N. K. S.

Before R. N. Mittal & M. M. Punchhi, JJ.

HUKAM SINGH,—*Petitioner*

versus

JODH SINGH AND OTHERS,—*Respondents.*

Civil Revision No. 2049 of 1983

February 1, 1984

Code of Civil Procedure (V of 1908)—Order 17, Rule 3—Civil trial—Nature of—Rules of Procedure—Interpretation—Party to a

suit whom time had been granted fails to produce evidence on the date fixed—Court closing the evidence of such praty under Order 17, Rule 3 and adjourning the case to another date for the next step in the suit—Word 'forthwith'—Meaning of—Suit—Whether should have been decided on the same day—Court—Whether obliged to condone the lapse of the defaulting party and permit it to lead evidence on the adjourned date.

Held, that a civil trial in this country is an adversary proceeding and the Judge an independent arbiter. This is a concept basic to the system that "sets the parties fighting". In essence, the Judge's task is umpiring of a competition which is found sometimes a grim game. During the trial, the Judge has to handle many problems which may arise. He is given or practically he is expected to be in complete charge of court room procedure and as such possesses considerable residue of what in legal parlance is termed 'judicial discretion'. That discretion demands an application of his intelligence and learning, knowledge of law, courage, and other enlightened faculties in order to do what is just and proper in the circumstances of the case. The large mass of provisions, orders and rules embodied in the Civil Procedure Code though guiding him in that direction, leave at specific points considerable discretion to him to further justice. It has often been repeated that all rules of procedure are nothing but hand maids of justice. They cannot be construed in a manner which would hamper justice.

(Para 6).

Held, that it is plain from the language of Rule 3 of Order 17 of the Code of Civil Procedure 1908 and its set up that the stage for its employment arises on an adjourned hearing when a party to the suit took ample time to produce its evidence or cause the attendance of his witnesses, or perform other necessary acts to further the progress of the suit. With the aid of the explanation to Rule 2, a party absent can be treated as a party present where its evidence or a substantial portion of the same, has already been recorded. And in that situation, treating a party to be present, the Court can proceed to decide the suit forthwith. The word 'forthwith' does not mean there and then, the same day. It is true that this word is often interchanged for 'immediately' but in the context of the rule, this is not the meaning which would further the purpose of the rule. It would rather be too strict and such cannot be the construction to be put in the rule. Inevitably, even to decide a case there and then, the court would require time inherent in the suit. Practically most of the dictionaries are providing that the word 'forthwith' means "within a reasonable time" and what is reasonable time must be determined on the facts of each case. The facts and circumstances of each case would alone determine what was the reasonable time taken to decide a particular case. The language of the provision is not "to decide the suit forthwith" but

"proceed to decide the suit forthwith". The pivotal word in the rule is not 'forthwith' but 'proceed'. It is on that day the court takes the effective step by manifesting on the record of the case that due to default of a party, it is proceeding towards the next step in order to decide the suit forthwith, that is within the time it would reasonably require to decide. Nothing stops the Court from entering upon a summary judgment, if it is feasible, by settling or declaring the rights of the parties on the material then existing on the record. But it would be going out of the text to read therein that if the plaintiff had led a substantial portion of the evidence and a small bit had been left to be led on the adjourned date, the Court in proceeding to decide the suit forthwith, shall shut out the evidence of the defendant and decide the suit in favour of the plaintiff. In such a situation, the Court would be within its rights to close the evidence of the plaintiff and proceed to examine the evidence of the defendant, if it was required to be present and take such other steps to further the progress of the suit as in its judicial discretion are necessary. Thus, to conclude, it is held that the court in a civil trial is not obliged under Order 17, Rule 3 of the Code to condone the lapse of a litigant and it is equally not obliged to decide the case there and then, the same day but can in its sound judicial discretion proceed to take the next step towards decision of the case as expeditiously as possible within a reasonable time as the circumstances of the case reqiure.

(Paras 7, 8 & 9).

