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13.04.2009

Heard Mr. S.P. Mishra, learned counsel for the appellants, Mr. Mohapatra, learned counsel for the respondent no.1 – Bank and the learned counsel for the Orissa State Financial Corporation (O.S.F.C.).

2. The appellants and the proforma respondents were defendants in O.S. No. 29/75 of 1986/82, which was filed before the learned Civil Judge (Sr. Division), Puri by the respondent no. 1 – Bank, for recovery of an amount of Rs. 25, 96, 174.68. The suit was contested by the appellants and the respondent no. 2 – OSFC. The other proforma respondents were set ex parte.

3. Upon examination of P.W.1 on behalf of the plaintiff, the suit was posted to 26.11.1992 for further examination of P.W.1. On 20.11.1992, the plaintiff filed an application to advance the date for moving an application for a direction to produce some documents in the custody of the Special Judge (Vigilance), Bhubaneswar. The copies of the said applications were served on the learned counsel appearing for the appellants-defendants at 3.30 P.M. on 20.11.1992. Receiving such copy, the appellants prayed for grant of accommodation for seven days to enable their advocate to get instruction to file an objection. The said prayer for adjournment was rejected and an order was passed on 21.11.1992 calling for the documents to be produced. The appellant no.1, being aggrieved by the said order, filed Civil Revision No. 349 of 1992 before this Court and this Court by order dated 27.4.1993 disposed of the revision holding that the appellant no.1-defendant should withdraw the petition filed by it for transfer of the case before the learned District Judge and the learned trial court shall give opportunity to the appellants -defendants to cross-examine the witnesses who were examined on

26.11.1992. It was further directed that the witnesses shall be produced for cross-examination at the cost of the plaintiff and the suit shall proceed from the stage where it was left on 26.11.1992 before the defendant was set ex parte but evidence already recorded and documents already marked as exhibits shall be valid evidence. On 26.11.1992, one witness Soura Barik was examined on behalf of the plaintiff and it was recorded in the order-sheet by the trial court that the cross-examination of the said witness is declined by the learned counsel for the defendant and the matter was adjourned to 2.00 P.M. At 2.00 P.M. on that day, three more witnesses, being P. Ws 3, 4 and 5 were examined, some documents were marked and the evidence from the side of the plaintiff was closed.

4. In views of the order passed in the Civil Revision, the suit was relegated to the position as on 26.11.1992. The contesting defendants were permitted to cross-examine the witnesses produced by the plaintiff with a direction to the plaintiff to produce the said witnesses for cross-examination at its costs. Subsequent thereto, it is submitted that the witnesses were produced by the plaintiff. But repeated adjournments were sought for by the defendants for cross-examining them. Ultimately, the case was adjourned to 6.5.1994. On that date, the plaintiff was present with P. Ws 3, 4 and 5. A petition was filed by the defendants to recall the order dated 2.5.1994 and permit them to cross-examine the P. Ws 3 and 5. The said prayer was allowed, though not by recalling the order but by allowing the contesting defendants to cross-examine the said witnesses. However, learned counsel present for the defendants expressed his inability to cross-examine the said witnesses on the ground that the conducting advocate is ill and prayed for further adjournment. The learned

court, however, while rejecting the prayer proceeded with the suit and on the same day, heard arguments and passed the judgment in the suit decreeing the suit. Thereafter, an application was filed under Order 9, Rule 13 C.P.C. for setting the ex parte judgment passed in the suit. The said application having been rejected, the appellants have preferred the present Miscellaneous Appeal.

5. Mr. Mohapatra, learned counsel appearing on behalf of the respondent no.1 - Bank vehemently urges that the judgment being one on contest, Order 9 Rule 13 C.P.C. has no application to the present case and the learned court below has rightly rejected the prayer of the appellants.

6. Mr. S.P. Mishra, learned counsel for the appellants, however, contends that the case comes under the provisions of Order 17, Rule 2 (Explanation) C.P.C. and the learned court below has acted contrary to law in holding that the case is one under Order 17, Rule 3 (a) C.P.C. though the case squarely comes under Order 17, Rule 3 (b) C.P.C. He relies upon the decisions in the case of **Prakash Chander Manchanda and another v. Smt. Janki Manchanda**, AIR 1987 SC 42 and in the case of **B. Janakiramaiah Chetty v. A.K. Parthasarathi and others**. (2003) 5 SCC 641.

