

Sohan Singh Vs. Surat Singh

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Court : Delhi

Decided On : Oct-16-1985

Reported in : 1986RLR108

Judge : J.D. Jain, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule 13

Appeal No. : Civil R. Appeal No. 874 of 1983

Appellant : Sohan Singh

Respondent : Surat Singh

Advocate for Pet/Ap. : O.N. Vohra and; D.D. Chawla, Advs

Judgement :

J.D. Jain, J.

(1) It may be stated at the outset that the original summons issued to the petitioner is not available on the record of the trial Court. So, the crucial question for both the courts below was whether the testimony of the petitioner as Aw 1 and his son Saran Jeet Singh, who was the only other witness examined by him to the effect that the petitioner was never served with the summons in the suit should be believed as against the judicial order dated 11.7.74 recording that deft. No. 3 had been served with the summons but was not present. On a consideration of the

evidence on record both the courts below have given concurrent finding that petitioner No. 1 had been duly served as recorded in the aforesaid order. It may be noticed here that there is also a note in the sheet just below the order dated 4.5.74 showing that defts. 1, 2 and 4 had not been served whereas deft. No. 3 had been served personally. The learned counsel for the petitioner has, therefore, canvassed with considerable fervour that the courts below have slipped into a grave error in not believing the evidence of the petitioner and his son, both of whom denied receipt of summons in the suit in categorical terms. To be precise his line of argument is that order dt. 11.7.74 was apparently passed by the court on the basis of the note recorded by the Reader to which I have already alluded. So, the presumption of correctness, if any, touching to the said order was intrinsically weak and it was abundantly rebutted by denial on oath of the receipt of summons by the petitioner, and his son ; more so when the process server, who had delivered the summons and effected service on the petitioner, was not even examined. The learned counsel has also taken me through the evidence of the Decree Holder-Surat Singh to bring home the point that he is a rank liar and his evidence that service was effected on the petitioner personally in his presence is not at all worthy of credence especially when he was not able to tell the name of process server who had accompanied him for effecting service of the summons on the petitioner.

(2) On a consideration of the entire material, I am satisfied that the impugned order does not suffer from any legal infirmity which would vitiate it and warrant inference by this Court. The burden of proving that the summons was not duly served was on the defendant-petitioner as would be manifest from the word 'if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing' appearing in Rule 13 of Order IX. The submission of Mr. Vohra, the learned counsel for the petitioner, is that the petitioner could not possibly produce any evidence except denying the receipt of summons and thereby shifting the burden of proof to the D.H. to prove service on him. In other words, the onus then lay on the respondent- D.H. to prove the positive fact of service of the summons on the petitioner. I do not feel persuaded to accept this argument. It is for the simple reason that it was for the court of fact to appraise the evidence of the petitioner

including his denial vis-a-vis other evidence on record and then arrive at the conclusion whether the denial of the petitioner inspired confidence or not. Unfortunately for the petitioner, in the face of the concurrent finding of the courts below it is not for the High Court to re-appraise the entire evidence de novo and arrive at its own conclusion as if it were dealing with it on the first instance. Merely because the High Court would have felt inclined had it dealt with the matter initially to come to a different conclusion as regards creditworthiness of the petitioner's evidence would hardly afford a justification for this Court to re-appraise the entire evidence. (See *M/s Bhojraj Kunwarji Oil Mill v. Yograjsinha* : AIR 1984 SC1894).

(3) That apart, assuming argue do that the concurrent finding of the courts below is not correct, the High Court in exercise of its revisional power u/s 115 of the Code, which is very limited in nature and scope, cannot interfere with the same. It is settled law that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has given an erroneous decision on a question of fact or even of law. The leading case on the subject is *Raja Amir Hassan Khan v. Sheo Baksh Singh*, 11 Indian Appeals 237, in which Privy Council observed that :

'The question then is, did the judges of the Lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case ; and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity.'

(4) In *T.A. Balakrishna v. Vasudeva* Air 1917 Pc 71 the Judicial Committee said that :

'It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.'

(5) Again in *N.S. Venkatagiri v, H.R.E. Board*, the Privy Council amplified the legal position as regard the scope of Section 115, further saying :

'The section empowers the High Court to satisfy itself upon three matters : (a) That the order of the subordinate Court is within its jurisdiction ; (b) That the case is one in which the Court ought to exercise jurisdiction and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate Court upon questions of fact or law. There can be no justification whatsoever for the view that S. 115(c) was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate Courts. It would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured.'

