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Court : Punjab and Haryana

Decided On : Sep-10-1992

Reported in : AIR1993P& H134; (1993)103PLR541

Judge : A.L. Bahri, J.

Acts : Code of Civil Procedure (CPC), 1908 - Order 9, Rules 4 and 9; Advocates Act, 1961 - Sections 29, 30 and 33

Appeal No. : Civil Misc. No. 15-E of 1992, in Election Petition No. 9 of 1991

Appellant : Onkar Singh

Respondent : Angrez Singh and Others

Advocate for Pet/Ap. : S.C. Mohanta, Sr. Adv. and ;Navin Mahajan, Adv.

Judgement :

ORDER

1. The petitioner filed election petition challenging election of respondent No. 3 Kharaiti Lal from Shahabad Assembly Constituency in the State of Haryana. After service on the respondents was completed written statement was filed by the contesting respondent No. 3. On the pleadings a preliminary issue was framed on March 18, 1992 as under:--

'Whether election petition discloses any cause of action?'

Counsel for both the parties stated that no evidence was to be led on the preliminary issue, stated above, and thus the case was adjourned to April 3,1992 for arguments. The case was taken up on April 6, 1992 and was adjourned to April 24,1992 for arguments on the preliminary issue. Parties counsel or their Clerks noted down the date of hearing fixed which is shown from the endorsement on the margin of the order aforesaid. Nobody appeared on April 24, 1992 and hence the election petition was dismissed.

2. Civil Misc. Application No. 15-E of 1992 was filed on behalf of the petitioner for restoration of the election petition, It was stated in this application that since the lawyers were on strike the case aforesaid could not be attended and thus absence was not intentional but bona fide due to the reasons aforesaid. It is further mentioned that the petitioner was also informed but he could not be made available at this short time and thus on the date fixed the case could not be attended by the petitioner or his counsel due to the reasons aforesaid. In support of the allegation mentioned in the application, no affidavit or affidavits of the persons con-cerned were attached. An opportunity was allowed vide order dated May 15, 1992 to the petitioner to file necessary affidavit/affidavits. Subsequently, an affidavit of the petitioner Onkar Singh dated July 22, 1992 was filed. The case was taken up on July 24, 1992. Since the allegation made in para 4 of the petition was vague, the petitioner was called upon to file better affidavit. Subsequently the petitioner filed affidavit dated August 6,1992 arid arguments were heard from the counsel for the petitioner.

3. It was stated by the petitioner in para 4 of the affidavit dated July 22, 1992, that he was informed but he could not be available at this short time. In the affidavit dated August 6,1992, Onkar Singh petitioner clarified that he was out of station since April 18, 1992 in connection with his party work and came back on April 25,1992. He further stated that he was informed but he could not be available at this short time and thus the case, in which the date was fixed, could not be attended by him or by his counsel due to the above reasons. It is in this state of affairs that the question for consideration is as to whether sufficient cause has been shown by the petitioner for his non-appearance on the date fixed. If it is held in the affirmative then the application for restoration deserves to be allowed.

4. Shri S. C. Mohunta, Sr. Advocate, appearing on behalf of the petitioner has argued that counsel for the petitioner were morally duty bound not to put in appearance in the cases fixed on the date when the Bar Association of Punjab and Haryana High Court had given a call for strike and thus there was sufficient cause for non-appearance of the lawyer in the case. It is further argued in this very context that for such an inaction on the part of the lawyer the client should not be made to suffer and the election petition should be restored. Reliance has been placed in support of this contention as well as on general principles on judicial decisions. Brief reference to the same is being made. The Andhra Pradesh High Court in Dekonda Venkataiah v. Bobbili Mallaiah (died) (1971) IIANWR 89, observed as under; with respectto the conduct of lawyers in not appearing in the cases on the resolutions passed by the Bar Association for going on strike:--

'To say the least, it is most unfortunate that the members of the Bar Association, representing a noble profession should take part in such activities and pass such a resolution. If the learned counsel or the members of the bar wanted to take part in such agitation, the proper procedure is to have intimated to the party and withdrawn from the case or from the profession, but not to boycott Courts and have the appeals dismissed for default. This sort of conduct on the part of the advocate cannot be pardoned on any principle known to legal ethics.'

