(1968) 11 AHC CK 0006

Allahabad High Court

Case No: F.A.F.O. No. 324 of 1965

Seth Munna Lal		APPELLANT
	Vs	
Seth Jai Prakash		RESPONDENT

Date of Decision: Nov. 18, 1968

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 13, Order 9 Rule 9

Citation: AIR 1970 All 257 : (1968) 38 AWR 860

Hon'ble Judges: G.C. Mathur, J; Bishambhar Dayal, J; B.N. Lokur, J

Bench: Full Bench

Advocate: H.P. Gupta, for the Appellant; Sudhir Chandra and Shanti Bhusan, for the Respondent

Final Decision: Disposed Of

Judgement

G.C. Mathur, J.
The following question has been referred to this Full Bench for opinion:--

"Whether a decision recorded specifically under Order 17, Rule 3 of the CPC would exclude relief under the provisions contained in Order 9 of the Civil P. C. irrespective of the question whether, in recording its decision under Rule 3, the Court acted rightly or wrongly?"

The question arises in the following circumstances: A suit was filed by the respondent against the appellant for rendition of accounts and recovery of commission. May 6, 1965, was an adjourned date of hearing. On this date, the defendant was absent and the Court recorded an order in the order sheet (English note) to the following effect:--

"This is an adjourned date of hearing because the defendant had been allowed adjournment on the previous date, viz., 14-4-1965. The defendant to-day has failed

to appear and, in my view, this suit should be heard under Rule 3 of Order 17, Civil P. C. I accordingly proceed to hear the suit under Order 17, Rule 3, Civil P. C."

Thereafter the plaintiff''s witnesses were examined and the next day was fixed for judgment. On May 7, 1965, the Court delivered its judgment, decreeing the suit on merits. On May 20, 1965, the appellant (defendant) filed an application, praying for an order setting aside the decree, treating the decree as an ex parte decree. This application was rejected on May 21. 1965, by the following order:--

"For the reasons given in the English Note dated 6-5-1965, the suit was decided under Order 17, Rule 3, Civil P. C. and, therefore, this application (under provisions not noted) for setting aside the decree is not maintainable and is hereby rejected."

Against this order, the appellant (defendant) filed an appeal before this Court. Before the Bench hearing the appeal, the defendant-appellant contended that the decree must be taken to be an ex parte decree passed under Order 9, Rule 6 read with Order 17, Rule 2 and, therefore, the application to set aside the decree was maintainable under Order 9, Rule 13. The respondent urged that, since the Court below acted under Order 17, Rule 3, the only remedy of the appellant was by way of an appeal against the decree. A question arose before the Bench whether it was open to it to go into the question whether Order 17, Rule 3 applied to the case or Order 17, Rule 2 read with Order 9, Rule 6 applied. The Bench found that there was a conflict of opinion on this question between the decisions of Division Benches of this Court and it, accordingly, referred the question set out above for opinion to a Full Bench.

2. Before examining the previous decisions of this Court on this point, it will be convenient to refer to the relevant provisions of law. Order 9 of the CPC deals with the appearance of parties and consequence of non-appearance on the first date fixed for the hearing of a suit. Rule 6, inter alia, provides that, if, on this date, the plaintiff appears and the defendant does not appear, the Court may proceed ex parte if it is proved that the summons was duly served. Rule 13 confers a right on the defendant to make an application for setting aside the ex parte decree. Rule 8 provides that, if, on this date, the defendant appears and the plaintiff does not appear, the Court shall dismiss the suit unless the defendant admits the claim or a part of the claim. Rule 9 confers a right on the plaintiff to apply for an order to set aside the dismissal. Order 17 deals with adjournments and the procedure at the adjourned date of hearing. Rules 2 and 3 of this Order, with which we are concerned, have been amended by this Court and, as amended, stand thus:--

"Rule 2-- 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 9 or make such other order as it thinks fit.

