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Madhya Pradesh High Court (Gwalior Bench)

Case No: First Appeal No. 26 of 1976

Nagar Palika Nigam, Gwalior		APPELLANT
	Vs	
Motilal Munnalal		RESPONDENT

Date of Decision: March 31, 1977

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1, Order 9 Rule 13, Order 9 Rule 6, 96(2)

Citation: AIR 1977 MP 182 : (1980) ILR (MP) 39 : (1977) 22 MPLJ 562

Hon'ble Judges: S.R. Vyas, J; C.M. Lodha, J

Bench: Division Bench

Advocate: P.C. Saxena, for the Appellant; Swamisaran, for the Respondent

Final Decision: Allowed

Judgement

C.M. Lodha, J.

This is a defendant"s First Appeal against the ex parte judgment and decree dated 26-3-1976 by Shri J. D. Shrivastava, Third Addl. District Judge, Gwalior.

The plaintiff"s case as set out in the plaint is that be was carrying on business in bangles of glass, lac and plastic in a wooden stall erected by him on public-land near Ram Mandir, Phalke Bazar, Lashkar. On 8-11-1971 some employees of the defendant, Municipal Corporation Gwalior (which will hereinafter be referred to as "the Corporation"), came to his shop to demolish the stall. Thereupon the plaintiff filed a suit for perpetual injunction against the corporation in the Court of First Addl. Civil Judge, Gwalior, to get the Corporation restrained as C. S. No. 346-A 1973. He also applied for issue of temporary injunction. But the application for temporary injunction was ultimately rejected on 25-1-1973. The plaintiff has alleged that on 30-1-1973, the employees of the corporation demolished his wooden stall as a result of which the stock of bangles lying in the shop

was destroyed. The employees, it is alleged took away all the goods lying in the shop along with the wooden structure. The plaintiff, therefore, claimed against the Corporation the price of his articles and stall assessed by him at Rs. 11,037.75 P. The plaintiff further applied for permission to sue as a pauper. The permission was granted on 15-4-1976, on which date Shri P. C. Saxena, counsel for the Corporation, sought time for filing written statement on behalf of Corporation and the case was adjourned to 1-5-1976. However on the adjourned date i. e. on 1-5-1976 nobody appeared for the defendant and the court directed that the defendant be proceeded against ex parte. The case was adjourned to 23-6-1976, on which date the plaintiff examined himself in the absence of the defendant and closed his evidence. The learned Third Additional District Judge, Gwalior, decreed the plaintiff"s suit in toto ex parte on that very day.

Aggrieved by the ex parte decree, the Corporation has filed this appeal. It has been argued by the learned Counsel for the appellant, in the first instance, that the ex parte decree may be set aside and so also the ex parte proceedings and the case be remanded and the appellant be allowed to file its written statement and contest the suit In the alternative he has submitted that the ex parte decree cannot be maintained on merits.

It may be pointed out that no application was filed by the Corporation under Order 9, Rule 13 for setting aside the ex parte decree and only an appeal has been preferred against it. There appears to be a conflict of opinion among various High Courts as to the power of the appellate Court to question the propriety of the ex parte order itself and to remand the case for re-trial. However we have a Bench decision of our own court reported in 1966 MPLJ 507, (Ramlal v. Rewa Coal Fields Ltd.) wherein it has been held that an error, defect or irregularity which has affected the decision of the case may be challenged in appeal against the decree whether ex parte or otherwise. The appeal against the ex parte decree u/s 96(2) of the CPC cannot be converted into proceedings for setting aside the decree with the concomitant duty of affording to the parties an opportunity of adducing evidence for and against any ground that may be raised in support thereof under Order 9, Rule 13, C. P. C. Nor can such an appeal be converted into an appeal under Order 43, Rule 1 (d), C. P. C. The reason is that when a particular remedy is provided for setting aside an ex parte decree and there is, by way of appeal, another special remedy against an order refusing to set it aside, these remedies and none other must be followed. Pandcy, J. speaking for the court observed as follows :--

"In our opinion, it is open to a defendant, who has filed an appeal against an ex parte decree u/s 96(2) of the Code, to show from the record as it stands that there is in the order proceeding ex parte against him. any error, defect or irregularity which has affected the decision of the case. If he succeeds in so doing, the ex parte decree will be set aside and the case will be remitted for retrial, But in the appeal against the ex parte decree he cannot be allowed to show that he was prevented by any sufficient cause from appearing at the hearing. For that purpose, he must have recourse to the special procedure under Order 9, Rule 13 of the Code for setting aside the said decree."