After observing as above, it was further observed:

'But, however, unpardonable the conduct of the Advocate may be the interest of the client should not suffer.'

In that case the lower appellate Court had dismissed the appeal for non-appearance of the Advocate. Subsequently, application for restoration was also dismissed and the matter was taken to the High Court. The counsel had not informed the client and thus the party was , not in a position to make other arrangement for the hearing of the case. Thus, holding that there was sufficient cause for non-appearance High Court directed restoration of the appeal. A further direction was given that in view of the gross dereliction of duty on the part of the Advocate, he was to pay a sum of Rs. 50/ - as costs to the other party. I fully subscribe to the views expressed by Allahabad High Court with respect to the duty of the lawyer towards the Court in the cases in which he had agreed to appear. However, the question of proof of sufficient cause has to be raised and decided on the facts of each case. On facts the ratio of the decision aforesaid cannot be applied as-the allegation made in the application by the petitioner himself is that he was informed by the Advocate about his intended non-appearance on the date fixed. Learned counsel for the petitioner further relied upon the decision of the Jammu & Kashmir High Court in Hari Kishan Shah v. Tilak Raj Bhasin, AIR 1972J & K 19. As per the facts of that case the plaintiffs counsel had gone out of station in connection with some professional work and had entrusted the case to another Advocate who was absent when the suit was called and was dismissed in default. In such circumstances it was held that there was sufficient reason for the non-appearance of the plaintiff and his application for restoration of the suit should be allowed. Such is not the case in hand that the ratio where of could be applied. It is not the allegation that counsel for the petitioner could not appear in the case when the petition was called for hearing on account of his appearance in any other Court in the course of his profession. Learned counsel relied upon the decision of the Supreme Court in Rafiq v. Munshilal, AIR 1981 SC 1400 : (1981 All LJ 704). The High Court had decided the appeal in the absence of the counsel. Application to recall the order of dismissal was rejected by the High Court. The Supreme Court while setting aside the order of the High Court observed in para 3 of the judgment as under:--

'The disturbing feature of the case is that under our present adversary legal system whether the parties generally appear through their advocates the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.

It was further observed that:-- 'The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order.'

5. While keeping in view the ratio of the decision aforesaid, it is to be decided in the present case whether the petitioner is to suffer on account of any action or inaction on the part of his lawyer. The Supreme Court in Savithri Amma v. Aratha Karthy, AIR 1983 SC 318, while setting aside the order of the High Court observed that when the counsel was occupied in another Court, the same was sufficient cause for not being present at the hearing. The ratio of the decision aforesaid cannot be applied to the case in hand as it is not the case wherein counsel for the petitioner, at the relevant time, was busy with his professional work in any other Court.

6. Learned counsel for the petitioner has further relied upon the two decisions of the Gauhati High Court, in Basanta Kumar Nag Choudhury v. Bijit Lal Das, AIR 1983 Cauhati 67 and Abdul Haque v. Kutubuddin Ahmed, AIR 1985 Gauhati 59. In the later case, the decision of the Supreme Court in Smt. Savithri Amma's case was relied upon. In the case of Basanta Kumar, the party had relied upon the medical certificate in support of his inability to appear in the Court at the time of the hearing which was considered a sufficient cause for non-appearance. In Abdul Haque's case the plaintiff had given instructions to Advocate's Clerk to take necessary steps for adjournment which was considered a sufficient cause for his non-appearance. Thus, on facts, both these cases are distinguishable and are not helpful in deciding the present application.