Where the evidence, or a substantial portion of the evidence, of any party has already been recorded and such party fails to appear on such day, the Court may, in its discretion, proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation-- No party shall be deemed to have failed to appear if he is either present or represented in Court by agent or pleader, though engaged only for the purpose of making an application."

"Rule 3-- Where, in a case to which Rule 2 does not apply, 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, proceed to decide the suit forthwith."

The words "in a cast to which Rule 2 does not apply" in Rule 3 were added on January 17, 1963. Before the amendment, there could be a case which fell both under Rule 2 and Rule 3 and, in such a case, it was open to the Court to decide whether it would proceed under Rule 2 or Rule 3. But, after the amendment, the two rules have become mutually exclusive and, if a case falls under Rule 2, it would not be open to the Court to proceed under Rule 3.

3. Learned counsel for the defendant-appellant has relied upon three decisions of Division Benches of this Court. The first case, on which he relied, is Raja Singh Vs. Manna Singh and Others, . In this case, on the adjourned date for the hearing of a suit, the plaintiff appeared but the defendants did not. The Court examined the plaintiff''s witnesses and decreed the suit, stating that the suit was decided under Order 17, Rule 3. The defendants filed an application under Order 9, Rule 13. The application was allowed and the decree was set aside. The plaintiff came to this Court in revision and contended that, since the suit was decreed under Order 17. Rule 3, no application under Order 9, Rule 13, lay. This Court held that the suit was not heard and decided in accordance with the provisions of Order 17, Rule 3 and that an application for restoration under Order 9, Rule 13, lay, it was observed by the Bench that the mere fact that the Court had remarked that it was acting under Order 17. Rule 3 cannot make Order 17. Rule 3 applicable.

The second case relied on is Rafiq Ahmad and Another Vs. Mohammad Shafi and Others, . In this case, the plaintiffs had examined some of their witnesses but, on the adjourned date of hearing, thereafter they were absent. The Court proceeded to decide the suit on merits under Order 17, Rule 3 and dismissed it. The plaintiffs made an application under Order 9, Rule 9, Civil P, C. but it was dismissed as not maintainable. The plaintiffs then came to this Court n appeal. It was held by a Division Bench of this Court that Order 17, Rule 3 had no application to the facts of this case and that the lower Court could not proceed to decide the suit on merits. It was further held that the plaintiffs could treat the dismissal as one under Order 17,

Rule 2 read with Order 9, Rule 8 and were entitled to file an application under Order 9, Rule 9. In this case, an objection was specifically raised that the question whether the Court could or could not proceed to dispose of the suit on merits under Order 17, Rule 3 could not be gone into. This objection was overruled by reference to the case of Raja Singh Vs. Manna Singh and Others, .

The last case relied on is Qudrutullah Vs. Mohammad Kasim Khan and Another, . In this case, on an adjourned date for further hearing, neither the defendant nor his witnesses appeared and the trial Court, after hearing arguments and considering the material on the record, purported to decide the case on merits under Order 17, Rule 3. The defendant filed an application under Order 9, Rule 13 for setting aside the decree but it was rejected on the ground that it was not maintainable as the decree was not an ex parte decree. Against that order, the defendant appealed to this Court. This Court held that the lower Court was bound to proceed under Order 17, Rule 2, and that, therefore, the suit must be deemed to have been decreed ex parte. It accordingly held that the application for restoration was maintainable. The only reason, which can be gathered from these three decisions for going behind the decision of the trial Court to proceed under Order 17, Rule 3, is that the remarks of the trial Court that it was acting under Order 17, Rule 3 cannot make Order 17, Rule 3 applicable.

