

Mukta Devi Panda Vs. Harish Chandra Panda

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Court : Orissa

Decided On : Aug-13-1963

Reported in : AIR1964Ori104

Judge : G.K. Misra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 9

Appeal No. : Civil Revn. No. 228 of 1962

Appellant : Mukta Devi Panda

Respondent : Harish Chandra Panda

Advocate for Def. : M.K.C Rao and ;A.K. Rao, Advs.

Advocate for Pet/Ap. : P.V.B. Rao, Adv.

Disposition : Revision allowed

Judgement :

ORDER

G.K. Misra, J.

1. Plaintiff is the petitioner. On 4-9-61 Title Suit No. 17 of 1960 was posted for hearing in the Court of Munsif, Rayagada. Petitioner's case is that she had taken steps for summoning her witnesses for that day. She had engaged two pleaders--

Sri V. K. Rao and Sri N. K. Das. The latter had been to Cuttack prior to 4-9-1961 on some urgent personal work. Sri V. K. Rao had to suddenly go to Jeypore in a professional work on 3-9-1961. A petition for adjournment was filed by the registered clerk of Sri V. K. Rao on 4-9-1961 for accommodation for one day only, that is, till 5-9-1961, to enable Sri Rao to come back to Rayagada to conduct the suit. On 4-9-1961 the pleader's clerk filed the petition without affixing court-fee as the stamp vendor was absent by the time. After filing the petition, the clerk went to the house of the Stamp Vendor to fetch court-fee. In the meantime the suit was called and dismissed. The petitioner filed an application under Order 9, Rule 9, C. P. C. for setting aside the order dismissing the suit. The main sufficient cause alleged was unavoidable absence of the pleader in his own professional work at Jeypore.

2. The opposite party opposed the application for restoration of the suit. There was assertion in the counter that the absence of Sri Rao, Pleader, did not amount to sufficient cause and that the plaintiff and his pleaders should not have been absent on the date of hearing.

3. The learned Courts below held that there was no sufficient cause for the absence of the pleader (Sri Rao). They dismissed the application under Order 9, Rule 9, C. P. C. The Civil Revision has been filed against the appellate judgment dated 29-6-1962 of the learned District Judge, Koraput-Jeypore.

4. The judgment of the learned District Judge contains 5 paragraphs. Paragraphs 1 to 4 are mere narration of facts without any discussion. Paragraph 5 is the only substantive paragraph on the basis of which the application under Order 9, Rule 9 was dismissed. It is necessary to quote the whole of paragraph 5. It runs as follows.

'On a consideration of these circumstances it really transpires that the plaintiff absented herself from the Court on the relevant date. It also transpires from the order sheet that no other witness for plaintiff was either present and that she had taken steps for summoning her witnesses as late on 28-8-1961 just 7 days prior to the date of hearing. The absence of the lawyer on his professional business without making any arrangement for the instant case can also be no ground for

giving any latitude to a party. In the circumstances, I do not find any ground to interfere in the present case which will tantamount to give premium to the negligence of the plaintiff and her lawyer.'

5. A finding of fact is hardly assailable in Civil Revision. Mr. P. V. B. Rao, however, contends that the judgment of the learned District Judge suffers from the infirmity that it does not consider the real point in issue, and that the broad principle laid by the learned Judge that laches on the part of a pleader without making an alternative arrangement, can never amount to sufficient cause, is too wide and is opposed to common course of human conduct in relation to the facts of a particular case.

6. The contention of Mr. Rao deserves close scrutiny and serious consideration. Whether negligence on the part of a lawyer would amount to a sufficient cause for absence is not a question of law. It is a pure question of fact which would vary according to the facts and circumstances of each case. In a Full Bench decision reported in *U. Aung Gyi v. Govt. of Burma*, AIR 1940 Rang 162, their Lordships observed that advocates who were engaged in cases which were fixed for hearing at a given time and place cannot be allowed to treat the Court before which the hearing is to take place with contumely or indifference, and then apply casually for reinstatement of a suit dismissed in their absence merely because they hoped or believed that they might attend the hearing. They must take reasonable precautions, and the provisions of Order 9, Rule 9 become meaningless if it can afterwards be urged that although none were taken and there was no sufficient cause for their non-attendance, the suit can still be restored to the file, because the litigant would otherwise suffer.

