A.F.R.

Court No. - 4

Case :- MATTERS UNDER ARTICLE 227 No. - 6485 of 2015

Petitioner :- Manoj Kumar And 4 Others
Respondent :- Vinod Kumar & Another
Counsel for Petitioner :- Dalvir Singh,Hari Prakash Singh
Counsel for Respondent :- Aklank Kumar Jain

Hon'ble Pankaj Mithal,J.

Heard Sri Dalvir Singh, learned counsel for the petitioners and Sri Aklank Kumar Jain, learned counsel for the respondents.

One Bahadur Singh, father of petitioner No.3 and the maternal grand father of petitioner Nos. 1, 2, 4 & 5 executed a Will bequeathing his properties in favour of the petitioners.

Pratap Singh, the brother of Bahadur Singh who had died in the meantime, filed original suit No.549 of 1994 (Pratap Singh Vs. Manoj Kumar and others) for the cancellation of the aforesaid Will. On the death of Pratap Singh, his sons succeeded him in the suit as the plaintiffs.

The aforesaid suit was dismissed on 28.02.1998 under Order 17 Rule 3 C.P.C. in the presence of the parties for want of evidence.

The plaintiff-respondents moved application purported to be under Order 9 Rule 9 C.P.C. for recalling the said order and for restoring the suit to its original number as if it has been dismissed for want of prosecution.

The application was rejected on 30.01.2010 on the ground it is not maintainable as the decision is on merits.

The respondents thereafter preferred Misc. Appeal purported to be under Order 43 Rule 1(d) C.P.C.

The appeal has been allowed by the impugned judgement and order dated 27.08.2015 and the suit has been directed to be decided on merits.

In challenging the above order, the submission is that the order passed dismissing the suit for want of evidence under Order 17 Rule 3 C.P.C. is a decision on merits. Therefore, the application under Order 9 Rule 9 C.P.C.

was not maintainable. Since the application was not maintainable under Order 9 Rule 9 C.P.C. its rejection was not appealable under Order 43 Rule 1 (d) C.P.C. Thus, the appellate order is without jurisdiction.

Sri Jain, in response contends that the order dismissing the suit is not on merits. It is basically an order under Order 17 Rule 2 C.P.C. thus making it liable to be recalled under Order 9 Rule 9 C.P.C. and to appeal thereafter if necessary, under Order 43 Rule 1(d) C.P.C.

In view of the respective arguments as above the short controversy which springs up herein is whether the order dated 28.02.1998 dismissing the suit under Order 17 Rule 3 C.P.C. for want of evidence without going into the pleadings of the parties and the controversy involved would be a decision on merits so as to oust the applicability of Order 9 Rule 9 C.P.C. and in turn the remedy of appeal under Order 43 Rule 1(d) C.P.C.

In answering the above question it would be better to thrash out some material facts. The suit as stated was for the cancellation of a Will wherein dates were being fixed for recording the evidence of the plaintiff respondents. The plaintiff respondents have not produced their evidence. Therefore, it was adjourned and fixed for 28.02.1998 for recording their evidence.

On 28.02.1998 counsel for both the parties were present but neither any witness was produced nor any application for adjournment was moved by the plaintiff respondents. The court therefore, proceeded under Order 17 Rule 3 C.P.C. to decide the suit forthwith and dismissed the suit in the absence of evidence of the plaintiff-respondents. The order dated 28.02.1998 which is very material and relevant is as under:

"वाद पुकारा गया। वादी व प्रतिवादी के विद्वान अधिवक्ता उपस्थित आये। पत्रावली साक्ष्य हेतु नियत है परंतु वादी की ओर से कोई गवाह उपस्थित नहीं है और न ही कोई स्थगन प्रार्थनापत्र वादी की ओर से दिया गया है।

अतः वाद एक पक्षीय रूप से प्रोसिड किये जाने का आधार प्रर्याप्त है।

आदेश

वादी का वाद आदेश 17 नियम 3 सी0 पी0 सी0 के अंतर्गत प्रोसिड करते हुए वादी द्वारा कोई साक्ष्य प्रस्तुत न करने के कारण वादी का वाद साक्ष्य के अभाव में खारिज किया जाता है।

एस0 डी0
सिविल जज–जू0 डि0
शिकोहाबाद।"

A bare perusal of the aforesaid order reveals that on the said adjourned date counsel for both the parties were present but as no evidence was produced by the plaintiff-respondents the court had dismissed the suit.

Since the suit was dismissed in purported exercise of powers under Order 17 Rule 3 C.P.C. it is relevant to place the aforesaid provision which reads as under:-

"**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."

The above provision is applicable where the party who has been granted time either to produce evidence or to cause attendance of his witness or to perform any other act necessary for the progress of the suit but fails to do any of the aforesaid acts. It contemplates two situations; the first is where the parties are present and the second is where the parties or any of them is absent.

The phrase "if the parties are present" does not mean that the parties have to be necessarily present in person. Their representation through counsel is deemed presence of the parties.

