

VIJAYKUMAR DURGAPRASAD GAJBI AND ORS.

A

v.

KAMLABAI AND ORS.

AUGUST 24, 1995

[K. RAMASWAMY AND B.L. HANSARIA, JJ.]

B

*Constitution of India, 1950 : Article 136*

*Ex-parte order—Appeal for setting aside—Categorical findings by Courts below that appellants were not diligent in contesting the suit—Held no interference was called for.*

C

*Code of Civil Procedure, 1908 : Order 9—Rule 13, Sections 114 and 115.*

*Suit—Defendants—Non-appearance—Ex-parte orders against—No bona fides for non-appearance—Refusal to set aside ex-parte orders—Held Justified.*

D

The appellant-defendants failed to appear before the trial Court when the suits were part-heard on February 20, 1992. The appellant's counsel reported on instructions and consequently ex-parte orders was passed against them. The appellants filed an application under Order 9 Rule 13 to set aside the ex-parte orders. The trial Court recorded its finding that the appellants, being in actual possession of the suit property, were intending to prolong the matter and there was no *bona fides* or genuineness for their non-appearance. Consequently it declined to allow the application to set aside the ex-parte orders. The High Court refused to interfere with the matters under section 115 of the CPC. Hence this appeal.

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Dismissing the appeal, this Court

HELD : No material was placed on the record either in the trial court or in the High Court, much less in this Court, to show that the appellants were diligently prosecuting the suits. In view of the categorical finding recorded by the trial court that there was no *bona fide* or genuineness for appellants' non-appearance, it is not an appropriate case for this Court to interfere under Article 136 of the Constitution and put the clock back

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H

A to further prolong the matter. [41-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7866 of 1995.

B From the Judgment and Order dated 10.3.93 of the Bombay High Court in C.R.A. No. 572 of 1992.

A.K. Sanghi for the Appellants.

The following Order of the Court was delivered:

C Notice on the respondents 1, 2, 4, and 6 to 8 have been served. The dasti service on respondents 3 and 5 shows that they have received the notice. Postal endorsement on notices, when sent through Court were returned with endorsements 'left, not known'. Since dasti service has been served on them, notices now are served on all respondents but none is appearing for them nor they appear in person.

D

Leave granted.

E This appeal by special leave arises from the order dated March 10, 1993 of the High Court of Bombay, Nagpur Bench, in C.R.A. No. 572 of 1992. From the record, it would appear that one Ishwar Das Gajbi filed Civil Suit No. 89 of 1985 after Civil Suit No. 82/1983 for eviction of the appellants was filed. When the suits were part-heard on February 20, 1992, the counsel for the appellant reported no instructions under exhibit 116. Consequently, they were set ex-parte. They filed application Order 9 Rule 13, CPC to set aside the ex-parte order, which the trial court dismissed by

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G Shri Sanghi, learned counsel for the appellants, contended that the appellants were diligent in prosecuting the suits. The counsel had wrongly reported no instructions. There was no delay on their part. The appellants had a strong case on merits. Therefore, they are entitled to be heard by setting aside the ex- parte order against them.

H The question is whether the appellants have given proper explanation for their failure to appear before the Court on February 20, 1992. Though Shri Sanghi Contended that all through they were diligent and it was at the instance of the plaintiffs that the suits were dragged on and that, therefore,

no blame could be laid on the appellants' door, unfortunately, no material was placed on the record either in the trial court or in the High Court, much less in this Court, to show that they were diligently prosecuting the suits. On the other hand, the trial court recorded that the appellants, being in actual possession of the suit property, were intending to prolong the matter. There is no *bona fides* or genuineness for their non-appearance on February 20, 1992. It is then stated thus :

"It is also important that the defendants are indulging in all sense and spirits to protract and prolong the progress of the suit, when it is filed in 1983 near about 9 years have been lapsed, but no progress could have been achieved so far. The defendants no.1 to 5 cannot be allowed to take advantage of their own wrong and they have absolutely no *bonafide* to come before the Court with a case for permission to contest the present suit claim. In other words, the defendants No. 1 to 5 are not diligent in contesting the suit claim and that, resulted into prolonging the suit and its decision. The suit is part-heard since last more than 3 years."

On these findings, the trial court declined to allow the application to set aside the ex-parte order. The High Court, having had the discretion, was not inclined to interfere with the matter under Section 115, CPC.

The question is whether this is a fit case for this Court to interfere under Article 136 of the Constitution. In view of the categorical finding recorded by the trial court, we think that it is not an appropriate case for us to interdict and put the clock back to further prolong the matter.

The appeal is accordingly dismissed. No costs.

T.N.A.

Appeal dismissed.