

Sohan Singh, v. Jawala Singh etc. (Sodhi, J.)

the land from land-revenue, the land in that instance would not be assessed to land-revenue and it would mean that the income from that land would not be agricultural income. However, this example does not furnish an answer to the problem which the Tribunal was called upon to determine. Effect has to be given to the plain meaning of the statute and two conditions mentioned in section 2(1) (a) have to be satisfied before the income can be regarded as agricultural income. One of these conditions is not satisfied in the present case. That being so, the income from such land cannot be treated as agricultural income.

(12) For the reasons recorded above, we answer the question referred to us in the negative, i.e., in favour of the Department and against the assesseees. However, we leave the parties to bear their own costs.

B.S.G.

APPELLATE CIVIL

Before H. R. Sodhi, J.

SOHAN SINGH,—Appellant.

versus

JAWALA SINGH ETC.,—Respondents.

**Regular Second Appeal No. 137 of 1969.**

**Treated as Civil Revision No. 1174 of 1971.**

October 15, 1971.

*Code of Civil Procedure (V of 1908)—Order 9, rule 2, Order 17 rules 2 and 3—Plaintiff failing to deposit process fee for the service of unserved defendants—Court ordering dismissal of the suit—Such dismissal—Whether to be under order 9, rule 2 and against the unserved defendants only.*

*Held*, that it is the substance of the order and the circumstances in which it is made that have to be taken into consideration in order to determine as to under what provisions of law the order was passed or must in law be deemed to have been passed and no hard and fast rule can be laid down. It also does not matter as to what rule has been cited by the Court

passing the same. Where, due to the omission of the plaintiff to pay process fee for the service of unserved defendants, the Court dismisses the suit under order 17, rule 3 of the Code of Civil Procedure, the order of dismissal must be deemed to have been passed under Order 9, rule 2 of the Code. The mere fact that the plaintiff is granted time to pay the process-fee, it does not follow that this time is granted to perform any act necessary for the progress of the suit within the meaning of Order 17, rule 3 of the Code. (Para 4)

*Held*, that a plain reading of Order 9, rule 2 of the Code leaves no doubt that it contemplates dismissal of the suit only against that defendant who is not served in consequence of the failure of the plaintiff to pay process fee or postal charges, chargeable for the service of the said defendant. The whole suit cannot be dismissed. The defendant against whom suit is dismissed will not remain as a party to the suit. Whatever are the consequences of his non-joinder will be determined by the Court in each case, but the dismissal of the suit is permissible only against the defendant who has not been served because of the default of the plaintiff.

(Para 5 and 6)

*Regular Second Appeal from the decree of the Court of Shri Surinder Singh, District Judge, Jullundur, dated the 29th October, 1968 affirming that of Shri R. L. Garg, Senior Sub Judge, Jullundur, dated the 21st February, 1968, dismissing the plaintiff's suit.*

R. S. Dhillon, Advocate, for the appellants.

Naginder Singh, Advocate, for Respondent No. 1.

#### JUDGMENT

Sodhi, J.—(1) This regular second appeal arises in the following circumstances. Sadhu Singh, son of Diwan Singh sold, as per registered sale deed, dated August 5, 1966, 20 Kanals 13-3/4 Marlas of land which was his 1/4th share in an area of 82 Kanals 15 Marlas situated in village Talhan, tehsil and district Jullundur. The sale was in favour of Jawala Singh defendant-respondent 1 and for an ostensible consideration of Rs. 17067.19. Sohan Singh and Karnail Singh sons of Lachhman Singh son of Diwan Singh instituted a suit for pre-emption on August 1, 1967. Since the sale of land was out of a joint *khata* he impleaded other co-sharers, Banta Singh, Lachhman Singh, Tara Singh, Kewal Singh and Phuman Singh, as proforma defendants 3 to 7. Sadhu Singh, vendor, was impleaded as defendant 2. Summonses for settlement of issues were directed

to issue to the defendants for October 11, 1967, on payment of process fee. Lachhman Singh, Tara Singh and Phuman Singh, defendants did not appear despite service and *ex parte* proceedings were taken against them on October 11, 1967. Jawala Singh, vendee, appeared through his wife Smt. Kartar Kaur. The remaining three defendants including Sadhu Singh vendor had not been served. The plaintiff was ordered to give their correct addresses and also to deposit fresh process fee. The case was to come up on November 29, 1967.

