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HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 508 of 2004

APPELLANTS
Plaintiffs

- : 1. Smt. Asha Devi, aged about 50 years, wife of Shri Surya Deo.
2. Ganga Bai, aged about 45 years, wife of Shri Bhola Nath.

Both are residence of village Rasoda, Tah. Baloda Bazar, Distt. Raipur (CG).

VERSUS

RESPONDENTS
Defendants

- : 1. Brijlal, aged about 50 years son of Shri Hagru Teli, resident of Village Rasoda, Tah. Baloda Bazar, Distt. Raipur (CG).
2. State of Chhattisgarh through the District Collector, Raipur (CG).
3. Ghanshyam, aged about 18 years, son of Bharatlal Sahu, resident of village Rasoda, PS & Tah. Baloda Bazar, District Raipur (CG).

(SECOND APPEAL UNDER SECTION 100 OF CPC)

(Single Bench: Hon'ble Mr. N.K. Agarwal, J.)

Present : Shri Ram Kumar Tiwari, Advocate for the appellants.
Shri Bhaskar Pyasi, Advocate for the respondent No. 1 & 3.
Shri Akhil Agrawal, Panel Lawyer for the State.

ORAL ORDER
(Passed on 31.08.2012)

1. This is plaintiff's Second Appeal under Section 100 of CPC against the judgment and decree dated 16.07.2004 passed by the Additional District Judge, Baloda Bazar, in Civil Appeal No. 1-A/04 affirming the judgment and decree dated 04.09.2003

passed by Civil Judge, Class-I, Baloda Bazar, in Civil Suit No. 155-A/2002.

2. Brief facts, necessary for the disposal of this appeal are that : appellants/plaintiffs filed a suit against the defendants for permanent injunction with respect to suit property i.e. land bearing Khasra No. 1542/3 (Kh), area 0.86 decimal situated in village Rasoda, District Baloda Bazar.
3. The trial court, on 04.09.2003 dismissed the suit under Order 17 Rule 3 of CPC holding despite several opportunities granted, the appellants/plaintiff failed to adduce any evidence.
4. First appeal preferred there-against was also dismissed. Hence this Second Appeal.
5. This court, vide order dated 24.12.2004, admitted this appeal for hearing on the following substantial question of law :

“Whether the trial court committed an error of law in proceeding under Order XVII, Rule 3 of the Code of Civil Procedure in the present facts and circumstances of the case?”
6. I have heard the counsel appearing for the parties and perused the order impugned including records of both the courts below.
7. Indisputably, the plaintiffs have not adduced any evidence in the case. On 04.09.2003, neither plaintiffs nor their witnesses were present.

8. The trial court, after dismissing the application filed by the plaintiffs under Order 17 Rule 1 of CPC for grant of adjournment, also dismissed the suit for want of evidence under Order 17 Rule 3 of CPC.

9. Order 17 Rule 2 and Rule 3 of CPC reads as under :

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 orders 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.”

10. A bare perusal of above provisions would reveal, if on the date of hearing, neither plaintiffs nor their witnesses were present nor any evidence is available on record to decide the suit, the suit has to be dismissed under Order 17 Rule 2 of CPC and not under Order 17 Rule 3 of CPC. Even Rule 3 itself provides that if the

parties or any of them absent, the court shall proceed to decide the suit under Order 17 Rule 2 of CPC. (Please see para 3 of judgment passed in Mohandas and others v. Ghisia Bai & others¹).

11. For the reasons mentioned hereinabove, both the courts below have committed an error of law in dismissing the suit under Order 17 Rule 3 of CPC which is not sustainable in law.
12. Therefore, judgment and decree impugned passed by both the courts below are set aside. The matter is remitted back to the trial court to decide the matter in accordance with law in the light of observations made hereinabove. No order as to costs.
13. Substantial question of law formulated is answered accordingly in plaintiff's favour.
14. Parties are directed to appear before the trial court on 24.09.2012.
15. Decree be drawn accordingly.

Sd/-
N. K. Agarwal
Judge

Sahu

¹ AIR 2002 SC 2436