2025 INSC 542

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5319 OF 2025
[arising out of SLP(C) 20978 OF 2024]

KANCHHU **... APPELLANT**

VS.

PRAKASH CHAND & ORS. **... RESPONDENTS**

J U D G M E N T

DIPANKAR DATTA, J.

THE APPEAL

1. This civil appeal is directed against a judgment and order dated 1st May, 2024[1] of a learned Judge of the High Court of Judicature at Allahabad allowing a writ petition[2] under Article 227 of the Constitution of India filed by the respondents. The impugned order also allowed multiple interlocutory applications, viz. application for condonation of delay in filing a recall application; application for recall/restoration, an application for amendment prior to the writ petition being allowed.

[1] impugned order
[2] Writ C No.378 of 2003

THE FACTS

2. Facts giving rise to this appeal, in a nutshell, are:

I. Appellant, as plaintiff, instituted a civil suit[3] on 22nd May, 1987 for cancellation of a sale deed in the court of the Munsif, Khurja, District Bulandshahr, Uttar Pradesh[4]. The prayer in the plaint was for cancellation of a registered sale deed[5], whereby the appellant purportedly transferred a land, measuring a little in excess of 6 bigha 5 biswa, in favour of the defendants. The appellant set up a case of fraud in support of his claim for relief.

II. Respondents, being the defendants, filed their written statement on 18th September, 1987. They claimed that the appellant was their brother. After relations between the brothers soured, the appellant instituted the suit with ill-motive. Issues were framed on 18th January, 1988. While issue No.4 was a preliminary issue, as to jurisdiction of the court to decide the claim of the appellant, issue no.3 was whether the suit was barred by Section 34 of the Specific Relief Act, 1963. Both these issues along with other issues were decided against the respondents.

III. After filing the written statement, the respondents went on taking adjournment one after the other. On 10 (ten) occasions, the trial court adjourned proceedings. Having abstained from participating in

[3] Suit No.105/1987
[4] trial court
[5] deed was registered in the Office of Sub-Registrar, Khurja, bearing No. 5179 dated 05th September, 1984

the proceedings, an order dated 24th April, 1991 was passed setting the respondents *ex-parte.* Evidence of the appellant was recorded on 2nd July, 1991. Since the respondents did not appear, the appellant faced no cross-examination. The suit was posted for arguments and arguments were heard on 6th August, 1991. Finally, the suit was decreed *ex parte* by the trial court on 17th August 1991.

IV. An application under Order IX Rule 13 of the Code of Civil Procedure, 1908[6] together with an application under Section 5 of the Limitation Act, 1963[7] was filed by the respondents[8].

V. By an order dated 3rd November, 1997, the application for condonation of delay was rejected, thereby resulting in dismissal of the Misc. Case. The order of dismissal was carried in revision[9] whereupon such revision was allowed. The prayer for condonation of delay was granted and the trial court was directed, by an order dated 19th April, 1999, to dispose of the application under Order IX Rule 13, CPC on its own merits.

VI. The trial court thereafter proceeded to hear the Order IX Rule 13 application and dismissed it by an order dated 23rd July, 2002.

VII. The order dated 23rd July, 2002 was then carried in a miscellaneous appeal[10], which was dismissed by the District Judge, Gautam Budh Nagar on 8th October, 2002. It was held by the appellate court that

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[6] CPC
[7] 1963 Act
[8] giving rise to Misc. Case No. 74 of 1991
[9] Civil Revision No. 174 of 1997
[10] M.C.A. No.52/2002

although the respondent no.1 claimed to have taken ill on 15th August, 1991 and such illness continued till 30th November, 1991, during this period only the judgment and decree dated 17th August, 1991 were delivered and passed, respectively. Therefore, on its very face, sufficient cause for non-appearance not having been shown by the respondents in the application under Order IX Rule 13, CPC, they did not deserve any order in their favour.

VIII. The appellate order dated 8th October, 2002 was challenged in the writ petition by the respondents, out of which this appeal has arisen.

IX. By an order dated 1st December, 2011, the writ petition was dismissed as infructuous. However, the learned Judge granted two months' time to seek recall of such order in case any question survived for decision.