4. Let us now examine the cases relied upon by learned counsel for the plaintiff-respondent. The first case relied upon is Sri Krishen and Another Vs. Radha Kishen and Another, . In this case, on the adjourned date of hearing, the plaintiffs were absent but the defendants were present. The Court proceeded under Order 17, Rule 3 and dismissed the suit. The plaintiffs under Order 9, Rule 9 for setting aside the order but the court rejected the application on the ground that the dismissal was not for default but under Order 17, Rule 3. The plaintiffs then filed an appeal in the lower appellate Court but the appeal was dismissed. The plaintiffs then came to this Court in revision. This Court dismissed the revision. It observed:

""The question whether an application for restoration is maintainable must be decided upon an interpretation of the order which the Court passes. If there is any doubt about the intention of the Court passing the order as to whether it intended to proceed under Order 17, Rule 3 or Order 17, Rule 2, in that case we can say that the order should be construed as one which ought to have been passed. But this cannot be done when the Court expressly passes an order under one of the two Rules. In that case, the aggrieved party should file an appeal against the order which is in fact a decree, and not apply for restoration."

Two things have to be noted about this case: The first is that this Court observed that the question whether the application for restoration was maintainable or not must be decided upon an interpretation of the Order. The second is that this Court, in fact, examined the facts and circumstances of the case and came to the conclusion that the trial Court acted rightly in proceeding under Order 17, Rule 3.

The next case relied upon is Faiyaz Khan Vs. Mithan, . In this case, on the adjourned date of hearing, the defendant was absent and his counsel reported no instructions. The Court proceeded under Order 17, Rule 3, recorded the evidence of the plaintiff''s witnesses and decreed the suit. An application by the defendant under Order 9, Rule 13 was dismissed on the ground that it did not lie as the decision was on merits under Order 17, Rule 3. The defendant filed an appeal before this Court. This Court noticed the conflict in the earlier decisions and observed;

"We therefore, find ourselves in the somewhat embarrassing position of having to decide between conflicting decisions of this Court. With great respect we are of opinion that the view taken in the cases which we have last mentioned is to be preferred. We think that if the order granting the plaintiff a decree is actually made by the Court under Order 17, Rule 3, an application by the defendant under Order 9, Rule 13 will not lie and that the defendant''s remedy is by way of appeal or review. This view appears to us not merely to have the merit of practical convenience -- for it is important that the litigant should be in no doubt as to where his remedy lies--but sound in principle. What has to be considered is the power vested in the Judge who decided the suit; and if in so deciding it, he purported to act under Order 17 Rule 3, he could have, it appears to us, no jurisdiction under Order 9, Rule 13 to set aside the decree which he had passed. His order may be wrong but so long as it stands, he has no power to alter it."

This case fully supports the contention of learned counsel for the respondent. The last case, on which reliance is placed, is Laxmi Chand v. Ishwar Din 1958 ALJ 290. In this case, on the adjourned date of hearing, defendant No. 1 was absent. The Court proceeded under Order 17, Rule 3, examined the witnesses of the plaintiff and decreed the suit. Defendant No. 1 filed an application under Order 9, Rule 13 for setting aside the decree but the application was rejected on the ground that it was not maintainable as the suit was decided on merits. Against that order, a revision was filed in this Court. This Court examined the facts and circumstances of the case and came to the conclusion that the case clearly fell within the purview of Order 17, Rule 3. After examining the previous decisions of this Court, the Bench observed:

"There is thus a preponderance of opinion of this Court in favour of the view that, if the order granting the plaintiff a decree is actually made by the Court under Order 17, Rule 3, in circumstances where Rule 3 may be attracted and not covered by Rule 2, an application by the defendant under Order 9, Rule 13 will not lie. What has to be considered in such cases is the power vested in the judge who decided the suit and if in so deciding it, he purported to act under Order 17, Rule 3, he could have no jurisdiction under Order 9, Rule 13 to set aside the decree which he had passed."

With respect, the observations appear to us to be somewhat contradictory. The first sentence seems to indicate that an application under Order 9. Rule 13 will not lie only if the suit has been decreed under Order 17, Rule 3 and the circumstances are such that Rule 2 would not apply and Rule 3 may be applicable. In our opinion, these

cases do not reveal any decisive reason in favour of the view that where the Court specifically proceeds under Order 17, Rule 3, the order can, in no case, be treated as one under Order 17, Rule 2 or Order 9.