We do not feel persuaded to take a different view as at present advised. We would state at once that the appellant has not been able to show that in the order proceeding ex parte against him there is any error, defect or irregularity which has affected the decision of the case. It is clear from what we have narrated above that in spite of time having been granted to the defendant to file its written statement, the defendant remained absent on the adjourned dates i.e. on 1-5-1976 and 23-6-1976. No application was made under Order 9, Rule 7 of the CPC for setting aside the ex parte order by assigning good cause for his previous non-appearance. Not only that, the defendant failed to put in appearance even on the adjourned date i. e. 23-6-1976 on which date the ex parte decree was passed. Even after the ex parte decree had been passed, the defendant corporation did not file an application for setting aside the ex parte decree, but has filed appeal u/s 96(2) of the Code. Thus we do not see anything wrong in the lower court''s direction to proceed to hear the case ex parte. It may not be out of place, here, to mention that no such ground has been taken in the memo of appeal that the lower court had committed an error of law or procedure in proceeding ex parte against the appellant or that there was sufficient cause for defendant''s absence on 1-5-1976 and 23-6-1976. In this view of the matter, we are unable to hold that the lower court was not justified in proceeding ex parte against the appellant and in passing the ex parte decree against it.

This brings us to the consideration of the decree under appeal on merits. As clearly stated there is the lone statement of the plaintiff in support of his case. He has stated that he had spent Rs. 5,225/- over the construction of the wooden stall vide Bill Ex. P.1 purporting to be of United Commercial Agency. As regards the price of the bangles alleged to be lying in the stall, the statement of the plaintiff is that he had purchased bangles worth Rs. 1,402.50 P. on 28-1-1973 from M/s. Om Bangles stores vide memo Ex. P. 2. He has further stated that he purchased bangles worth Rs. 3,715/- vide receipt Ex. P. 3 from one Lalnarayan Das Vaishya. He has, however, not cared to produce the proprietor of M/s. Om Bangles stores and Lalnarayan Das Vaishya nor has he proved the execution of the Bill Ex. P.1 and the receipts Exs. P.2 and P.3 by their respective executants. In this state of evidence, we are satisfied that the plaintiff has not succeeded in proving even prima facie his claim for a sum of Rupees 11,037.75 P. and the decree cannot be sustained.

We may here point out that every court in dealing with an ex parte case should take good care to see that the plaintiff''s case is at least prima facie proved. Mere absence of the defendant particularly in the circumstances of a case like the present one does not justify the presumption that the whole of the plaintiff''s case is true. Even the plaintiff failed to make out a prima case and (sic) the defendant is entitled ex debito justitiae to have such a decree set aside. It is no doubt the practice that no issues are framed but that does not absolve the plaintiff of his responsibility to prove his case. The plaintiff is bound to prove his case to the satisfaction of the court and his burden is not lightened merely because the defendant is absent. After having given our careful consideration to the facts and circumstances of the case we are satisfied that the plaintiff has failed to prove his claim.

Learned counsel for the respondent has submitted that his client was misled and he did not examine the full evidence as the case was ex parte and therefore the case may be remanded for recording more evidence. In support of his submission he has relied upon the following observations made in AIR 1948 168 (Nagpur) :

"Where the defendant does not appear and the court requires the plaintiff to adduce prima facie evidence I think the court ought to warn the plaintiff that such evidence as he has adduced is not in the opinion of the court sufficient to establish a prima facie case. Unless this is done it is evident that a plaintiff would be bound to adduce all his evidence and examine his witness as fully as he would in a defended case. It is quite evident even on the view which requires prima facie evidence in such cases, that the plaintiff need not prove his case in full. The whole idea is that the Judge should take just enough evidence to satisfy himself that a prima facie case has been established. But I think in any event the Judge should at least tell the plaintiff how much evidence he requires. Otherwise, as I say, the plaintiff will be bound to adduce all his evidence in every undefended case and proceed as fully as he would have done in a defended action. Also on doubtful questions like the present a plaintiff is likely to be misled."