X. The order dated 1st December, 2011 was passed in the absence of the respondents, who were the petitioners in the writ petition.

XI. More than six and a half years later, the respondents sought recall of the order dated 1st February, 2011 together with an application for condonation of delay. The explanation proffered for the delay was that the respondents had not been informed by their counsel that the writ petition stood dismissed as infructuous *vide* order dated 1st December, 2011.

XII. By the impugned order, the High Court allowed the prayer for condonation of delay, recalled the order dated 1st December, 2011, allowed the prayer for amendment and then proceeded to allow the

writ petition. The appellate order confirming dismissal of the application under Order IX Rule 13, CPC was set aside as well as the *ex-parte* decree dated 17th August 1991.

CONTENTIONS ON BEHALF OF THE PARTIES

3. Mr. Partha Sakha Datta, learned senior counsel for the appellants was overly critical of the impugned judgment and order. According to him, absolutely incorrect tests were applied by the learned Judge while allowing the writ petition and the impugned order is, thus, indefensible.

4. Mr. Sukumar Pattjoshi, learned senior counsel for the respondents, on the other hand appealed to the conscience of the Court not to interfere with the discretion exercised by the learned Judge in favour of the respondents. He contended that the ultimate effect of the impugned order is to ensure a fair trial which the respondents missed on the earlier occasion due to reasons absolutely beyond their control. Accordingly, he prayed that the appeal be dismissed.

ISSUE

5. The solitary issue emerging for adjudication by us is whether the High Court was justified on facts and in law to allow the writ petition of the respondents in the manner it did?

ANALYSIS AND REASONS

6. We have heard Mr. Datta and Mr. Pattjoshi and perused the materials on record.

7. The writ petition of the respondents stood dismissed as infructuous on 1st December, 2011 along with multiple other writ petitions in the process of

weeding out matters, which the High Court felt had become infructuous by efflux of time. The learned Judge of the High Court, however, was conscious that there could be writ petitions which involved question(s) surviving for a decision but the petitioner(s) in such petitions had not been represented on that day. Accordingly, the learned Judge observed that recall could be sought within a period of two months, meaning thereby that if an application for recall were filed, recall of the order of dismissal and restoration of the writ petition would be a mere formality.

8. The respondents applied for recall as late as on 5th June, 2018. By then 7 (seven) years had passed. We have gathered from the papers forming part of the paper book that the respondent no.1 is a lawyer. Even if he were not a lawyer, nothing much would turn on it. The period of 7 (seven) years is sufficiently long and considered in the light of the fact that the decree of the trial court had been executed and the impugned sale deed cancelled, the respondents should have woken up from their slumber earlier. This delay itself would constitute sufficient reason for not condoning the delay in filing the application for recall of the order dismissing the writ petition as infructuous. However, we propose to take a lenient view having regard to the explanation proffered by the respondents that their lawyer did not inform them that the writ petition had been dismissed. For the moment, we shall assume that there was sufficient ground for the respondents not to apply for recall earlier and that the learned Judge was justified to (i) condone the delay in presentation of the recall application; (ii) recall the order dated 1st December, 2011 and (iii) restore the writ petition to file.

However, by no means should we be understood to lay down any law that whenever a litigant places the blame on the lawyer by pleading that it was the lawyer's fault or mistake that resulted in his (litigant's) misfortune, the same has invariably to be accepted.

9. Moving forward, we have found the grounds assigned by the learned Judge for allowing the writ petition to be quite strange. The learned Judge did not at all discuss what was the case set up by the respondents while seeking recall of the *ex parte* decree and what the defence of the appellant was in his written objection. The reasons given in the appellate order upholding dismissal of the application under Order IX Rule 13, CPC seem to have gone unnoticed. Despite issues having been framed as late as on 18th January, 1988, the ignorance of the learned Judge becomes apparent when in the operative part of the impugned order directions are given for framing of issues. Over and above all these, the learned Judge appears to have set aside the *ex parte* decree passed by the trial judge as if he were sitting in appeal and exercising appellate jurisdiction over such decree. This is evident from a bare reading of the impugned order. Relevant observations therefrom read as follows:

> … I have gone through the *ex parte* judgment and decree passed by the trial court on 17th August, 1991 and find that the trial court has simply proceeded to record statement of plaintiff and had decreed the suit. He has referred to the written statement filed by the defendant but has not considered it only on the ground that court had proceeded *ex parte* in the matter.
>
> In my considered view, while the court was proceeding *ex parte*, the court ought to have considered the written statement and defence taken therein.
>
> It is well settled law that whenever the suit filed and finally judgment is passed, it is an adjudication of *lis* between the parties. There has to be

> independent application of mind as to the issues emerging out from the plaint allegations and written statement if filed. There has to be a proper adjudication and only then it can be said that to be formal declaration of judgment to fall within the meaning of Section 2(2) of C.P.C.
>
> In view of the above, this petition holds merit and is accordingly allowed.
> …

Consequent upon the aforesaid observations, the learned Judge did what we have recorded above together with directions to expedite a decision on the suit.

10. We are not so much dismayed by the outcome of the writ petition but rather the manner in which the learned Judge proceeded and also by the reasons assigned for granting the prayers of the respondents.

11. In exercise of jurisdiction under Article 227 of the Constitution, the learned Judge was required to examine whether the respondents had shown sufficient cause for staying away from the proceedings of the suit after filing their written statement; in other words, whether despite showing sufficient cause, not only the trial court but also the appellate court fell in error in not accepting the explanation proffered and in setting aside the *ex parte* decree.

12. As referred to above, the learned Judge barely considered the application under Order IX Rule 13, CPC filed by the respondents and, thus, without even looking into the cause shown allowed the prayer for setting aside of the *ex parte* decree perceiving the judgment preceding it to be flawed on merits.

13. We have perused the affidavit accompanying the applications under Order IX Rule 13, CPC and Section 5 of the 1963 Act in the Misc. Case. It was

averred therein that the respondent no. 1 was looking after the case on his own behalf and on behalf of the other respondents; that, he fell sick on 15th August, 1991; and that, he was so sick that he was unable to walk. A medical certificate dated 30th November, 1991 issued by a local doctor was sought to be relied on certifying that the respondent no. 1 was under his treatment from 15th August 1991 to 30th November, 1991. A written objection to the application was filed by the appellants wherein it was averred that the respondent no.1 was a resident of the same village where the appellant no.1 resided and that he has seen the respondent no. 1 moving around in a healthy state and that the medical certificate was bogus. It was further pleaded that the respondents were deliberately not participating in the proceedings and filing repeated applications for adjournment for which they were set *ex parte* on 24th April, 1991. On 2nd July, 1991, evidence was recorded and 6th August, 1991 was fixed for arguments. On 24th April, 2nd July, 1991 and 6th August, 1991, the respondent no.1 was not ill as per his own case. Why did the respondents stay away from the proceedings had not been explained. Ultimately, the suit was decided *ex parte* on 17th August, 1991.

14. Significantly, even if the plea of the respondent no. 1 that he fell sick from 15th August, 1991 is accepted, we find that the respondents went on seeking adjournments. The appellate court in its order dated 8th October, 2002 noted that on 10 (ten) previous occasions, prayers for adjournment made by the respondents were allowed. It is also found that the respondents stayed away from the trial court months before the claimed

illness of the respondent no.1. No wonder, due to their absence, the respondents were set *ex parte* by the trial court on 24th April, 1991. The respondents never explained what was the real cause for the suit to proceed *ex parte*. The cause shown falls much short of an explanation and we are inclined to view it as nothing but a lame excuse. In view of the specific objection taken by the appellants, one would have thought that the respondents would step on to the witness box and prove the case set up in the applications. Neither did the respondent no.1 and the co-respondents nor the so-called attending doctor of the respondent no.1 stepped into the witness box to prove that the respondent no.1 was ill; the appellant no.1 was not, therefore, proved wrong. Assuming that the respondent no. 1 was so sick which prevented him from attending the court, there is no explanation either as to why the other respondents after filing of the written statement had not shown any interest to contest the suit.

