

V. Bhagat Vs. Usha Bhagat

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Court : Delhi

Decided On : Jul-31-1986

Reported in : AIR1987Delhi74a; 30(1986)DLT307; 1986(11)DRJ169

Judge : M.K. Chawla, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 1

Appeal No. : Civil Miscellaneous (Main) Appeal No. 157 of 1986

Appellant : V. Bhagat

Respondent : Usha Bhagat

Advocate for Pet/Ap. : J.K. Seth and; S.C. Singh, Advs

Judgement :

M.K. Chawla, J.

(1) The petitioner in this petition is Shri V. Bhagat, Advocate. He was the plaintiff in his Suit which was instituted in the Court of District Judge, Delhi on 2nd January, 1986. Miss Usha Bhagat, the defendant is his sister. The office of the District Judge fixed the case before the District Judge on 6th January, 1986 but the petitioner/plaintiff as per the averments, noted the date as 8th January, 1986. The case was marked to the Court of Shri S M. Aggarwal, A D J. by the District Judge. On the same day, Shri S. M. Aggarwal directed his office to check up the case and

report for tomorrow. On 7th January, 1986, however, none appeared for the plaintiff and the case was ordered to be resisted on 8th January, 1986. The order of the said date reads as under :

'PRESENT:None Be awaited. The case has been listed for 3 days but none has turned up to prosecute the same. Hence, the suit is dismissed for want of prosecution. Consign. sd/- 8-1-86- 3 P. M.'

(2) The petitioner has alleged that he has mainly confined his work in the Supreme Court and was not familiar with the procedure of the District Court. However, on 8th January, 1986, when he perused the cause list of the District Judge, he did not find his case and thereafter requested one of his colleagues to find out the fate of his Suit. Shri Jugal Kishore Seth, Advocate, followed the matter and ultimately came to know that the Suit has since been dismissed for non-prosecution of the order of Shri S. M. Aggarwal on 8th January, 1986. He immediately informed the petitioner/plaintiff and without listing any further time, filed an application under order IX Rule 4 C. P. C. for the restoration of their Suit on 10th January, 1986. It is further alleged that without hearing the Counsel for the plaintiff, the learned lower Court ordered the issuance of notice to the defendant for 17th February, 1986 which was duly served. On the adjourned hearing, the learned lower court without having any reply or opposition from the defendant framed the issues reading as under :-

(1) Whether the Suit is liable to be restored? Opp (2) Relief.

(3) The case was fixed for the evidence of the plaintiff on 10th April, 1986. It is against these orders that the present petition has been filed praying for the setting aside of the orders and restoring the Suit to its original number and for issuing the directions to the lower Court for deciding the Suit on merits.

(4) The respondent has put in appearance and has opposed the petition on the short ground that the supervisory jurisdiction conferred on the High Court under Article 227 of the Constitution is limited to seeing that the inferior Court or tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record, much less an error of law. It is also contended that a mere

wrong decision without anything more is not enough to attract jurisdiction under this Article. Otherwise, the facts of the case are not disputed.

(5) I have heard the arguments of the learned Counsel for the parties and, with their help, gone through the record carefully. In this case, the learned lower court prima facie has travelled beyond its jurisdiction in dismissing the Suit and ignoring the directions of the High Court contained in High Court Rules and Orders Vol. I Chapter 1(J) and the mandatory provisions contained in the Code of Civil Procedure.

(6) When a plaint is presented, the Suit is thereby instituted under Order VI Rules I of the Code. and the Suit in just forthwith be entered in the Register of the Civil Suits in accordance with Order IV Rule 2. It is made obligatory as per the High Court Rules and Orders that when a plaint is presented, the Court shall fix a short preliminary date in order to permit the examination of the plaint. On this preliminary date, the plaintiff is expected to appear to receive notice of the date fixed for hearing of the Suit. It sometimes happens that the plaintiff does not appear on this date and several cases have come to the notice of the Judges in which the Courts have forthwith dismissed the Suit for default by orders purporting to be made under Order IX. This procedure as per the High Court Rules and Orders is incorrect and it has been held that the preliminary date is not a date fixed for hearing and, therefore, the provisions of Order IX do not apply.

(7) This very direction appears to have been followed in a Judgment reported as *Inder Singhv. Sheru*, Air 1921 Lah 320. Under similar circumstances as in the prevent case, during the course of the Judgment, it was held as under :-

'Where no date is fixed for the appearance of the defendant within the meaning of Order 5 Rule I, the Court has no pener to dismiss the suit in default under Order 9 Rule 3. Plaintiff's absence on a day fixed not for the bearing of the case but for the plaintiff to attend and find out what date has been fixed for the appearance of the defendant docs not justify dismissal of suit for default. What the Court should do in case of plaintiff's absence on such a date is to fix a date for the appearance of the defendant and if, on the date so fixed, the plaintiff docs not appear, it can dismiss the suit under Order 9.'

(8) This very Judgment was later on affirmed in the Judgment reported as R. C. J Paul v. Devi Dayal Sethi, Air 1935 Lahore 656.

(9) Applying the ratio of the aforesaid two Judgments on the facts of the present case, no doubt is left in my mind that the learned Lower Court almost ignored the directions of the Court contained in the High Court Rules and Orders and did not follow the law laid down in this behalf. It is not a case where a notice to the defendant had been issued thereby bringing the decimal within the four-corners of Order IX Rule 3. The only course left with learned lower Court was to issue notice to the plaintiff for his appearance and then issue the summons to the defendant for his appearance. If in that situation, the plaintiff had failed to appear, then the dismissal of the Suit could have been justified but not in the present circumstances.

(10) Furthermore, as the Suit has been dismissed in the absence of the defendant, it was not necessary for the Court to have issued notice of the restoration application to the respondent which act on the part of the lower Court is absolutely without jurisdiction, illegal and not warranted by law. Further more, without any contest from the side of the defendant or the receipt of the reply to the restoration application, the learned lower Court travelled beyond his jurisdiction to frame the issues on 17.286. The whole procedure adopted by the lower court from the very beginning is contrary to law and cannot be allowed to stand. Even otherwise, the ends of justice demand that the plaintiff's Suit reunite disposed of on merits, if it docs not suffer from any technical defect. The defendant will not suffer any irreparable loss or injury in case they put in appearance and contest the; Suit on merits.

(11) As a result of the above discussion, I accept the petition, set aside the orders of the learned lower Court dated 8th January, 1986, 14th January, 1986 nd 17th February, 1986, and issue directions to the lower Court to restore the Suit to its original number and dispose it of on merits. The delay, if any, in moving the application is condoned as per the averments made in the application. Parties are directed to appear before the lower Court on 11th August, 1986 for further proceedings.