7. Learned counsel for the petitioner has also referred to some of the decisions of this Court. Chander Kanta v, Sulekh Chand Sumer Chand, 1978 PLJ 156, was a case where Advocate without making any arrangement for appearance in the case kept himself busy in another place. With respect to the conduct of the Advocate in para 3 of the judgment, it was observed as under:--

'I feel that in this case the conduct of the Advocate in the discharge of his duty has been most reprehensible. I am of the opinion that he in the most light-hearted manner put in an application for restoration when the application was dismissed in default and conveniently trotted out an excuse for his not being present at the time when the application was put up. I want to make it clear that Advocates cannot trifle with Courts in this manner. There is a grave responsibility on the Advocate and there is a duty both to the client as well as to the Court. I will not countenance an application for restoration where the party or his Advocate does not appear in Court, but later on files an application merely alleging that his Advocate was busy in another Court and hence he could not appear in time.'

The order of the District Judge dismissing the appeal was set aside with the direction to readmit the appeal on payment of Rs. 150/-as costs on the ground that sins of Advocate should not be allowed to visit on the party.

In Buta Singh v. Puro, 1979 PLJ 259, it was observed that even if the plaintiff had failed to prove strictly sufficient cause for his non-appearance, his application for restoration, if made within time ought to be restored and other party should be compensated with costs. In Malook Singh v. Baljit Singh 1989 (1) SPJ 200 relying upon the principle that sins of Advocate should not be allowed to visit the party. Cause was restored on payment of Rs. 500/- costs. Chander Kanta and Buta Singh's cases referred to above were relied upon.

8. Although it has been argued by the learned counsel for the petitioner that on account of a call given by the Bar Association, 'he did not put in appearance, when the election petition was dismissed in default, thatshould perse be sufficient cause for restoration of the Election Petition. This contention as such cannot be accepted. On reference being made to the Division Bench in Saudagar Singh v. Executive Officer, Municipal Committee, 1989 (2) PLR 693, the, answer was given in the negative. The question of law was referred as to whether non-appearance of the Advocate on account of strike call would be sufficient ground for restoration, the Division Bench observed that on either side it could not be a ground to dismiss the application for restoration or to allow it in such a matter, it was left to the discretion of the Court and such discretion left to be exercised judicially. It was indicated therein that there must be something more to tilt the balance either side. Subsequently, the matter was considered by another Division Bench of which I was also a member in State of Haryana v. Rai Sahib, 1992 (I) PLR 693. That was a case of hearing criminal appeal in the absence of counsel for the appellant. However, the matter was discussed in detail about the matters on which the Bar association had been giving calls to the lawyers not to appear in Court as well as duties of the Advocate towards their clients and towards the Court. Vide referring to the provisions of Sections 29, 30 and 33 of the Advocates Act, 1961, it was observed that the rights of the Advocate for appearing in Court were governed by those provisions and they are supposed to appear in such cases having been duly engaged by the litigants. It was further observed as under:--

'The Advocates have duel obligations in the matter of conducting cases in the Courts. Firstly, the obligation is towards their clients who have engaged them. Such obligations are subject to the terms and conditions of the contract or authority given to the counsel (power of attorney). For non-appearance or negligently conducting or non-conducting the cases rights and remedies could be governed by such terms and conditions of the power of attorney. The other obligations of the Advocates is towards the Court as an Officer of the Court. An Advocate is considered an Officer of the Court to assist the Court in the matter of dispensation of justice. Such statusof an advocate is recognised by passage of time by the Courts. Such obligation is moral. For not giving such assistance to the Courts, there would be no cause for any action against an advocate.'

While making reference to the historical aspects and the guidelines given by the High Court to the Subordinate Courts and keeping in view the different grounds on which such calls for strike were given by the different bar associations in the States of Punjab and Haryana, in para 10 of the judgment it was observed as under:--

'In the situation that we are presently, our utmost anxiety and worry in the matter has compelled us to think as to whether strictly under the law, the Court can function without the assistance of lawyers. It may be mentioned here that our concern in the matter apart, we would like to deal with the matter apart, we would like to deal with the matter strictly in accordance with the provisions that govern the field.'

Holding that criminal appeals could be disposed of by the Courts even if the assistance of the lawyers was not available, on merit the appeal was disposed of.

