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Court : Orissa

Decided On : May-04-1965

Reported in : AIR1966Ori41

Judge : G.K. Misra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Orders 9 and 17, Rules 1 and 13(1)

Appeal No. : Civil Revn. No. 222 of 1964

Appellant : Sk. Makbul

Respondent : Sk. Sidik and ors.

Advocate for Def. : R.N. Sinha, Adv.

Advocate for Pet/Ap. : B. Patnaik, Adv.

Disposition : Revision allowed

Judgement :

ORDER

G.K. Misra, J.

1. Money Suit No. 101 of 1963 was posted for hearing on 20-12-1962. The following order was passed on that day:

Both parties pray for time to adduce evidence. . . . Plaintiff's time petition is rejected for want of merit. Defendant 1's time petition is also rejected. He ought to have been more diligent in taking steps, I do not see any reason why he could not take those steps earlier. Again defendant-1 applied for time. The time petition is rejected. Defendant 1 is set ex parte. Plaintiff files hazira. The suit taken up. P.W. 1 Sk. Siddik is examined. To 22-12-62 for orders.'

On 28-12-62 the suit was decreed in full ex-parte against defendants 1 to 6. On 7-1-63 defendant-1 filed an application under Order IX Rule 13, C.P.C. for setting aside the ex-parte decree which was registered as Misc. Case 10/62 and dismissed on 11-10-63. An appeal against the trial Court's order was dismissed on 2-5-64. The Civil Revision has been filed against the appellate order.

2. The only question for consideration is whether the petitioner was ill on 20-12-62. The finding of the appellate Court that the petitioner was not ill is based on the following reasons:

(i) The petition for adjournment filed on the date of hearing did not mention illness as a ground.

(ii) Sk, Ali, through whom the petitioner sent information to his lawyer to move the time petition in court on 20-12-62 on the ground of illness, was not examined. The explanation of the petitioner that Sk. Ali could not meet the lawyer and accordingly could not inform him about the illness of the petitioner could have been proved by the examination of Sk. Ali and the lawyer. From their non-examination, adverse inference should be drawn.

(iii) The son of the petitioner, who had been to the hospital to obtain medicine for his father was not examined.

(iv) P.W. 2, who was not summoned before-hand to attend court, simply spoke about his seeing the petitioner going to attend call of nature and had no actual knowledge as to the illness of the petitioner.

(v) The prescription, given by the doctor though filed, has not been proved in the case. Though the doctor was summoned, no further steps were taken by the

petitioner to examine him in court. Non-examination of the doctor, who could have enlightened us as to the illness of the petitioner, gives rise to adverse inference against the illness of the petitioner.

3. Order IX Rule 13, Sub-rule (i) C.P.C. as amended in Orissa and so far as relevant, may be quoted:

'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 there was sufficient cause for his failure to appear 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.'

The onus is on the petitioner to establish that there was sufficient cause for his failure to appear when the suit was called on for hearing. The question whether there was sufficient cause or not is essentially a question of fact. In *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee* AIR 1964 SC 1336 'sufficient cause' in relation to Order XXII Rule 9(2) was held as involving a pure question of fact. In that case, their Lordships observed that the question--whether there was sufficient cause--was exclusively within the jurisdiction of the Court. The Court can decide it rightly or wrongly and the High Court cannot set aside such a finding in exercise of its powers Under Section 115, C.P.C. On the same principle, the question whether the petitioner was ill or not, is essentially a question of fact and the High Court cannot set aside that finding in exercise of its revisional jurisdiction unless it comes within the purview of Section 115(1)(c). In other words, if the subordinate Court appears to have acted, in exercise of its jurisdiction, with material irregularity in arriving at its conclusion, the High Court may pass such order as it may think fit.

4. The ambit and scope of Section 115(1)(c) C.P.C. has been authoritatively pronounced by series of Privy Council and Supreme Court decisions. It is unnecessary to refer all of them. *Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras*, AIR 1949 P.C. 156 has been considered as the

leading decision on the point and has been accepted as the foundation of all the Supreme Court decisions--See Keshardeo Chamria v. Radha Kissen Chammria AIR 1953 SC 23, AIR 1964 SC 1336 and Abbasbhai Ali Mahomed v. Ghulamnabi, AIR 1964 SC 1341. 'Material irregularity' was construed by the Privy Council as meaning 'by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision'. 'Material irregularity' does not refer to the decision arrived at but to the manner in which it is reached.

5. Keeping himself within the bounds of the aforesaid concept, Mr. Patnaik contended that the Courts below exercised their jurisdiction with material irregularity for the following reasons--

(i) The evidence of P.W. 2 was misread inasmuch as the appellate Court observed that he had no actual knowledge as to the illness of the petitioner; and

(ii) The petitioner's application for time to examine the doctor on whom summons had been served having been rejected, no adverse inference should have been drawn against him for non-examination of the doctor and that the petitioner should have been given opportunity to examine the doctor.

