

Civil Revision

Present: **The Hon'ble JUSTICE I.P. MUKERJI**

Judgment on: 22.02.2010

C.O. NO. 3460 OF 2009

MR. DEBASISH CHANDRA

Versus

MR. TUHIN BILAS DEB

Point:

STAY: Ex-parte decree- Court recorded decree passed on contest- Application for stay in O9 R 13 proceeding whether maintainable- Code of Civil Procedure, 1908, O. 9, R. 13.

Fact: An eviction case was filed against the petitioner before the Civil Judge (Junior Division), Sealdah and the plaintiff's witness was examined and cross-examined. The defendant/petitioner did not adduce any evidence and the same has been recorded in the judgment and decree passed by that Court. However, it was recorded by the Court that the ejection case had been allowed on contest with costs against the opposite party. The petitioner filed an application under order IX Rule 13 of the Code of Civil Procedure against the Decree and he also filed an application for stay of the decree which was, by an order, rejected. Challenging such rejection order, the petitioner has filed the instant revisional application.

Held: The learned First Court has not exercised its jurisdiction properly by dismissing the application for stay on the ground that in the decree it has been recorded that it was being passed on contest. When an Order 9 Rule 13 application was pending before it and the application for stay was in aid of that application the court below ought to have examined first whether the decree was

ex-parte applying the above admitted facts and principles of law and then decide the stay application.

Paragraph – 13

Cases: Prakash Chander Manchanda and another – vs – Janki Manchanda, (1986)4 SCC 699.

For the petitioner : Mr. Sabyasachi Bhattacharjee
Mr. Jasojeet Mukherjee

For the opposite party : Mr. Jiban Ratan Chatterjee
Ms. Pompey Basu
Mr. Debanjan Chakravertty

The Court:

1. There was an eviction case against the petitioner before the Civil Judge (Junior Division), Sealdah being Case No. 459 of 2004. The plaintiff's witness was examined and cross-examined. The defendant/petitioner did not adduce any evidence. That has been recorded in the judgment and decree passed by that Court dated 20th July 2009. However, the Court when on to record "that the instant ejection case be and the same is allowed on contest with costs against the opposite party." This recording by the learned Judge has been the cause of all the controversy in this civil revision application. This will appear from the subsequent events recounted in this judgment and order.

2. Against this decree the petitioner filed an application under order IX Rule 13 of the Code of Civil Procedure which is pending. According to the procedure prevalent in the courts below, in aid of the application under order IX Rule 13, the petitioner also made an application for stay of the decree, pending hearing of this application. This stay application was numbered as Misc. case No.

34 of 2009. It is the order dated 8th September 2009 passed in that stay application which has been assailed in this revisional application.

3. The relevant part of this order is reproduced below:

“Consequently, since a contested judgment and decree is in force at present, hence an application under Order IX Rule 13 CPC cannot lie against the same. Accordingly, since the Misc. Case itself is untenable in law in view of the existing position, hence the instant stay application arising out of the same cannot also be entertained.

Accordingly, in view of the reasons discussed above, the stay application is rejected on contest.”

4. Mr. Jiban Ratan Chatterjee, learned senior advocate appearing for the opposite party takes a very technical objection. He says that in the decree it is recorded that it was passed on contest. Therefore, the learned court below was fully justified in treating the decree as contested unless records of the court below have been duly corrected substituting ex parte for contested. Therefore, there was nothing wrong in the order of the learned judge of the first instance.

5. On the other hand, Mr. Sabyasachi Bhattacharjee, learned counsel for the petitioner has argued that when it is an admitted position that after taking of the plaintiff's evidence was over, no evidence was adduced on behalf of the defendant, the suit from that point of time proceeded ex parte. He has shown me order 17 Rule 2 of the Code of Civil Procedure. He has also cited **Prakash Chander Manchanda and another – vs – Janki Manchanda, (1986)4 SCC 699**. He contended that it was the duty of the court to examine whether the decree was ex parte or not and then pass an order for stay of the decree pending hearing of the order IX Rule 13 application.

I have considered the rival contention of the parties.

6. In examining the impugned order of the court below it is to be seen when a suit could be said to have proceeded ex-parte.

Order 17 Rule 2 provides for the conditions when the suit is to be treated to proceed ex-parte.

7. This order deals with the consequence of appearance or non-appearance of a party on the date fixed for hearing of the suit. It says that if any party fails to appear on the date fixed for hearing the suit is to proceed in the same way as in order IX, which order, also provides for proceeding with the suit ex-parte at an earlier stage of the suit.

8. However, the explanation to this order makes it plain that when evidence or substantial portion of the evidence of a party has been recorded and the party fails to appear on the date of hearing the court is left with a discretion to decide whether to treat the suit as ex-parte or not. The language of order 17 Rule 2 is in very clear terms and is set out below:

“Order 17, Rule 2. Procedure if parties fail to appear on day fixed. – 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.

Explanation.- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

9. In this particular suit it is an admitted position that the petitioner/defendant did not lead any evidence. Only the evidence of the plaintiff was tendered. Therefore, in the circumstances there was no scope for exercise of any discretion by the court whether to treat the hearing as ex-parte or

not under the explanation to order 17 Rule 2 because the discretion would only be exercised if some evidence is tendered by a party.

10. Therefore in this case there ought to have been no dispute at all that the hearing proceeded ex-parte and the decree was ex-parte.

11. This position of law is made absolutely clear by the judgment of the Supreme Court in the case of **Prakash Chander Manchanda and another Vs. Janki Manchanda, reported in (1986)4 SCC 699.**

12. There the defendant did not lead any evidence. In an application under order 9 Rule 13 made by the defendant for setting aside of the ex-parte decree the court refused to entertain the application on the ground that order 17 Rule 3 applied and an application under order 9 Rule 13 was not maintainable. The Supreme Court made it clear that in case of absence of a party at the time of hearing order 17 Rule 2 would apply.

The dictum of the Supreme Court in that Judgment is as follows :

“It is clear that in cases where a party is absent the only course as mentioned in Order 17 Rule 3(b) is 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 it now stands also clearly lays down that if any one of the parties fails 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 up to 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 October 30, 1985 the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's 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 up to the date i.e. October 30, 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."

13. The learned First Court has not exercised its jurisdiction properly by dismissing the application for stay on the ground that in the decree it has been recorded that it was being passed on contest. When an Order 9 Rule 13 application was pending before it and the application for stay was in aid of that application the court below ought to have examined first whether the decree was ex-parte applying the above admitted facts and principles of law and then decide the stay application.

14. Therefore the impugned order has been made taking into account absolutely wrong considerations and by failing to consider the above principles of law.

In the result this order no. 56 dated 08-09-2009 in ejectment case no. 459 of 2004 is quashed and set aside. The learned court below is directed to re-hear and re-determine the application for stay in accordance with the above principles, together with the order 9 Rule 13 application within a period of 8 weeks from the date of communication of this order.

15. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

(I.P. MUKERJI, J.)