(2) As service had not been effected on some defendants summonses were again ordered to issue for January 5, 1968, on payment of process fee within three days. The case was adjourned to January 5, 1968. Defendants 2, 3 and 6 were again not served and fresh summonses were to issue for February 21, 1968, on payment of process fee and filing of the correct addresses. It appears that the plaintiff did not this time deposit the process fee within the prescribed time. The trial Court on February 21, 1968, passed the following order :—

“P.F. not filed by the plaintiff. The suit is, therefore, dismissed under order 17, Rule 3, Civil Procedure Code.”

(3) The plaintiff took an appeal to the District Judge, Jullundur, who dismissed the same on October 29, 1968. He took the view that the suit was adjourned from time to time on account of the non-service of defendant-respondents and that since the plaintiff did not pay the process fee within the prescribed time as ordered on January 5, 1968, the suit had been rightly dismissed under Order 17, rule 3, Civil Procedure Code. The plaintiff has come to this Court in second appeal.

(4) Before the Motion Bench, Mr. R. S. Dhillon, learned counsel for the appellant cited *Pandit Ram Nath Kalia v. Shri Paul Singh* (1), and the learned Judge admitted the appeal mainly on the basis of this citation. It is now strenuously urged that the trial Court was not justified in dismissing the suit when only the proforma defendants had not been served and that it was incumbent on the Court to have disposed of the suit on merits. This argument is based on the assumption that the impugned order of the

(1) I.L.R. 1959 Pb. 596.

trial Court was in substance passed under Order 17, rule 3. Order 17, rule 3, Civil Procedure Code, reads as under :—

“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, proceed to decide the suit forthwith.”

The only default alleged in the instant case is that the plaintiff did not pay process fee within three days as ordered on January 5, 1968. The rule which provides for dismissal of suits where summonses are not served in consequence of the plaintiff's failure to pay process fee or postal charge is only rule 2 of Order 9, Civil Procedure Code, and it is in the following terms :—

“Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.”

This rule relates to the first hearing of the suit but is made applicable to adjourned hearings as well by virtue of Order 17, rule 2, Civil Procedure Code, which too, it is necessary to reproduce here-under for facility of reference :—

“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.”

Admittedly failure of the unserved defendants to be present on February 21, 1968, was due to the omission of the plaintiff to pay

Sohan Singh v. Jawala Singh etc. (Sodhi, J.)

process fee as ordered on January 5, 1968. When some of the defendants did not appear on 21st February, 1968, the Court had an option under Order 17, rule 2, Civil Procedure Code, to dispose of the suit in a mode contemplated in that behalf by Order 9, of the Civil Procedure Code. Order 9, rule 2, specifically provides for the cases where the plaintiff has not deposited process fee to enable the defendant or defendants to appear on the date of hearing. In case of an adjourned hearing by virtue of Order 17, rule 2, Civil Procedure Code, the provisions of Order 9, rule 2, are made applicable. The Courts below took the view that the order must be considered to have been passed under Order 17, rule 3, Civil Procedure Code, but in my opinion this was not a correct approach. It is the substance of the order and the circumstances in which it is made that have to be taken into consideration in order to determine as to under what provisions of law the order was passed or must in law be deemed to have been passed, and no hard and fast rule can be laid down nor does it matter as to what rule has been cited by the Court passing the same. In the instant case, the inevitable conclusion is that the order must be deemed to have been passed under Order 17, rule 2, read with Order 9, rule 2, and not under Order 17, rule 3, Civil Procedure Code. It was a failure of the plaintiff to pay process fee for which action could be taken only under Order 9, rule 2 of the Code of Civil Procedure, and the order of dismissal of suit has, therefore, been erroneously held to have been passed under Order 17, rule 3 Civil Procedure Code. From the mere fact that the order of January 5, 1968, gave a period of three days to the plaintiff to pay the process fee, it does not follow that time had been granted to him to perform any act necessary for the progress of the suit within the meaning of Order 17, rule 3, Civil Procedure Code.