7. Mr. Mohapatra, learned counsel for the respondent no.1 relies upon the decision of this Court in the case of **K. Sudarsana Sundari Narasimma v. Judhisthi Padhi**, 22 (1956) CLT 395.

8. Order XVII, Rules 2 and 3 of the C.P.C. reads as follows:-

**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 IX 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).

**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)".

9. In the case of *K. Sudarsana Sundari Narasimma* (supra), learned Single Judge of this Court has considered the applicability of the provisions of Order 17, Rule 3 and Order 9, Rule 9 of the C.P.C. to the facts of the said case. The facts of the said case reveal that during the pendency of the first appeal before the lower appellate court, the husband of the petitioner in the said case died and the appeal was dismissed having been abated. The defendant approached this Court in a Misc. Appeal and this Court disposed of the said Misc. Appeal setting aside the orders of abatement and sent back the case to be heard on merits by the lower appellate court. The lower appellate court, however, upon hearing the appeal, remanded the case with a direction that a fresh specific issue had to be framed on the question of insanity on the date of the registered agreement and the Munsif ought to dispose of the matter in

accordance with law after allowing the parties to adduce further evidence, if they choose. On the date when the suit was fixed by the trial court, there was no appearance on behalf of the plaintiff. The defendant, however, was ready with evidence and the trial court allowed the defendant to adduce his evidence. On the evidence already on record and the subsequent evidence recorded by the trial court after remand, the plaintiff's suit was dismissed. Against the said order of dismissal, the plaintiff chose to file a petition for restoration of the suit under Order 9, Rule 9 C.P.C. The trial court as well as the first appellate court thereafter came to the conclusion that the petition under Order 9, Rule 9 C.P.C. was incompetent as the order passed by the trial court was a decree coming under the provisions of Order 17, Rule 3 C.P.C. and the plaintiff had remedies by way of appeals against the decree. The learned Judge quoting Order 17, Rule 3 C.P.C. in the judgment, came to the conclusion that the case having been remanded for further evidence and framing issues and the parties having been given opportunity of adducing further evidence, the case comes within the language of Order 17, Rule 3 C.P.C. as the plaintiff did not adduce evidence whereas the defendant was ready with evidence which was recorded by the trial court after remand. In that context, this Court dismissed the said Civil Revision holding that the petition under Order 9 Rule 9 C.P.C. was definitely incompetent.

10. The facts of the said case are distinguishable from the facts of the present case as in the present case , there is no remand order passed by any appellate court under Rules 23, 23-A or 25 of Order 41 C.P.C. Rather, the case was sent back by this Court by setting aside the order dated 21.11.1992 of the trial court rejecting the prayer for adjournment made by the appellant herein and calling for

certain documents as prayed for by the respondent-plaintiff and directing that the suit will proceed from the stage as it was on 26.11.1992. An opportunity was afforded to the appellant-defendant to cross-examine the witnesses of the plaintiff who were examined on 26.11.1992.

11. The Supreme Court in the case of *Prakash Chander Manchanda and another* (supra) interpreting the provisions of Order 17, Rules 2 and 3 and Order 9, Rule 13 C.P.C. held :-

“If on a date fixed, one of the parties to the suit 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 O.17, R.2 in any one of the modes prescribed under O.9 of the Civil P.C. After the Amendment by Act 104 of 1976 to O.17, Rr.2 and 3 in cases where a party is absent only course is as mentioned in O.17, R. 3(b) to proceed under R.2. Therefore, in absence of the defendant, the Court had no option but proceed under R.2. Similarly the language of R.2 as 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 O.9. The explanation to R.2 gives a discretion to the Court to proceed under R. 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.”

The Supreme Court also held in the said case, as follows:-

“Also, in such a case, the Court cannot proceed to dispose of the suit on merits and after it proceeds to dispose of the suit in any one of the modes provided under O. 9, in the present case to pass ex parte decree, the defendant can subsequently file an application under O.9. Rule 13 for setting aside ex parte decree. Decision of Delhi High Court reversed.”