9. Reverting back to the facts of the present case, out of two grounds taken up in the application, the first ground is not at all available to the petitioner for getting the Election Petition restored for the simple reasons that in the application as well as in the affidavit filed, it was conceded that lawyer had informed the petitioner that he was not appearing in the case. Since the matter has been argued, a brief discussion is considered necessary as to whether absence of the counsel on the day the lawyers were on strike was not intentional and was bona fide. At the outset it may be stated that when lawyers go on strike and the counsel absents from

appearing in the Court, it is very much intentional and deliberate act on his part. The assertion to the contrary in para 3 of the application is otherwise incorrect. Such non-appearance of the counsel cannot be classified as negligent act or bona fide omission on the part of the lawyers. In such circumstances, it cannot be said thatthe lawyer was prevented from appearing either by circumstances beyond his control or he wanted to appear but something prevented him. The argument suggested is that the call of the Bar association is in the form of a mandate, indicating thereby if the lawyers refuse to obey such a call, they would be dismembered from the association. From that in my view, it cannot be gathered that for violating/call command of the Bar Association, the lawyers would be debarred from practising in the Courts, The Courts are supposed to function in accordance with law. It is the duty of all concerned to see that the functioning of the Court is not stopped as the same would shake the judicial structural set up itself, which is embedded in the Constitution. Justice is administered by the Courts which cannot be party to any agitation sponsored or supported either by the Bar Association or its members to stop the functioning of the Court or in other words blocking or locking of the Courts. This would amount to denying justice to the public. There is no legal sanctity behind the resolutions passed by the Bar Association calling upon the lawyers to abstain from appearing in Courts. As a matter of fact, it is the noble profession that the lawyers join as a privileged class. Lawyers have been granted right of audience in Courts under the Advocates Act and to conduct cases of their clients on getting remuneration for the same. If they consciously, intentionally and deliberately abstain from conducting the cases in , the Courts on behalf of their clients, they would be committing breach of contract and subjecting themselves to consequences flowing from such a breach. It may be mentioned that at this stage there is no awareness in the public or the litigants about their rights on this subject. Time is not far of when they would agitate against the class of lawyers who after accepting their fees deliberately commit breach in not conducting their cases. It is unfortunate that the lawyers who are supposed to help the public in getting justice from the Courts would be proceeded against for justice by their clients.

10. Since in the present case, the stand taken up in the application is that the petitioner was informed by the Counsel, theground of non-appearance of the counsel for any reason, for restoration of the Election petition is not available.

11. With regard to the second ground taken up in the petition, there is conflicting stand in the application, para 4 of which reads as under:--

'That the petitioner was also informed but he-could not be made available at this short time and thus the case in which the date was fixed could not be attended by the petitioner or by his counsel due to the reasons mention-ed above.'

In the affidavit dated July 22,1992, para 4 is similar as in the application reproduced above. In the affidavit of August 6, 1992, para4 reads as under:--

'That I was out of station since 18th of April, 1992 in connection with party work, and came back on 25th of April, 1992 as I was informed. But I could not be available at this short time and thus, the case in which the date was fixed could not be attended by me or by counsel due to the above mentioned reasons.'

The date of appearance was April 24, 1992. If the assertion in the application as well as in the first affidavit is taken as correct, it would mean that Onkar Singh, petitioner was informed that his lawyers would not be appearing and he himself was to make arrangement for appearance which according to him on account of short time, he could not do so. The later part of the assertion is completely belied. As per subsequent affidavit filed on August 6, 1992, Onkar Singh petitioner tried to project that he was out of Station since April 18, 1992 and he returned on April 25, 1992 and that in fact he was not informed by his counsel. This new stand is being taken up, giving up the previous stand. Petitioner has been taking up fake and false pleas in the affidavits filed in Court. The petitioner has not approached the Court with clean hands to seek exercise of discretion in his favour.

12. For the reasons recorded above, the application is dismissed.

13. Application dismissed.

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