A MAHESH YADAV & ANR.

v.

RAJESHWAR SINGH & ORS.

(Civil Appeal No. 7316 of 2008)

DECEMBER 16, 2008

B

[S. B. SINHA AND CYRIAC JOSEPH, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

Or. 9, r.13, proviso – Setting aside of decree **ex-parte** C *against some of the defendants – Trial court setting aside ex parte decree- High Court reversing order of trial court – Held: Proviso to r.13 postulates that when an ex-parte decree has been passed against some of the defendants and it is necessary to set aside the entire decree, they may file an application to set aside ex-parte decree and court is not* D *powerless in this regard – High Court was not correct in holding that because a joint written statement was filed, an application for ex-parte decree was not maintainable – Order of High Court set aside – However, since the order of trial court is an unreasoned one and evidence led by defendant-* E *applicants was not analysed for arriving at a finding as to whether a case for setting aside ex-parte decree has been made out or not, in exercise of jurisdiction under Article 142 of the Constitution, order of trial court is also set aside – Matter remitted to trial court for consideration afresh on merits – Constitution of India, 1950 – Article 142.*

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Or.9 r.13 – Setting aside of ex parte decree – Reasons to be recorded – Held: An order setting aside an ex parte decree, being a judicial order should be supported by reasons – Evidence adduced should be analysed for arriving at the conclusion..

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In a suit for possession, defendants nos. 2 and 5 entered into a compromise with the plaintiff. Since the suit was decreed ex-parte against defendants nos. 1 and 6, they, on coming to know of the *ex-parte* decree, filed an application for setting aside the same. The application

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was allowed. The plaintiff challenged the order in revision before the High Court, which reversed the order of the trial court. Aggrieved, defendants 1 and 6 filed the instant appeal.

Allowing the appeal, the Court

HELD:1. There is nothing on record to show that the appellants were being represented by the same advocate who represented the other defendants. If they were represented by different advocates, it is not known as to whether the order of transfer of the case was brought to the notice of the advocate for the appellants. The High Court, therefore, may not be correct in holding that only because a joint written statement was filed, an application for ex-parte decree was not maintainable. In fact, the same was held to be maintainable by the trial court. [Para 11] [732-D-E]

2.1. The proviso appended to r. 13 of Order 9 of the Code of Civil Procedure, 1908 postulates that when an ex-parte decree has been passed against some of the defendants and it is necessary to set aside the entire decree, the Court is not powerless to do so. When an ex-parte decree is passed, the defendant may have more than one remedies which include filing of an application under Order IX Rule 13. The judgment of the High Court, therefore, is not sustainable. [Para 13 and 14] [733-B-D]

Bhanu Kumar Jain v. Archana Kumar & Anr. (2005) 1 SCC 787, relied on.

3. The Court expresses its dissatisfaction in the manner in which the trial court has passed the order impugned before the High Court. The said order is an unreasoned one. The evidence adduced on behalf of the appellants was not analysed for arriving at a finding as to whether a case for setting aside an ex- parte decree has been made or not. The matter was not considered as is required in terms of Order IX Rule 13. An order setting aside the ex-parte decree being a judicial order should

A **have been supported by reasons. The trial court could not have allowed the said application without following the legal principles on the basis whereof such an order could be passed. This Court, in exercise of jurisdiction under Article 142 of the Constitution of India, while setting**
B **aside the order passed by the High Court also sets aside the order passed by the trial court. The matter is remitted to the trial court for consideration afresh on merits. [Para 14] [733-G-H; 734-A-B]**

Case Law Reference:

C **(2005) 1 SCC 787 – relied on para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7316 of 2008.

From the Judgment and final Order dated 4.3.2004 of the
D High Court of Judicature at Patna in C.R. No. 497 of 2003.

Goutam Prasad and Krishnanand Pandeya for the Appellant.

H.L. Agrawal and Dr. Kailash Chand for the Respondent.

The Judgment of the Court was delivered by

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S.B. SINHA, J. 1. Leave granted.

2. Plaintiff in a suit for declaration of title and possession is before us aggrieved by and dissatisfied with the judgment and order dated 4.3.2004 passed the High Court of Judicature
F at Patna in Civil Revision No.497 of 2003 whereby and whereunder an order dated 20.2.2003 passed by Munsif Biharshrif, Nalanda in Miscellaneous Case No.19 of 1998 setting aside an *ex parte* decree, was reversed.

3. Plaintiff filed the aforementioned suit as Secretary of
G Magadh Raj Jarsandh Akhara, Rajgir. In the said suit six defendants were impleaded as parties. It was, *inter alia,* contended that although the plaintiff had been in uninterrupted possession of Plot No.5180, the defendants attempted to take forcible possession of land measuring 9 decimals.

H In the said suit, the defendants filed a joint written

statement. During the pendecy of the said suit, however, the defendants No.2 and 5 entered into compromise with the plaintiff. A compromise petition filed by the parties thereto was accepted. Indisputably, talks for compromise were going on by and between the plaintiff and defendant Nos.1 and 6; however, no compromise petition was filed in that behalf. Although witnesses examined on behalf of the plaintiff were cross-examined on behalf of defendant Nos.1 and 6, they did not adduce any evidence.

The learned Munsif, Biharsharif decreed the suit, stating :

"After contest this suit is decreed in favour of the plaintiff partly on the basis of the compromise petition and partly after contest. If the defendants have effected any possession over the disputed land during pendency of the present suit, the plaintiff will have full right to effect eviction of the defendants with the assistance of the court on payment of proper cost. No order regarding any cost is being given in the suit."

4. Appellants herein, having come to know of the said ex parte decree passed against them, filed an application in terms of Order IX Rule 13 of the Code of Civil Procedure. They examined a large number of witnesses in support of their case.