Under Order 3, C. P. C. a party can appear through a pleader. It has been held in some cases that the failure of a lawyer to appear in a case, for which his client is in no way responsible, may not always be a sufficient cause for non-appearance. If such non-appearance, however, takes place without any fault on the part of the party, in spite of his best efforts to prevent it, it would not be fair to hold that there is still no sufficient cause for non-appearance : *Tulsiram v. Sitaram*, AIR 1959 Cal 389. In other cases it has also been held that when a party has arranged for his due

representation in Court through a duly instructed pleader, he need not be called upon also to assign sufficient reason for his own absence at the hearing : *Sohanlal y. Devachand*, AIR 1957 Raj 11.

The essence of the matter is that mere absence of a pleader or that the pleader had some professional work elsewhere, by itself, may not amount to a sufficient cause. On the other hand, if a party has done all that is necessary to engage a pleader, and the pleader fails to appear, it may be a sufficient cause for the non-appearance of the party. This question is purely one of fact and must be determined with reference to the circumstances of each case.

It is necessary to clarify the position by way of an illustration. A particular Advocate has only 25 appeals in his file in the High Court in a year. If each of the appeals is taken on a separate date, he might finish all the appeals within 25 working days or less and sit idle for the rest of the time. If per chance it so happens that on a particular day when 4 Benches are sitting, these 25 appeals are listed in all the 4 Benches, then it may not be possible for him to argue all these appeals. It cannot also be contended that he should have refused all these briefs, because he is over-burdened with work. Despite request for adjournment, the advocate may not be accommodated by the Courts. As the list is prepared just on the previous day, he may not be in a position to make effective arrangement in all the cases. If in such circumstances, the advocate shows his bona fides and files an application for restoration on behalf of the party, it cannot be said with reference to all the appeals that he had no sufficient cause for his non-appearance. It might be argued with reference to some cases that alternative arrangement could have been done. But an argument cannot be advanced having regard to human conduct and experience that there would be no sufficient cause in any. These are therefore pure questions of fact which must be examined in the light of the circumstances transpiring in each case and no hard and fast general rule can be enunciated so as to govern all cases.

7. In the light of the aforesaid tests, the facts and circumstances of this case should have been examined by the learned District Judge. The plaintiff had engaged the pleader. The pleader had his case at Rayagada on the 4th and

another urgent case at Jeypore on the same day. In between the two, the pleader thought that the work at Jeypore was more emergent and needed absolute attendance as a commission had to be executed under the orders of the District Judge. His prayer for adjournment was only for one day. The subject-matter of the litigation, though irrelevant to the question of determining the sufficiency of the cause, is relevant for determining the attitude of the pleader in taking a particular decision. The property involved is about 25 acres of land and the pleader is not expected to leave the plaintiff in the lurch unless he was satisfied that there was sufficient cause for his absence elsewhere and that he expected that normally he would be accommodated for a day whereby no injury would be caused to his client's interest.

Though in the application for restoration there was no mention of the fact that on 3-9-1961 the pleader sent information to the plaintiff not to come on the 4th, as he would be absent, he stated in Court :

'To my information, the plaintiff had not come to Rayagada on 4-9-1961.'

This statement has not been challenged in cross-examination and a respectable person like Sri V. K. Rao is not expected to make a false statement. Even assuming that the plaintiff had taken all steps earlier for summoning the witnesses to come on that day and the plaintiff would have herself been present in Court, she could not have prosecuted the suit in the absence of a lawyer.

The question whether any court-fee was affixed on the application is thoroughly irrelevant. Even if court-fee had been affixed, the petition under Order 9, Rule 9, C. P. C. has to be dismissed if there is no sufficient cause. On the contrary, it is not the learned Judge's finding that adjournment must have been granted if court-fee had been affixed. The evidence of the pleader's clerk as to why court-fee could not be affixed has not been considered. The story given by him appears natural. Attention should have been focussed on the question as to whether there was sufficient cause for the absence of the lawyer to ask for one day's adjournment without making an arrangement for the prosecution of the case on the date of hearing. There may be cases in which there would be sufficient cause for an advocate to be absent even without making any alternative arrangement.

The essence should not be missed in the cobweb of technicalities.

8. On a careful analysis, I am satisfied that the learned District Judge exercised his jurisdiction with material irregularity in not focussing his attention on the relevant question. To my view, there was sufficient cause for the plaintiff's absence on 4-9-1961 and the suit must be restored to file.

9. In the result, the Civil Revision is allowed, but in the circumstances, parties to bear their own costs throughout.

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