6. The first ground has no substance. I have gone through the evidence of P.W. 2 carefully and it cannot be said that his evidence was misread. It was open to a court of fact to assess the evidence in any manner as it chose without committing any error of record. No error of record has been committed in this case. Another court of fact might have taken a different view of the evidence. That by itself is no ground for holding that the lower appellate court misread the evidence. The argument based on misreading of the evidence of P.W. 2 is accordingly rejected.

7. The residual ground is that the petitioner had taken summons for the appearance of the doctor to prove his illness. There is no dispute that the summons had been served on the doctor for appearance on 5-10-63 to which date the Misc. Case 10/63 had been fixed for hearing. Despite service of summons the doctor did not appear nor sent any information as to why he did not appear. The petitioner was therefore constrained to ask for adjournment for the examination of the doctor. The petition was rejected and the hearing of the miscellaneous case

was concluded on 5-10-63. There is no dispute that the doctor was the most material witness in the case to prove illness of the petitioner on 20-12-1962 and the prescription granted by him which had already been filed in Court. Normally a careful Judge should have closed the case by examining all the witnesses appearing for both the parties and would have fixed a peremptory date for the examination of the doctor. Unfortunately as the case had been long protracted, the trial Court did not adopt such a course.

The question for consideration, however, is whether adjournment should have been granted for the examination of the doctor on whom summons had been served to appear on the date fixed and over whom the petitioner had no control.

Order XVII Rule 1, C.P.C. deals with adjournment. It says that the court may for sufficient cause at any stage of the suit grant time to parties or to any of them and may from time to time adjourn the hearing of the suit. Thus granting of adjournment is left to the discretion of the Court which is not subject to any definite rule. But it can hardly be doubted that such a discretion must be exercised in a judicial and reasonable manner and not arbitrarily or with capriciousness. No hard and fast test can be laid down as to how this discretion should be exercised on each occasion. It would vary according to the facts and circumstances of each case.

In the facts and circumstances of this case there cannot be any doubt that adjournment should have been granted for the examination of the doctor. After summons had been served, appearance in court depended upon the volition of the doctor over which the petitioner had no control. The doctor is the most material witness in the case. He being a man of status, if he would have deposed in favour of the petitioner, his evidence, if accepted, would tilt the balance.

8. The further question for consideration, however, is would the High Court in exercise of its powers Under Section 115(1)(c) interfere with the orders of the courts below in the matter of granting adjournment. If the Court did not act illegally or with material irregularity, the discretion of the Subordinate Courts in the matter of granting adjournment cannot be interfered with. Question of granting or refusing adjournments relates to a procedure in the course of the trial. If an error is

committed in such procedure, that is, in the matter of granting adjournment, which may have affected the ultimate decision, the High Court can quash such an order. An illustration was put to Sinha in the course of hearing which may be noticed.

On the date of the hearing the son of the defendant died. Defendant applied for time. The Court accepted defendant's version but yet refused time saying that it did not amount to sufficient cause. An ex parte decree was passed.

The question is whether the Court can be said to have exercised its jurisdiction with material irregularity. Mr. Sinha frankly conceded that in such an extreme case, the finding would be that the subordinate Court exercised its jurisdiction with material irregularity in refusing time. The aforesaid illustration is not mentioned as being analogous or apposite, but only to clarify the concept that even in the matter of granting adjournments, the subordinate Court can exercise its jurisdiction with material irregularity.

9. It is clear that the Court exercised its jurisdiction with material irregularity in not granting time for the examination of the doctor in the circumstances already mentioned. Out of the five reasons, mentioned in paragraph 2 supra, the first four reasons are circumstantial. Even if all those reasons are accepted, the ultimate decision in the case might materially change if the doctor deposes in favour of the petitioner that he was ill on 20-12-62 and if such evidence is accepted by the Court. The non-granting of time, therefore, amounted to an error of procedure in the course of the trial which is material inasmuch as it may affect the ultimate decision. The facts thus come directly with the dictum in AIR 1949 PC 156. The findings of the Courts below are not being set aside on the ground that they committed either error of fact or of law. If the doctor had been examined and the Courts below would have discarded his evidence, this court would have no jurisdiction to set aside the conclusion of the Courts below on the ground of error of fact or of law. The manner in which the Courts below reached their ultimate decision is vulnerable.

10. For the aforesaid reasons, I would set aside the judgments of the Courts below and remand Misc. Case No. 10 of 1963 for rehearing. The evidence already taken would be the evidence in the case. A date be fixed when the doctor would be

examined after fresh service of summons on him. No. other evidence would be permitted to be taken. The trial Court would proceed to judgment after hearing the arguments of the parties on the evidence already on record and on the evidence of the doctor.

In the result, the Civil Revision is allowed. In the circumstances, parties to bear their own costs upto this stage.

Records be sent back forthwith.

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