(6) The Supreme Court referred with approval to these decisions of the Privy Council in a number of its decisions, viz., *Keshardeo v. Radhe Kissen*, : [1953]4SCR136 , *Manindra land & Building Corp. v. Bhutnath*, : [1964]3SCR495 *Vora Abhasbhai v. Haji Gulamnabi*, : [1964]5SCR157 *Pandurang v. Maruti Hari Jadhuv*, : [1966]1SCR102 (a decision of five Judges), *Ratilal v. Ranchhodbhai* : AIR 1966 SC439 and *M/s D.L.F. Housing and Con. Co. v. Sarup Singh*, : [1970]2SCR368 . The gist of all these authorities is summerised in *M/s. D.L.F. Co.* as under :

'While exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words 'illegally' and 'with material irregularity' as used in Clause (c) do not cover either errors of fact or of law they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the

prescribed formalities have been complied with.'

(7) Applying the aforesaid criteria to the facts of the instant case it cannot be said by any stretch of reasoning that the finding of the courts below is vitiated either by breach of some provision of law or due to material defects of procedure affecting the ultimate decision and warranting interference by this Court in revision.

(8) The learned counsel for the petitioner has adverted to S.P. Srivastava v. Smt. Prem Lata : AIR1980 All336 , Akhtar Begum v. Jamshed Munir, : AIR1979 Delhi67 and Budhui Nepal Chandra, v. Sudhaneshu, Air 1976 Gauhati 7, to countenance his submission that the decision of the trial Court and for that matter of the appellate Court is manifestly vitiated because it has heavily leaned against the statement about service as reflected in order dated 11th July 1974 as against statement on oath of the petitioner denying the service of summons on him by ignoring the fact that the onus of proving the negative could be discharged only by denial and nothing else. However, on a perusal of the decisions adverted to by Shri Vohra, I am unable to find anything which would lend support to his contention. In Smt. Akhtar Begum v. Jamshed Munir (supra), Prakash Narain, J. (as His Lordship then was) adverted to various authorities relating to the scope of interference by the High Court u/s 115 of the Code and arrived at the conclusion that :

'One has to keep in mind the distinction between a case in which the court decides a question of fact or law pertaining to jurisdiction and a case in which it decides a question within its jurisdiction or where the relevant law has not been applied ; or the error of law vitally affected the determination of the issue in a proceeding. It is this test which one has to apply in order to find out where the impugned order in the present case is or is not revisable u/s 115.'

(9) Eventually he allowed the revision petition on the ground that the discretion had been exercised by the court below in total disregard of law and was without application of mind.

(10) In Budhui Nepal case the applicant/def No. 4 had denied service of summons in the original suit and witness No. 1 for the opposite party, who was a partner of

the D. H firm M/s. Budhai Nepal Chandra stated that he could not say whether the summons were duly served or not. Considering all the material on the record, the learned Munsif had, therefore, found that the summons had not been served on the defendants in the said case. This finding was challenged in revision. The learned Judge simply observed that 'this finding of fact cannot be interfered with in this revision petition in any view of the matter.' Obviously, therefore, these two decisions are of no avail to the petitioner. As for the third case of S.P. Srivastava, I may say with all the respect to the learned Judge that his observation that 'if a finding of fact is based on consideration of material evidence, there is material irregularity in exercise of jurisdiction' is not attracted to the facts of this case and there is nothing to warrant an inference that any material evidence has been ignored. The mere fact that evidence accepted is slender or tenuous is no ground for interference in revision.

(11) To sum up, therefore, the impugned order cannot be said to suffer from lack of jurisdiction or materially irregular exercise of jurisdiction vesting in the trial Court.

(12) Before concluding I may also make a passing reference to the fact that an application being C.M. 3633/83 was made by the respondent-Decree Holder for summoning the record of this Court in R.S.A. 129/77 decided on 20th December 1977 which had been filed by Arjan Singh & others/Judgment Debtors against the respondent-Surat Singh and the petitioner. The object of calling that file is to countenance the plea of the respondent that the petitioner having been duly served with summons therein he was well aware of the proceedings and as such his story that he came to know of the ex-parte decree only on 5th February 1978 is absolutely false and concocted. On going through the appellate file it would not doubt appear that the petitioner who was arrayed as respondent No. 2 had been duly served. However, this fact too has been denied by the petitioner. The learned counsel for the petitioner submits that the revisional jurisdiction of this Court being limited by the terms of Section 115 to jurisdictional infirmities only, the Court must confine itself to the record of the trial Court as it stands and it cannot admit any additional evidence for arriving at its own conclusion. I find considerable force in this submission. For obvious reasons this Court cannot admit additional evidence

and the case must be decided on the basis of evidence already adduced by the parties and considered by the Courts below.Revision dismissed.

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