1969 KHC 89
Kerala High Court
V. R. Krishna Iyer, J.

KURUVILLA CHANDY v. HASSAN BAVA RAWTHER
Parallel citation(s) : 1969 KHC 89 : 1969 KLT 402 : 1969 KLR 177
CaseNo : C. R. P. No. 250 of 1968
Date : 10/12/1968

Code of Civil Procedure, 1908 -- O.9 R.9, O.17 R.3 -- If disposal of suit was not under O.17 R.2 but under O.17 R.3, Court has no jurisdiction to restore suit acting under O.9 R.9

Important Para(s):3

Code of Civil Procedure, 1908 -- O.17 R.2, O.17 R.3 -- Suit adjourned for filing of report by commissioner -- On such failure suit dismissed -- Rule under O.17 R.2 applicable

Important Para(s):3

Code of Civil Procedure, 1908 -- O.17 R.2, O.9 R.9 -- Non appearance at hearing of suit is a sine qua non for applicability of O.17 R.2 -- Mere physical presence in Court cannot be taken cognizance of and in effect that is non appearance at hearing -- If so, case coming under R.2 of O.17 -- Not presentation of person but presentation of case that constitutes effective appearance

Important Para(s):3

Code of Civil Procedure, 1908 -- O.17 R.2, O.17 R.3 -- If O.17 R.3 does not apply, R.2 must apply -- Where both rules apply, party must be given benefit of R.2

Important Para(s):4

Referred: Mullas CPC pp. 802; 803; 1961 KLT 653; 34 Cal. 403; Referred to

Advocates:

Joseph Augustine; M. C. Mathew; A. K. Avirah; For Petitioner
K. C. John; For Respondent

ORDER

1. The suit of a pauper, which had reached the trial stage, was dismissed, but, on a subsequent motion under O.9 R.9 CPC., was restored. The defendant seeks in this revision to get that order reversed and thus get rid of the suit altogether. I am not disposed to agree because there are no grounds made out.

2. A commission had been issued for taking evidence in the case and to report to the Court together with the depositions recorded. On 5-10-1967 the case came up for hearing when it was adjourned to 16-10-1967 to await the report of the commissioner. On that date, the commissioner reported that he had not been able to examine the witnesses and therefore he was not in a position to return the commission warrant duly executed. Thereupon, the Court dismissed the suit. However, when an application was made under O.9 Rule. 9 CPC. on the basis that the dismissal of the suit was under O.17 R.2, CPC. the Court was inclined to relent and "to grant him an opportunity" to prosecute the suit "subject to the conditions that he will be given only one opportunity alone for examining his witnesses and that he should also see that his examination is completed within 10 days from the date of restoration. He should also pay D. C. Rs. 25/- to the other side for the additional trouble caused to the defendant". Not K) days, but 10 months have passed since thanks to the revision petition and the stay granted therein.

3. The question raised before me by counsel for the petitioner is that the dismissal of the suit must be deemed to be on the merits under O.17 R.3 CPC. and that therefore the Court had no jurisdiction to restore the suit acting under O.9 R.9. There is no doubt that if the disposal of the suit was not under O.17 R.2,but under O.17 R.3 the contention of the counsel is correct. Thus what is left to be considered now is to ascertain whether, in the circumstances of the case. O.17 R.2 is attracted as against O.17 R.3. I may state straightway that the posting of the suit to 16-10-1967 was not for the performance of any act contemplated in O.17 R.3 nor was it an adjournment granted at the instance of

the plaintiff. Nor can we call it a default of the party if the commissioner fails to file his report on 16-10-1967. In short, the requirements of O.17 R.3 are not complied with and so it is not proper to say that the dismissal of the suit was under that provision. In fairness to the Trial Court it must be mentioned that the judgment of the Court dismissing the suit does not purport to be on the merits either. Naturally, it must be treated as one under O.17 R.2 CPC. The question then arises whether there was any non appearance of the plaintiff so as to warrant a disposal under this provision. Non appearance at the hearing of the suit is a sine qua non for the applicability of O.17 R.2. But what is non appearance? Courts have disagreed on this simple concept which has acquired a special meaning in the law reports over the decades. Supposing an advocate appears on behalf of the party, moves for adjournment and on refusal thereof does not do anything more on behalf of his client in the case, can it be said that such limited participation constitutes appearance of the party so as to deprive him of the benefit of O.9 R.9 CPC.

"A pleader appears at the hearing on behalf of a plaintiff, and applies for an adjournment on the ground that he had no time to prepare himself with the case, or on the ground that the papers being left with his senior he could not proceed with the case. The application is refused, and the pleader being unable to go on with the case, the suit is dismissed. Can it be said under these circumstances: that the plaintiff appeared by a pleader? .....

The ratio of these decisions appears to be that when counsel who is unable to proceed with the case does not expressly withdraw from the case, he must be held to have appeared and that accordingly an application under this rule to set aside the order of dismissal or under R.13 to set aside the ex parte decree as the case may be is not maintainable. This somewhat strict view has not been adopted in later decisions. It was Observed by Mookherjee J. in Satischandra v. Ahara Prasad (1907 (34) Cal. 403 that if the pleader is unable to answer all material questions relating to the suit, to treat his mere physical presence as appearance would be to defeat the policy of the Jaw and the course of justice. In Arunachala Goundan v. Katha Goundan (47 MLJ 614) Venkatasubba Rao J. observed:

"There is no magic in the words 'I have ceased my connection with the case.' In my opinion, the mere attendance of a pleader who, for want of instructions, is unable to answer all material questions relating to the suit, is not an appearance on behalf of the client".

The trend of the later decisions has been not to treat mere physical presence of a pleader as appearance (23 Bom. 414)." (Mulla C. P. C. Vol. I page 803).