The above cited case was no doubt relied upon by a single Judge of this court (Tare, J. as he then was) in Mohanlal v. Union of India (1962 MPLJ 269). But it may be observed that in Mohanlal''s case the defendant did not file his written statement but cross-examined the plaintiff''s only witness, the plaintiff himself. The trial court delivered the judgment which was termed ex parte and dismissed the suit on the ground that the case of the plaintiff was not proved. The learned Judge held that in fact it was not ex parte, as the defendants counsel had appeared and cross-examined the plaintiff''s sole witness. It was further observed that the trial court should have called upon the petitioner to adduce more evidence. The learned Judge went on to observe that the small cause Judge acted illegally in dismissing the suit without cautioning the plaintiff that his oral assertion could not be relied upon and that more evidence was necessary. In this view of the matter the learned Judge set aside the decree passed by the trial court and remitted the case to it for giving an opportunity to the plaintiff to lead requisite evidence.

With great respect we are unable to subscribe to this view. If it is held that in cases in which proceedings are taken ex parte against the defendant the Judge should tell the plaintiff how much evidence is required to prove his case, it would place the Judge in the position of an advisor to a party which law does not envisage. Unless the Judge cuts out or stops the evidence of the plaintiff, it is the duty of the plaintiff to produce all such evidence as he considers will prove his case.

In this connection it would not be out of place to observe that even Bose, J. in ATR 1948 Nag 168 had not accepted the extreme view enunciated by Hallifax A. J. C. in AIR 1928 165 (Nagpur) that where a defendant does not appear a court is bound to pass a decree at once and that it is not necessary for the plaintiff to adduce any evidence at all.

We are therefore, of the opinion that it was the duty of the plaintiff to prove his case. We do not find substance in the respondent''s contention that because the case proceeded ex parte therefore, he thought that his own statement would be sufficient for getting a decree. It was his duty to have produced the persons from whom he had purchased the articles and prove the bills for the same to substantiate his claim and also show that the act of the employees of the Corporation was illegal and unauthorised. Since this has not been done, we cannot hold the plaintiff''s case to have been proved.

Accordingly, we allow this appeal, set aside the judgment and decree by the lower Court and dismiss the plaintiffs suit. But in the circumstances of the case, we leave the parties to bear their own costs throughout.

S.R. Vyas, J.

I entirely agree with the view taken by my learned brother Lodha, J., that this appeal should be allowed and the judgment and decree passed by the trial court should be set aside. I would however, like to add a few words of my own.

When pursuant to the suit being heard ex parte, an ex parte decree is passed against the defendant, he has a remedy of getting the ex parte decree set aside under the provisions of Order 9, Rule 13, C. P. C. He can, no doubt, also appeal under Sub-section (2) of Section 96, C. P. C., but in the event of such an appeal being filed, all that he can urge is that the decree, as it stands, is not justified. He cannot ordinarily question the propriety of the suit being proceeded ex parte. He also cannot be heard to contend that there was sufficient cause for his non-appearance when the suit was heard and decreed ex parte. This question has already been dealt with by my learned brother, and I need not repeat what he has already stated.

Even when a suit is heard ex parte and there is no one to challenge the ex parte evidence given by the plaintiff and/or his witnesses, the question may be as to what is the quantum and nature of evidence that would be sufficient for decreeing the plaintiff''s claim. My learned Brother Lodha, J., has referred to some decisions of this court and, while disagreeing with the view taken by Tare, J. (as he then was) has held that in such cases it is not necessary for the Court to tell the plaintiff in advance as to how much evidence will be sufficient for his claim being accepted. I entirely agree with this view.

While the ex parte evidence is being recorded it is for the plaintiff to decide as to what should be the kind and extent of evidence which will satisfy the Court for holding that his claim deserves to be decreed. There is no duty cast upon the Court to tell at every stage of recording the ex parte evidence that the evidence given by the plaintiff is either sufficient or more evidence is necessary. The fact that the defendant is absent and has not joined any issue with the plaintiff does not in any way lessen the plaintiff''s burden for proving his case. He must adduce all such evidence which, under any circumstance, should satisfy the court that his claim is genuine and deserves to be decreed. There is, as

already stated above, no legal duty cast upon the court at any stage of the ex parte trial of the suit to warn the plaintiff in ad- vance that the evidence adduced by him in the ex parte proceedings is either insufficient or unreliable, and that if he wants a decree, some additional and reliable evidence should be adduced by him.

In this case, as already held by my learned brother Lodha, J., the evidence given by the plaintiff is insufficient to support the decree passed by the trial court in his favour. In my opinion, therefore, this appeal should be allowed; the ex parte decree passed by the trial court be set aside and the plaintiff''s suit be dismissed. There will be no order as to costs incurred by both the parties throughout.

In this case the plaintiff had sued as a pauper. A copy of the decree passed in this appeal be forwarded to the Collector as required by Order 33, Rule 14, C. P. C.