(5) The next question that survives for consideration is whether the suit should have been dismissed against all the defendants or only against those who had not been served. In my opinion the whole suit could not be dismissed and the trial Court acted without jurisdiction in doing so. A plain reading of Order 9, rule 2 leaves no doubt that it contemplates dismissal of the suit only against that defendant who is not served in consequence of the failure of the plaintiff to pay process fee or postal charges, chargeable for the service of the said defendant. No decision of this Court has been cited before me but I am fortified in the view taken by me by a Single Bench judgment of the Nagpur High Court in *Krishnarao Bapurao Deshmukh v. Wamanrao Ganpatrao Deshmukh and others* (2)

(2) A.I.R. 1950 Nagpur 188.

which followed two judgments of the Patna High Court reported as *Surendra Mohan v. Gena Sardar* (3) and *Ramanand Singh v. Chandrama Singh* (4) and one judgment of Oudh High Court in *Mt. Ganesh Kuer v. Sheo Raj Singh* (5).

(6) Mr. Naginder Singh, learned counsel for the respondents cited solitary judgment of the Bombay High Court in *Shek Aba's v. Ibra'himji* (6), wherein a different view was taken, but with utmost respect I find myself unable to accept the reasoning of that judgment. The view contrary to what I have taken is likely to lead to unreasonable results. It could not have been intended by the Legislature that no matter that the necessary parties are before the Court the suit must still be dismissed for the failure of the plaintiff to deposit process fee to get service effected on those defendants, who may not be necessary or even proper parties. It does sometime happen that as a matter of abundant caution and to avoid the possibility of any objection being raised at the trial, persons are impleaded as defendants who are not necessary to be so impleaded. What are the consequences of the non-joinder of the parties will be determined by the Court in each case, but the dismissal of the suit is permissible only against the defendant who has not been served because of the default of the plaintiff.

(7) Mr. Naginder Singh lastly contended that if the order is taken to be under Order 9, rule 2, Civil Procedure Code, no appeal was competent and the only course open to the plaintiff was to have made an application to the trial Court to have the dismissal set aside on showing sufficient cause for his failure to pay the process fee or to move this Court in revision. The Court of first appeal in the present case proceeded on the basis that the order of the trial Court had been passed under Order 17, rule 3, and it was on this score that the appeal was entertained. No doubt the plaintiff as an aggrieved party could proceed under Order 9 for restoration of the suit but it was open to him to file an appeal as well since the order purports to have been passed under Order 17, rule 3, Civil Procedure Code though erroneously. The right of appeal depends on what the Court actually does and not what it should have done. It is an

(3) A.I.R. 1920 Patna 820.

(4) A.I.R. 1921 Patna 422.

(5) A.I.R. 1937 Oudh. 502.

(6) 5 Bombay High Court Reports 188.

Prithi Pal Singh v. The State of Punjab etc. (Jain, J.)

elementary rule of justice that a party cannot be made to suffer for the mistake of a Court. A similar situation arose in *Ganga Das v. Mst. Gopli* (7), and it was held that in the circumstances like the present one an appeal could lie. At any rate even if the appeal is not competent it is a fit case in which I would exercise the revisional powers of this Court and treat the appeal as a revision because the order of the trial Court dismissing the entire suit was without jurisdiction. In the result the appeal is allowed and the order of the appellate Court affirming that of the trial Court is set aside and the case is remanded to the trial Court for disposal in accordance with law. There is no order as to costs.

N.K.S.

FULL BENCH

Before Harbans Singh, C. J., Bal Raj Tuli and Prem Chand Jain, JJ.

PRITHI PAL SINGH,—Appellant.

versus

THE STATE OF PUNJAB ETC.,—Respondents.

Letters Patent Appeal No. 204 of 1973.

November 21, 1973.

*Punjab Municipal Act (III of 1911)—Sections 20, 22 and 24—President-elect of a Municipal Committee—Whether can start functioning before the approval of the State Government—Issuance of a notification under section 24—Whether a condition precedent to the assumption of the office by such President-elect—No-confidence motion against the President—Whether can be passed before the approval of the State Government.*

*Held*, that there is no ambiguity in the language of sub-section (1) of section 20 of Punjab Municipal Act 1911 and on its plain reading, the one and the only conclusion that can possibly be arrived at is that the President-elect assumes office only after approval is accorded by the State Government. The act of granting approval is a positive act and has to be performed by the State Government consciously. It is a condition precedent to the assumption of office by the President-elect. (Para 8)

(7) A.I.R. 1960 Raj. 245.