1. Smt. Darkhri and others *vs.* Munshi and others, 1967, P.L.R. 149.

2. Basant Kaur and another *vs.* Smt. Gurdyalo, 1975, P.L.R. 772.

3. State of Punjab *vs.* Radha Kishan, 1978, P.L.R. 454.

OVERRULED.

Petition under section 115, *C.P.C., for the revision of the order of the Court of Shri G. S. Jhaj, P.C.S., Sub-Judge, 1st Class, Bassi (with powers of District Judge under Indian Succession Act), dated 11th August,* 1983, *closing the evidence of the respondents under order* 17, *rule* 3, *C.P.C. Fixing the case to come up on 22nd August,* 1983, *for rebuttal and arguments.*

V. P. Sharda, Advocate, *for the Petitioner.*

T. S. Doabia, Advocate, with J. C. Arora, Advocate, *for the Respondent.*

JUDGMENT

Madan Mohan Punchhi, J.

(1) Is the Court in a civil trial obliged under Order XVII, Rule 3, Code of Civil Procedure, to condone the lapse of a litigant in case it cannot and justifiably will not decide the case there and then the same day, is the precedent broiled question which requires to be settled in this petition.

(2) It arises in this manner.

The dispute between the parties pertained to the estate of one Punjab Kaur. The respondents herein filed an application under section 372 of the Indian Succession Act, before the Sub-Judge 1st Class, Bassi, who had the necessary powers to entertain it. The petitioner-herein was arrayed as a respondent. It appears that the applicants-respondents had concluded their evidence and the case was at the stage of the evidence of the petitioner. On the adjourned date on 11th August, 1983, the trial Court closed the evidence of the petitioner under Order XVII, Rule 3, Civil Procedure Code, and adjourned the case further to 22nd August, 1983, for rebuttal and arguments. Such order was passed on the view that petitioner had availed six dates for evidence and had not concluded it as also that he was not even present in Court to make statement in support of his case. From such conduct the trial Court recorded the opinion that the petitioner had failed to take further steps for the progress of the case and thus ultimately it had to close his evidence. The said order is now under challenge.

(3) The matter was placed at the motion stage before B. S. Yadav, J. The Hon'ble Judge finding the petitioner's counsel relying upon *State of Punjab* v. *Radha Kishan* (1), and the respondents' counsel upon *Ishwar Dutt* v. *Smt. Dilbhari* (2), in which the correctness of the aforesaid case of *Radha Kishan* was doubted, admitted the case to a Division Bench. And this is how the matter has been placed before us.

(4) Learned counsel for the petitioner relied on the decision of R. S. Narula, J., in *Smt. Dakhri and others* v. *Munshi and*

(1) 1978, P.L.R. 454.
(2) 1979, P.L.R. 35.

others (3), where in Order 17, Rule 3, Civil Procedure Code, was interpreted in this manner :—

> "The provisions of the above-quoted Rule are penal in character, and unless the Court concerned decides to follow the same in an appropriate case, it cannot adopt a via-media..... In my opinion the learned Additional District Judge was correct in holding that once the Subordinate Judge did not proceed to decide the case forthwith, Order 17, Rule 3 of the Code had no application to the matter and that the Subordinate Judge having adjourned the case, he should have allowed another opportunity to the plaintiffs to lead their evidence on the date of adjourned hearing."

This view was followed by D. S. Tewatia, J., in *Basant Kaur and another* v. *Smt. Gurdyalo* (4) by observing that in the event of the case instead of being decided, is adjourned by the trial Judge, the defaulting party should be entitled to produce its witnesses on the adjourned date. This again was followed by Gurnam Singh, J., in *Radha Kishen's case* (supra) by taking the view that if the suit is decided forthwith no fault can be found with the order but if the Court does not proceed to decide the case forthwith and adjourns it, it shall have to allow another opportunity to the defaulting party for its evidence on the adjourned date. In *Dilbhari's case* (supra), M. R. Sharma, J., doubted the rule laid down in *Smt. Dakhri's case* (supra) and followed subsequently, by observing as follows:—

> "A plain reading of this rule shows that it vests the Court with the discretion to decide or not to decide the case forthwith. It no where provides that where a party had been given a large number of adjournments to adduce proof in support of its case its evidence should not be closed and if the case cannot be finally decided for one reason or the other on that date the party concerned must of necessity be allowed to produce evidence on the adjourned date of hearing. In my considered opinion if this view is allowed to

(3) 1967, P.L.R. 149.
(4) 1975, P.L.R. 772.

prevail it would tend to unnecessarily lengthen the procedure in trial of the cases. For that reason I was initially inclined to refer this case to a larger Bench but the facts disclosed by Mr. Sarin are somewhat different.....".