The learned author has explained the point earlier (page 802) as follows:

"Appearance by a pleader within the meaning of this order does not, like appearance by a party in person, mean mere presence in Court; it means appearance by a pleader 'duly instructed and able to answer all material questions relating to the suit' ..... Hence, a party cannot be said to "appear" by a pleader, if the pleader appears at the hearing and States that though he has filed his vakkalathnama, he has not received any instructions from his client ..... and that he is, therefore, unable to go on with the suit. Similarly a party cannot be said to "appear" by a pleader if the pleader has no instructions other than to apply for an adjournment, and, on the adjournment being refused, withdraws from the suit, stating that he has no further instructions to go on with the suit ....."

There is a divergence of opinion among the High Courts as to whether mere physical presence of the pleader, unaccompanied by ability and instructions to conduct, the suit, is. sufficient to constitute appearance. All that I need say here is that so far as the Kerala High Court is concerned, there is a direct decision reported in Kunjannam v. Isaac (1961 KLT 653) where his Lordship Mr. Justice Govinda Menon took the view expressed in para 4 of that ruling which runs as follows:

"It is contended that O.17 R.2, would apply only where there is a default of appearance on the part of the plaintiff. That is so, but in B. M. Venkatappa Navanum v. Padi Ramakrishnappa Chetty (AIR 1917 Mad. 106) following the decision in Gopala Raw v. Manis Susava Pillai (1907 (30) Mad. 274), it was held in circumstances substantially similar to the present case that there was no appearance of the plaintiff. In those cases the Pleader for the plaintiff asked for adjournment of the suit and when, it was refused stated to the court that he was not willing to proceed with the case and it was held that it could not be said that there was appearance of the plaintiff in the suit. The plaintiff though physically present in court did not take part in the proceedings after the adjournment was refused and therefore could not be said to have been present there as plaintiff partaking in the proceedings. ,Mere physical presence in Court cannot be taken cognisance of and in effect that is non appearance at the hearing. If that is so it would be a case coming under R.2 of O.17 which provides that on a party failing to appear, the court may proceed to dispose of the suit, which the court has done by dismissing the suit. That is what has happened in this case also and following

the view expressed above the dismissal must be taken to be one under O.9 R.8, for want of appearance and an application could be filed under O.9 R.9".

Comity and consistency compel me to accept this view which, it must be remembered, is also in consonance with the preponderance of authority, although a later ruling of Division Bench, reported in 1964 KLT 307, has refrained from expressing any opinion as to whether appearance of advocate, only for the purpose of applying for an adjournment of the case, would constitute appearance. Madras High Court has in a long line of cases taken the view that a pleader asking for adjournment and declining to proceed with the case on refusal of adjournment cannot be said to have appeared for the plaintiff. It is not the presentation of the person but the presentation of the case that constitutes effective appearance. A Full Bench of the Calcutta High Court has held in Satischandra Mukherjee v. Ahara Prasad Mukerjee (34 Cal. 403 F.B.) at the turn of this century, that

"The term 'appearance' is nowhere defined in the Code, and, as pointed out by Benson J. in Seeley v. Evans, has several significations, the word must always be understood in reference to the particular subject matter to which it relates, and the purpose or end to be answered by the appearance has an important bearing in determining what is sufficient to constitute an appearance in a particular case. It seams to me, that having regard to the scope of S.556 of the Civil Procedure Code, and the object to be gained by the attendance or appearance of the appellant ..... the mere appearance of counsel to make an application

for adjournment ought not to be treated as appearance so as to oust the jurisdiction of the Court to make an order for readmission under S.658 of the Civil Procedure Code, if proper cause is shown."

Relying on certain passages in this ruling, Mr. K. C. John went to the extent of asserting that this proposition has international standing as it has been adopted in similar jurisdictions in England and America. Whatever that be, it looks as if even in Calcutta a different view appears to have been taken, without referring to the Full Bench ruling, by a Division Bench of that Court in the decision reported in Tulsiram Bhagwandas v. Sitaram Srigopal (AIR 1959 Cal. 389). The Court there observed as follows:

"It often happens that a prayer made by a lawyer in a suit or other legal proceeding is disallowed and if he has nothing to do other than what he wanted to do, he merely stays on and does not take any further part in the proceedings of an active character. But because such a prayer is refused, it can by no means

be said that he does not appear or that, having appeared, disappears".
Probably these observations were obiter dicta in that case because counsel had taken part in the trial in this Calcutta decision. Certain other rulings have been cited before me, to some extent supporting this view point, by counsel for the petitioner. But I am inclined to take the 'view that a beneficial provision calculated to help a party in default should be so construed as to give the benefit of reasonable doubt, if doubt exists, in favour of the party in default. Even otherwise, appearance by pleader in Court has a purpose to serve and if the presence of the advocate does not serve that purpose it is as good as non appearance from the point of view of the party. The learned Subordinate Judge has, therefore, taken the correct view of the law and proceeded to dispose of the application under O.9 R.9, read with O.17 R.2 CPC. Let me conclude my point with the learned thought that in law, as in philosophy, appearance is not always reality.

4. If O.17 R.3 does not apply R.2 must apply and where both R.3 and 2 apply such a situations are perfectly possible the party must be given the benefit of R.2, as has been pointed out in Parvathi Pillai v. Kuttan Pillai (1961 KLT 178) and Francis Peter v. Rajamma Pillai (1963 KLT 256). We may not have to go into that refinement of law in the present case, because there is nothing to show on the record that the adjournment to 16-10-1967 was at the instance of the respondent.

5. I therefore dismiss the revision petition. The lower Court has stated that the various averments made in the affidavit of the plaintiff are false and bearing that in mind I disallow him costs in this case.