In **AIR 1976 All. 290 (FB) M.S. Khalsa Vs. Chiranji Lal and others** it has been held that a party appearing by pleader and asking for adjournment must, in the absence of an effective withdrawal of the pleader so engaged, would be deemed to have appeared through pleader. Therefore, appearance of the pleader is deemed presence of the party.

In **AIR (33) 1946 All. 353 (FB) Panna Lal Mandwari Vs. Mt. Bishen Dei** it has been held that for the purposes of Order 17 Rule 3 C.P.C. the party must be present or deemed to be present. Therefore, presence of the counsel for the parties is sufficient presence of the parties for the purposes

of the above provision.

In view of above, the suit was dismissed in the presence of both the parties, as has also been mentioned in the order.

However, the court in deciding the suit has not considered either the pleadings of the parties or any issue arising in the suit but has simply dismissed the suit as there was no evidence from the side of the plaintiff respondents. Therefore, an ancillary question arises if the aforesaid dismissal of the suit would be a judgement in view of Section 2(g) read with Order 20 Rules 4 & 5 C.P.C.

In **Ashok Kumar Singh Vs. Prabhat Kumar Ghose and another AIR 2008 (Jhar.) 76** his Lordship Justice M.Y. Eqbal (as he then was) interpreting the phrase "to decide the case forthwith" used in Order 17 Rule 3 C.P.C. held that the order dismissing the suit for no evidence without going into the pleadings of the parties cannot and shall not be treated as an order under Rule 3 (a) of Order 17 C.P.C. as there was no decision of any dispute and as such application filed under Order 9 Rule 9 C.P.C. could not have been dismissed as not maintainable.

There may not be two opinions that the order dated 28.02.1998 dismissing the suit for want of evidence in exercising of power under Order 17 Rule 3 C.P.C. may not be a judgement in the strict legal sense nonetheless such an order has been held to be a decision on merits vide 1**912 (13) Indian Cases (172) (Lahore):AIR 1936 Lahore 385 Nila Vs. Punun.**

In **Smt. Batual Fatima Vs. Mohd. Qasim AIR 1971 All. 102** a Learned Single Judge of this court relying upon **AIR 1976 All. (FB) (Supra)** that held where a party appears and does not produce evidence or participate in the hearing and the court proceeds with the hearing and decides the case under Order 17 Rule 3 C.P.C., the decision is not an ex parte decision in default of the party concerned.

In view of above two decisions it can be easily said that an order dismissing a suit for want of evidence in exercise of powers under Order 17 Rule 3 C.P.C. is neither an ex parte order or an order in default of a party rather it is a decision on merits which is appealable.

In **Pitamber Prasad Vs. Sohan Lal AIR 1957 All.107** a Division Bench of this court laid down that a suit dismissed for want of evidence would undoubtedly be a decision on merits and a decree fulfilling the requirement of Section 2(2) of C.P.C. An order passed under Rule 3 of Order 17 C.P.C. will have to be treated as an order decreeing the suit on merits against which an appeal would lie. The argument that the order would not be treated as a decree as there was no judgement was not accepted and it was held that the provisions of Order 20 Rules 4(2) & (5) C.P.C. are not necessary to be followed when there is absolutely no evidence on record. It would be a sheer formality to write a judgement on the issues arising in the suit in such a situation. A decision dismissing a suit for want of evidence or proof actually dispossess of all the matters in controversy in the suit and therefore such a the decision is a decree.

Simultaneously, the Full Bench of this Court in **AIR 1946 All. 353 (FB) Supra** holds that an order passed under Rule 3 of Order 17 C.P.C. is open to appeal or review but application for restoration under Order 9 Rule 9 C.P.C. would not lie against it.

In other words, the ration of the decisions can be summarised as under:-

(i) An order dismissing a suit for want of or lack of evidence under Order 17 Rule 3 C.P.C. is a decision on merits;

(ii) It is not an ex parte decision or a decision dismissing a suit in default of a party; and

(iii) It is a decree which is appealable or open to review against which no application

lies under Order 9 Rule 9 C.P.C.

In view of above legal position it is difficult for me to agree with the opinion expressed by the Jharkhand High Court in **Ashok Kumar Singh (Supra)** and it is held that an order dismissing the suit for no evidence under Order 17 Rule 3 C.P.C. is a judgement & a decree and is appealable against which neither any application under Order 9 C.P.C. would lie nor any

revision. Consequently, the application under Order 9 Rule 9 C.P.C. was not maintainable and its rejection was not open to appeal under Order 43 Rule 1(d) C.P.C.

Accordingly, the court of first instance was right in holding that the application filed under Order 9 Rule 9 C.P.C. was not maintainable. The Appellate Court on the other hand committed a grave error in entertaining the appeal in purported exercise of power under Order 43 Rule 1(d) C.P.C. against the order of the trial court as the application itself was not maintainable rendering the appellate decision to be without jurisdiction & a nullity.

Accordingly, the impugned appellate order dated 27.08.2015 is hereby set aside and that of the court of first instance dated 30.01.2010 holding the application under Order 9 Rule 9 C.P.C. as not maintainable is upheld.

The petition is **allowed** with no order as to costs.

Order Date :- 13.12.2016
piyush