(5) We have heard the learned counsel for the parties at length and have pondered over the matter. What should be the correct interpretation of Order 17, Rule 3, Civil Procedure Code, can well be gathered from our judicial system relating to the trial of civil cases, the spirit of the Code of Civil Procedure, and the language of the provision in question.

(6) As is well-known, a civil trial in this country is an adversary proceeding and the Judge an independent arbiter. This is a concept basic to the system that "sets the parties fighting". In essence, the Judge's task is umpiring of a competition which is found sometimes a grim game. During the trial, the Judge has to handle many problems which may arise. He is given, or practically he is expected to be in complete charge of court room procedure and as such posses considerable residue of what in legal parlance is termed 'judicial discretion'. That discretion demands an application of his intelligence and learning, knowledge of law, courage, and other enlightened faculties in order to do what is just and proper in the circumstances of the case. The large mass of provisions, orders and rules embodied in the Civil Procedure Code though guiding him in that direction, leave at specific points considerable discretion to him to further justice. It has often been repeated that all rules of procedure are nothing but handmaids of justice. They cannot be construed in a manner which would hamper justice. In this back-drop it is to be seen that Order XII in the Civil Procedure Code, providing for adjournment has just three rules. Under Rule 1, the Court can grant time and adjourn the hearing of the suit as also make order with respect to costs. Under Rule 2 if a party fails to appear on a date to which the hearing of the suit is adjourned, the Court may proceed to dispose of the suit in one of the modes prescribed in that behalf by Order 9, or make such other order as it thinks fit. Explanation added thereto by the Civil Procedure Code (Amendment) Act, 1976, empowers the Court to treat the party which failed to put in appearance as deemingly present if its evidence, or substantial portion of the same, has already been recorded. In that

back-drop, Rule 3 follows, which may well be reproduced here:—

> "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
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> (b) if the parties are, or any of them is, absent, proceed under Rule 2."

(7) As is plain from the language of the rule and its set up, the stage for its employment arises on an adjourned hearing when a party to a suit took ample time to produce its evidence, or cause the attendance of his witnesses, or perform other necessary acts to further the progress of the suit. With the aid of the explanation to Rule 2, a party absent can be treated as a party present where its evidence, or a substantial portion of the same, has already been recorded. And in that situation, treating a party to be present, the Court can proceed to decide the suit forthwith. Now the word 'forthwith' has been understood to mean there and then, the same day, in *Smt. Dakhri's case* (supra) and in the decisions which followed that case. But in our view, that is not the meaning of 'forthwith' as appearing in the rule. It is true that the word 'forthwith' is often interchanged for 'immediately' but in the context of the rule, this is not the meaning which would further the purpose of the rule. It would rather be too strict and such cannot be the construction to be put in the rule. Inevitably, even to decide a case there and then, the Court would require time inherent in the suit. The words of J. N. Bhat, J., in *Hariram* v. *Krishan Lal* (5), are meaningful:—

> "Order 17, R. 3, is a general provision of law which can be made applicable to any case. Order 17, R. 3, contemplates final disposal of the suit on the material that is on record on that day. Therefore, a reasonable construction of this rule would suggest that from the action

(5) A.I.R. 1964, J. & K. 79.

> of the Court it should transpire that the court does not want to have any further hearing of the case but has made up its mind to dispose of the case on the material that is already on record at that time and must, as the dictionary meaning put it, try to dispose of the case within a reasonable time and without delay."