In Raja Singh Vs. Manna Singh and Others, , the Benches hearing the cases actually went into the question whether the orders of the trial Court were really under Order 17, Rule 3 or under Order 17, Rule 2 and do not appear to have taken the extreme view. We are unable to accept the extreme view taken in Faiyaz Khan Vs. Mithan, The following example would be sufficient to show why we cannot accept this view. On an adjourned date of hearing, the plaintiff is absent and, without recording any evidence, the trial Court purports to proceed under Order 17, Rule 3 and passes an order in these terms: "The suit is dismissed for default of the plaintiff under Order 17, Rule 3." Surely, when it is brought to the notice of the Court that the dismissal could be only under Order 9, Rule 8, it would not shut its eyes and refuse to entertain an application for restoration under Order 9, Rule 9. The consideration mentioned by Mootham, C. J. in Faiyaz Khan Vs. Mithan, that it was important that the litigant should be in no doubt as to where his remedy lies is outweighed by the consideration that, if the defaulting party is compelled to file an appeal, it will result in unnecessary delay and expense to the parties.

5. We agree with learned counsel for the respondent that it is not permissible to go into the question as to what order the trial Court should have passed and then to decide whether an application under Order 9, Rule 9 or 13 lies against the order that should have been passed. We are of opinion that the circumstances, in which the order was passed, have to be examined and the order, as passed, has to be interpreted to find out whether the order in law and substance, is one under Order 17, Rule 3 or under Order 17, Rule 2 read with Order 9, The answer to the question referred is to be found in the decision of a Full Bench of this Court in Lalts Prasad v. Nand Kishore. ILR (1899) All 66. This was a case decided under the provisions of the CPC of 1882 but the material provisions of that Code are in pari materia with the corresponding provisions of the Code of 1908 with which we are concerned. In this case, some evidence, oral as well as documentary, had been taken and then the hearing was adjourned. There were several adjournments. On the last adjourned date the plaintiff was not present. The suit was dismissed "for default of appearance and for want of prosecution". The plaintiff filed an application for restoration u/s 103 (equivalent to Order 9, Rule 9), contending that the dismissal was for default u/s 102 (equivalent to Order 9, Rule 8) read with Section 157 (equivalent to Order 17, Rule 2). The application was disallowed on the ground that the order dismissing the suit was not, in effect, an order u/s 102, that it was a dismissal for want of proof and, therefore, the plaintiff''s remedy was by way of appeal against the decree and not by an application u/s 103. Against the order rejecting his application, the plaintiff filed an appeal in this Court. The appeal was heard by a Full Bench of four learned Judges and it held that the dismissal of the suit was u/s 102 (Order 9, Rule 8) and that the application u/s 103 (Order 9, Rule 9) was maintainable. In the course of his

judgment, Stratchey, C. J,, with whom the other learned Judges agreed, observed:

