar Bhaduri, Advocate.

For State/respondent No. 2 : Mr. Vijay Bahadur Singh, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma

Judgment On Board

03/04/2019

1. This first appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against judgment/ decree dated 21.08.2018 passed by District Judge, Bemetara, District- Bemetara (C.G.) in Civil Suit No. 27A/2018, wherein the said court proceeded under Order 17 Rule 3 of the C.P.C., consequently dismissed the suit.
2. Learned counsel for the appellant submits that the plaintiff/ appellant filed the suit for declaration and permanent injunction regarding subject matter which was pending before the trial court for recording

evidence on 21.08.2018. As per the appellant/ plaintiff, no witness of his side was cross-examined before the trial court and on the said date and the appellant was not present in the court, but the trial court proceeded under Order 17 Rule 3 of the C.P.C. which is not in the fitness of procedure. The case of the appellant was to be dismissed under Order 17 Rule 2 of the C.P.C., but that is not done and the matter was decided without appreciating the evidence, therefore, the same is liable to be set aside.

3. On the other hand, learned State counsel submits that the finding arrived at by the trial court is based on relevant material placed on record and the same does not warrant any interference of this Court with invoking jurisdiction of the appeal.
4. The core issue for consideration of this court is whether the trial Court was right in proceeding with the case under Order 17 Rule 3 of the Code of Civil Procedure, 1908.
5. Order 17 Rule 3 of the CPC may be read as under:

Order 17 Rule 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."

6. In the matter of **Prakash Chander Manchada and another Vs. Janki Manchanda**, reported in **1986 4 SCC 699** 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 and Rule 2 of Order 17 of the Cr.P.C., and observed as under:

“It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) 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 fail 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 upto 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 of any controversy. In this view of the matter it is clear that when in the present case on 30th October 1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiffs 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 upto the date i.e. 30th October, 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”.

7. The Hon'ble Supreme Court again in the matter of **B. Janakiramaiah Chetty Vs. A.K. Parthasarathi and others**, reported in **2003 5 SCC 641** 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

paragraph 9 and 10 of the report.

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

8. If we proceed to examine the facts of the case, no evidence is

recorded by the trial Court on behalf of the appellant. Though, the same is filed under Order 17 Rule 3 of C.P.C., but no witness is cross-examined before the trial court. On 21.08.2018, neither the appellant was present nor his witnesses were present, therefore, the trial court should have proceeded under Order 17 Rule 2 of the C.P.C as provided under Order 17 Rule 3 of the CPC. In absence of party, only Order 17 Rule 2 of the C.P.C. would be attracted, therefore, the trial Court ought to have proceeded with that Rule and not under Order 17 Rule 3 of C.P.C. The order passed by the trial Court is not sustainable and the same is hereby set aside.

9. Accordingly, the appeal is allowed and the trial Court is directed to proceed with the case in accordance with law and decide the issue between the parties after providing opportunity to adduce evidence to both parties. Both parties shall remain present before the trial Court for further proceeding on 15th May, 2019.

Sd/-
(Ram Prasanna Sharma)
Judge