5. We may notice that plaintiff's evidence was closed on 18.5.1995. The learned Judge thereafter was transferred. The learned District Judge transferred the said case by an administrative order dated 20.2.1997. There is nothing on record to show that the counsel appearing on behalf of the other defendants were the advocate of the appellants herein also. By reason of an order dated 20.2.2003, the learned Judge while considering the case of the appellants that they were kept in dark about the development of the case due to connivance of the respondents herein as they had been informed that the compromise had been entered into by some of the parties and the Presiding Officer has been transferred, noticed :

"Four witnesses have been examined on behalf of the applicant and all of them supported the facts mentioned

A in the miscellaneous application. Witness No.2 Chinta Devi is herself opposite party No.2 and has clearly stated in examination in chief that she is prepared to contest the suit and therefore, the suit should be revived, on behalf of the opposite party one witness was examined in support of the B rejoinder. Witness No.1 is himself opposite party No.1. In the examination in chief he has stated that the applicant has filed the miscellaneous application with the intention of causing harassment to him because the applicant had information about the suit. Therefore, the application should be dismissed."

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It was directed :

"After hearing both parties and after perusal of records, I find that the applicant has furnished satisfactory reasons to show that he had no information about developments D in Suit No.67/90 and his application for revival is fit to be accepted but will cost.

Therefore the miscellaneous application is accepted subject to cost of Rs.200/- under Order 9 Rule 13. And the ex parte decree in original suit No.67/90 is rescinded."

E 6. A revision application was filed thereagainst.

The High Court passed the impugned judgment only on the premise that as all the defendants had filed a joint written statement, there was no occasion for the court to set aside the ex parte decree stating that if a fraud had been practised upon F the court, an appropriate proceeding should have been initiated therefor. It was held :

"If the contention of the defendants 1 and 6 is to the effect that the decree was obtained by fraud and collusion, then this matter need be pleaded by facts and circumstances G so as to take a declaration under Section 44 of the Evidence Act, 1872. This step was not taken. Suffice it to say that if there be a fraud it is a criminal act and there is no limitation if such action is to be taken by a party to the suit.

H Thus, at present the order dated 20 February, 2003 in

Miscellaneous Case No.19 of 1998: *Mahesh Yadav & Ors. V. Rajeshwar Singh & Ors.* Permitting setting aside an ex parte decree under Order 9 Rule 13 of the Code of Civil Procedure is set aside." A

7. Mr. Goutam Prasad, learned counsel appearing on behalf of the appellant, would submit that the High Court failed to take into consideration that only because a joint written statement was filed, the same was binding upon the appellants although some of them had been won over by the plaintiff. B

8. Mr. H.L. Agrawal, learned senior counsel appearing on behalf of the respondents, however, supported the judgment. C

9. Order IX Rule 13 of the Code of Civil Procedure reads as under :

"13. Setting aside decree ex parte against defendants.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: D E

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also: F

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim. G

Explanation.--Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has H

A been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

10. Indisputably, two of the defendants had entered into B compromise with the plaintiff. They have accepted the title of the plaintiff.

The contents of the written statement filed by the appellants had not been noticed by the High Court. The High Court furthermore failed to consider that according to the appellants C herein, talks of compromise started by and between the defendant Nos. 1 and 6 and the plaintiff. They cross-examined the witnesses of the plaintiff but did not adduce any evidence. It was on the aforementioned premise alone, the plaintiff was found to be in possession of the suit land and a decree was D passed.

11. There is nothing on record to show that the appellants herein were being represented by the same learned advocate. If they were represented by different advocates, it is not known as to whether the order of transfer of the case was brought to E the notice of the learned advocate for the appellants. The High Court, in our opinion, therefore may not be correct in holding that only because a joint written statement was filed, an application for ex parte decree was not maintainable. In fact, the same was held to be maintainable by the learned Civil Judge by an order dated 26.7.2000.

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12. The proviso appended to Order IX Rule 13 of the Code of Civil Procedure postulates that when an ex parte decree has been passed against some of the defendants and it is necessary to set aside the entire decree, the Court is not powerless to do so. If an application for setting aside the ex G parte decree was maintainable at the instance of the appellants, we fail to understand as to why a separate suit was required to be filed. When an ex parte decree is passed, the defendant may have more than one remedies. He may file a suit contending that the decree was obtained fraudulently. He H may file an application under Order IX Rule 13 of the Code of

Civil Procedure for setting aside the ex parte decree. He may prefer an appeal from the ex parte judgment and decree. In a given case, he may also file a review application.

13. In *Bhanu Kumar Jain v. Archana Kumar & Anr.* [(2005) 1 SCC 787] , this Court held :

> **"26.** When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

It was, however, observed :

> **"28.** It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions."

14. The judgment of the High Court, therefore, in our opinion is not sustainable.

While, however, saying so, we must express our dissatisfaction in the manner in which the learned Civil Judge has passed the order impugned before the High Court. The said order is an unreasoned one. The evidence adduced on behalf of the appellants were not analysed for arriving at a finding as to whether a case for setting aside an ex parte

A decree has been made out by the appellants or not. The matter had not been considered as is required in terms of Order IX Rule 13 of the Code of Civil Procedure. An order setting aside the ex parte decree being a judicial order should have been supported by reasons. The learned Judge could not have
B allowed the said application without following the legal principles on the basis whereof such an order could be passed.

We, therefore, in exercise of our jurisdiction under Article 142 of the Constitution of India, while setting aside the order passed by the High Court also set aside the order passed by
C the learned Civil Judge. The Civil Judge should consider the matter afresh on merit and pass a reasoned order.

15. Appeal is allowed with the aforementioned directions. However, in the facts of and circumstances of this case, parties shall bear their own costs.

D R.P. Appeal allowed.