15. While hearing the application under Order IX Rule 13, CPC as well as the miscellaneous appeal, the trial court and the appellate court, respectively assigned cogent reasons for not accepting the cause shown by the respondents. Since the learned Judge did not refer to the orders dated 23rd July, 2002 and 8th October, 2002 passed by the said courts at all, we do not have the benefit of ascertaining how the trial court and the appellate court went wrong in not allowing the application for setting aside the *ex parte* decree.

16. It is truism that vigilance and diligence go hand-in-hand, making them two sides of the same coin, when it comes to pursuing/defending a legal action.

In this case, not only vigilance and diligence on the part of the respondents are woefully lacking but such lack is glaringly apparent.

17. The respondents faltered to defend the suit even prior to 24th April 1991 when the order setting them *ex parte* was passed and we find it incomprehensible as to how the learned Judge of the High Court could be convinced, so much so that without any reference to the case and counter-case set up by the parties and the orders passed by the trial court and the appellate court, the application under Order IX Rule 13, CPC could succeed. It is only on this short ground (that the respondents did not make out sufficient cause for their absence on continuous dates from 24th April 1991 till the suit was decreed on 17th August 1991) that the impugned order cannot be sustained in law.

18. Although we have expressed our mind about the inevitable outcome of this appeal, we have observed with a great sense of disappointment the observations made by the learned Judge extracted (supra) demonstrating a clear misconception of the legal position as to the rights of a defendant in a civil suit where such defendant has been set *ex parte.* Before parting, therefore, there is a need to say a few words for the guidance of the courts.

19. Pleadings, either in a plaint or a written statement, constitute the plinth on which the respective claims and defence of the parties to a civil suit rest. What a pleading ought to contain is provided in Order VI Rule 2, CPC. Only material facts, on which the party pleading relies for his claim or defence to succeed, have to be stated without the evidence by which the pleading is to be proved. Once the pleadings are complete but the defendant is set *ex*

parte, and such order has attained finality, the defendant's rights suffer a curtailment. He cannot produce evidence in defence and hence statements, which are in the nature of factual assertions, cannot be proved by leading evidence. Generally speaking, the limited right that the defendant, set *ex parte*, would have is confined to cross-examining the plaintiff's witnesses. The effort has to be directed towards demonstrating that they are not speaking the truth and, thereby, demolish the case of the plaintiff. Essentially, therefore, in such a case the defendant has to convince the court that the case put up by the plaintiff is so false that the court ought not to accept it. However, if the defendant raises an issue on law which is traceable in the written statement, for instance, the suit is barred by limitation or Section 9, CPC is attracted, or if the relief claimed in the suit cannot be granted for reasons disclosed, the requirement of the defendant proving such defence as raised in the written statement by leading evidence may not arise and the court may frame an issue of law and decide the same.

20. We have noticed that the preliminary issue of jurisdiction of the trial court to receive, entertain and try the suit was decided against the respondents *vide* an order dated 18th January, 1988. The little detail that is decipherable from the written statement of the respondents is that in view of a local enactment with regard to the Zamindari system, the respondents claimed that the trial court did not have jurisdiction. Nevertheless, it does appear that other issues were framed and since the respondents did not cross-examine the appellant, whatever he deposed was believed and accepted. We are left to wonder how the judgment of the trial court could have been

faulted and the decree set aside on the ground that the defence raised in the written statement was not considered while granting relief. The observations of the learned Judge cannot be countenanced with reference to any provision of law or binding precedent.

21. We have no doubt that it is the flawed approach of the learned Judge which has resurrected the dispute between the brothers, which was finally decided over 3 (three) decades back. As has rightly been contended by Mr. Datta, the impugned order of the High Court being based on irrelevant, illogical and immaterial observations is clearly indefensible.

CONCLUSION

22. The impugned order dated 1st May, 2024 of the High Court is set aside and the order of the appellate court dated 8th October, 2002, impugned in the writ petition, is upheld with the result that the writ petition of the respondents filed in the High Court shall stand dismissed.

23. The civil appeal, accordingly, stands allowed.

24. The pending application(s), if any, stands closed.

.....J.
(DIPANKAR DATTA)

.....J.
(MANMOHAN)

NEW DELHI;
APRIL 22, 2025.