Tripathi Sansnath v. *Tripathi Bhagwal Nath and others* (6), is also a precedent on the same lines.

In the 12th edition of Maxwell on the Interpretation of Statutes, it has been stated thus :—

> "Sometimes a statute requires an act to be done 'forthwith' or 'immediately' 'forthwith' Harman, L.J., has said is not a precise time and, provided that no harm is done, 'forthwith' means any reasonable time thereafter..... It may involve action within days; it may not involve action for years."

(8) In *K. N. Joglekar* v. *Commissioner of Police* (7), their Lordships after summing up a number of decisions on that aspect observed—

> "On these authorities, it may be taken, an act which is to be done forthwith must be held to have been so done, when it is done with all reasonable despatch and without avoidable delay."

Practically most of the dictionaries are providing that the word 'forthwith' means "within a reasonable time", and what is reasonable time must be determined on the facts of each case. And in the light of the extracted portion of the observations of Bhat, J., the facts and circumstances of each case would alone determine what was the reasonable time taken to decide a particular case. The language of the provision is not "to decide the suit forthwith" but "proceed to decide the suit forthwith". In our view, the pivotal word in the rule is not 'forthwith' but 'proceed'. It is on that day the Court takes the effective step by manifesting on the record of the case that due to default of a party, it is proceeding

(6) A.I.R. 1966, All 615.
(7) A.I.R. 1957, S.C. 28.

towards the next step in order to decide the suit forthwith, that is within the time it would reasonably require to decide. Nothing stops the Court from entering upon a summary judgment, if it is feasible, by settling or declaring the rights of the parties on the material then existing on the record. But it would be going out of the text to read therein that if the plaintiff had led a substantial portion of the evidence and a small bit had been left to be led on the adjourned date, the Court in proceeding to decide the suit forthwith, shall shut out the evidence of the defendant and decide the suit in favour of the plaintiff. In such a situation, the Court would be wthin its rights to close the evidence of the plaintiff and proceed to examine the evidence of the defendant, if it was required to be present and take such other steps to further the progress of the suit as in its judicial discretion are necessary. But to say that in observance of *Smt. Dakhri's case* (supra) the Court shall either adjourn the case for evidence of the plaintiff or decide the case there and then that day, on the substantially recorded evidence of the plaintiff alone, would be nailing down justice. It is worth repeating that the Court as an umpire in such a situation, then knows that one of the parties, though given an opportunity to fight, has failed to fight or has stopped fighting any further. As a good unmpire, it is then to take the next step towards winding up of the game, but not in the process causing injustice to the other adversary who is yet in the arena.

(9) Thus, for what has been observed above, we are of the considered view that the doubt expressed by Sharma, J., in *Ishwar Dutt's case* (supra) was rightly entertained and the view taken in *Smt. Dakhri's case* (supra), is not sound in law. We, hereby overrule *Smt. Dakhri's case* (supra) and other cases which followed that view. Thus to conclude, we hold that the Court in a civil trial is not obliged under Order 17, Rule 3, Civil Procedure Code to condone the lapse of a litigant and it is equally not obliged to decide the case there and then the same day, but can in its sound judicial discretion proceed to take the next step towards decision of the case as expeditiously as possible, within a reasonable time, as the circumstances of the case require.

(10) Now applying that principle, we find, rightly did the Court close the evidence of the petitioner, for he neither brought his evidence nor put in appearance himself. Learned counsel for the petitioner maintains that there were two witnesses whose process-fee and diet money had been paid by him in time but

service had not been effected for the date fixed. He contends that the petitioner was not at fault on this score. We find that there is no mention of these particulars in the impugned order. There is equally no denial from the respondents in that regard. Lest there be any prejudice to the petitioner on that score, we set aside the impugned order and direct the Court concerned to pass a fresh appropriate order keeping in view the situation as it then existed on the date when the impugned order was passed, in the light of the observations made heretofore.

(11) This petition is accordingly accepted but without any order as to costs. Parties through their counsel are directed to put in appearance before the Court concerned on February 22, 1984.

Rajinder Nath Mittal, J.—I agree.