"In the second place, what is the meaning of the opening words of Section 103 of the Code ''when a suit is wholly or partially dismissed u/s 102?'' Is it a dismissal u/s 102 merely it the order says that it is passed u/s 102? Or is it only a dismissal u/s 102, if, irrespective of the language of the order, the suit was dismissed upon an actual non-appearance of the plaintiff in fact or law? Or is the suit dismissed u/s 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff''s appearance, or non-appearance, the real meaning and substance of the Court''s action is that it dismisses the suit on the view, whether right or wrong, that the defendant appears that the plaintiff does not appear? We think that the third of these views is the correct one. The mere naming of the section is not conclusive though, no doubt, it may be a useful piece of evidence in construing the order, which must be read and construed as a whole. But, although the Court may describe an order of dismissal as being made u/s 102, the order, taken as a whole, may show that the description is an error, and that the Court was not really dismissing the suit on the view that the plaintiff was not appearing. So, too, if Section 102 is not named, and even if some other section, whether Section 158 or any other, is named, still it may be that that is a mere mis-description, and that nevertheless the real reason for the dismissal is that in the Court''s view the defendant appears and the plaintiff does not appear. In such a case, notwithstanding the mis-description, there is in substance and in fact a dismissal of the suit for non-appearance of the plaintiff, and therefore a dismissal u/s 102, although that dismissal may be absolutely wrong, either because the Court was mistaken in supposing that the plaintiff did not appear, or for any other reason. If the Court was mistaken in supposing that the plaintiff did not appear, still, whether the mistake was one of fact or of law, the appearance would not make the dismissal one not ordered u/s 102; it would only make the dismissal under that section a wrong one. In other words, a suit is dismissed u/s 102 if the dismissal is based on the state of things contemplated in that section, that is, if the Court''s reason for the dismissal is its view that the plaintiff has not appeared.
If that Is the correct view of the meaning of the opening words of Section 103, referring to a suit being dismissed u/s 102, it follows that a plea by the defendant, in answer to the plaintiff''s application u/s 103, that the order u/s 102 was illegally made, is irrelevant. Section 103 allows the plain tiff to apply for an order to set the dismissal aside, where the suit has been in fact wholly or partially dismissed u/s 102. If there has been such a dismissal in the sense I have explained, whether right or wrong, the plaintiff is entitled to apply to the Court to set it aside, and it is no answer to such an application to say that the order sought to be set aside was illegal for any reason whatever. Therefore, the defendant cannot contest the application in limit as one which cannot be entertained at all u/s 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact and in law."

We entirely agree with these observations. What has been said by the Full Bench regarding Section 103 (Order 9, Rule 9) applies equally to Order 9, Rule 13. A suit is decreed under Order 9, Rule 6 if apart from the mere description which the Court gives to its action, the real meaning and substance of the Court''s action is that it proceeds to decree the suit on the view that the plaintiff appears and the defendant does not. We have accordingly come to the conclusion that, if the facts, on the basis of which the Court has proceeded under Order 17, Rule 3, are such under which an order under Order 17, Rule 2 read with Order 9 would be legally justified and the order actually passed is also one which could be legally cashed under Order 9, it is permissible to hold that the order is an order under Order 9 and that an application under Order 9, Rule 9 or 13, 35 the case may be, lies.

6. The view, which we are taking, appears to us to be just and equitable also. If an order, in law and substance, is an order under Order 9, though purported to be passed under Order 17, Rule 3, it would cause much unnecessary expenditure of time and money to the aggrieved party if he is compelled to file an appeal instead of an application for restoration. In the appeal which will be against the decree, a court-fee will have to be paid according to the valuation and the subject-matter of the suit. It is well known that an appeal takes a much longer time for disposal than an application for restoration; then the scope of the appeal would be very limited. Obviously, in a majority of such appeals, the decree will not be challenged on the merits as the evidence, if any would be one-sided. Such appeals will mainly be on the ground that the trial Court should have proceeded under Order 17, Rule 2 read with Order 9 and not under Order 17, Rule 3. If the appellate Court allows the appeal, it will set aside the decree on the ground that the trial Court was not justified in proceeding under Order 17, Rule 3 and remand the case. If the trial Court then does not pass an order under Order 9, the defaulting party will obtain restoration without even having to satisfy the Court that it had a reasonable cause for its default. But if it passes an order under Order 9 then the defaulting party will be entitled to file an application for restoration under Order 9. Thus the parties would still be in the same position as they would have been if the defaulting party had been originally permitted to file a restoration application and had not been compelled to file an appeal. The time, labour and money spent on the appeal will be to no one''s advantage.

7. Our answer to the question referred is that it is permissible to entertain an application for restoration under Order 9 even when the Court purports to act under Order 17, Rule 3 if the circumstances set out by the Court are such that an order under Order 9 read with Order 17, Rule 2 would be legally justified and the actual order passed is one which could be legally passed under Order 9 read with Order 17, Rule 2.