12. Again dealing with the same point, the Supreme Court in the case of *B. Janakiramaiah Chetty* (supra) discussing the facts of the case held:-

“For application of the Explanation to Rule 2 of Order 17 CPC the court has to satisfy itself that: (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day; and (c) the day is one to which the hearing of the suit is adjourned. The Explanation is in the nature of an exception to the general power given under the rule, conferring discretion on the court to act under the specified circumstance stated above. Rule 2 permits the court to adopt any of the modes provided in Order 9 or to make such order as it thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. If such is the factual situation, the court may in its discretion deem that such party was present. Under Order 9 Rule 3 the court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. The present case is primarily concerned with a situation covered by Rule 6. The crucial words in the Explanation are “proceed with the case”. Therefore, on the facts it has to be seen in each case as to whether the Explanation was applied by the court or not. (para – 8)

In Rule 2, the expression used is “make such order as it thinks fit”, as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17 Rule 3(b), the 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 with the case 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 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. (para – 9)

“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 for 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. (para – 10)

The judgment and order of the court in this case clearly has imprints of an ex parte adjudication and not of a decision on merits. There is not even any indication as to what evidence was evaluated and/or whether the merits were tested”. (para – 12)

13. Applying the ratio of the aforesaid decisions of the Apex Court to the facts of the present case, it is amply clear that the Court has not proceeded under Rule 3 of Order 17 C.P.C. but has proceeded with the suit under Rule 2 of the said Order. Hence, it is inevitable to conclude that the application under Order 9, Rule 13 C.P.C. filed by the appellants was maintainable. Palpably, therefore, the conclusion of the learned Addl. Civil Judge (Sr. Division), Puri in his order dated 30.6.1994 that the suit has been

disposed of on contest and the Misc. Case filed under Order 9, Rule 13 CPC is not maintainable, is erroneous and cannot be sustained, which is accordingly set aside.

14. I have perused the application filed under Order 9, Rule 13 C.P.C. As it is submitted by the learned counsel for the parties, remitting the matter to decide the petition under Order 9, Rule 13 C.P.C. will not enure to the benefit of either of the parties, but will only prolong the litigation, I allow the said Misc. Case No. 25 of 1994 and set aside the judgment dated 6.5.1994 passed in O.S. No. 29/75 of 1986/82-II. It is further directed that the plaintiff – respondent will produce the witnesses as was directed by this Court in Civil Revision No. 341 of 1992 by order dated 27.4.1993 for being cross-examined by the appellants. Since it is submitted by the learned counsel for the respondent-Bank that the suit was for recovery of Rs. 25, 96,174.68 and the civil court has no jurisdiction to try the suit after coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the records on being received by the learned Additional Civil Judge (Sr. Division), Puri shall be transmitted to Debts Recovery Tribunal, Cuttack as the civil court has no jurisdiction to decide the same. The Debts Recovery Tribunal shall proceed with the suit by appropriately renumbering it from the stage as it was on 26.11.1992 by fixing a date, when the plaintiff-respondent shall produce the witnesses for being cross-examined by the appellants-defendants. The Presiding Officer, Debts Recovery Tribunal, Cuttack shall issue notice to the parties fixing such date of hearing. The above order is subject to condition that the appellants-defendants shall pay a cost of Rs. Rs.10,000/- (Rupees ten thousand) only to the plaintiff – Bank.

15. It is made clear that in the event, any of the P.Ws already examined by the plaintiff-Bank are no more available to be cross-examined , their evidence will be expunged from the records and the plaintiff will be at liberty to produce any other witnesses/evidence in support of its case before the Debts Recovery Tribunal.

In view of the fact that the judgment passed by the learned Addl. Civil Judge has been set aside, the Recovery Proceeding, being O.A.(Execution) No. 30 of 2003, pending before the Recovery Officer, Debts Recovery Tribunal, shall be dropped.

With the aforesaid observations and directions, the Misc. Appeal is disposed of.

Urgent certified copy of this order be granted as per rules.

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**M. M. Das, J.**

( The matter to be sent to the learned Civil Judge to be remitted to the DRT. Time to be stipulated as six months. Witness who cannot be produced, their evidence as recorded will be expunged but the documents exhibited by them shall be considered as evidence by the court below (DRT).

Recovery Proceeding O.A. (Execution) No. 30 of 2003 shall remain stayed. Plaintiff will be at liberty to produce any other new witnesses. Costs of the witnesses to be borne by the appellants.