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SooperKanoon Citation : sooperkanoon.com/728345

Court : Kerala

Decided On : Aug-28-2006

Reported in : AIR2007Ker94; 2006(4)KLT369

Judge : J.B. Koshy and; M. Sasidharan Nambiar, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 9 - Rules 3, 4, 6, 7, 8 and 13; Constitution of India - Article 227

Appeal No. : W.P. (C) No. 7810 of 2006

Appellant : Deepak

Respondent : George Philip

Advocate for Def. : N. Sukumaran,; S. Shyam,; N.K. Karnis and;

Advocate for Pet/Ap. : V. Chitambaresh,; T.C. Suresh Menon and; Jibu Thomas

Disposition : Petition dismissed

Judgement :

J.B. Koshy, J.

1. What is the procedure or course of action a court should adopt when the counsel reports no instructions? Is the court invariably bound to issue fresh notice to litigants before proceeding with the case further? Whether the observations in

Jayalakshmi v. Avara 2003 (2) KLT 901 lays down an inflexible rule that whenever counsel reports 'no instructions', the court should issue a registered notice to that party? A learned single Judge of this Court (Mr. R. Basant, J.) referred this case to the Division Bench for clarification of the above issues. Before dealing with the question, we shall briefly refer to the facts of this case.

2. A suit was filed by the first respondent herein against one Sasidharan Nair. The defendant Sasidharan Nair filed written statement on 22-8-1997. The suit is one for recovery of money on the strength of a dishonoured cheque, allegedly issued by the original defendant, Sasidharan Nair. It is seen that, prior to the institution of the suit, a lawyer notice was sent, which was received by the defendant, but, not replied. In the suit, the defendant admitted the signature, but disputed the execution. According to him, he had availed a loan of Rs. 10,000/- alone for meeting his medical expenses. He further stated that the amounts were paid in part by him. After framing issues, the above suit was listed for trial to 9-2-1998. On a petition filed by the defendant, it was removed from the list. Thereafter, there were several postings. Again, the case came up for trial in the list on 14-9-1998 and the defendant got an adjournment stating that the matter will be settled by him. The case was adjourned to 18.9.1998 for filing compromise. Thereafter, it was adjourned to 25-9-1998 and again to 28.9.1998. On 28.9.1998, counsel appearing for the defendant reported no instructions and the defendant was set ex parte as he was not present. Thereafter, an ex parte decree was passed on 29-9-1998. The defendant did not file any petition to set aside the ex parte decree. After about four months, the defendant died on 22-1-1999. Thereafter, wife of the defendant, late Sasidharan Nair and two children filed an application for setting aside the ex parte decree along with a petition to condone the delay on 20-7-1999 and those petitions were returned as impleading petition was not filed. Thereafter, impleading petition was filed to implead the legal heirs as additional defendants and the petitions were re-presented. Those applications were dismissed as defendant died only on 22-1-1999 and he had sufficient time to file a petition to set aside the ex parte decree during his life time. It also found that no valid reasons were stated to condone the delay in setting aside the ex parte decree. In the above petition for setting aside the ex parte decree filed by the wife and two children of the defendant, writ petitioner was arrayed as second respondent. It is

stated that since he was residing at Bombay, he did not join the earlier petitions. However, notice was issued and he was aware of the proceedings. After dismissal of the above petition filed by the wife and two children of the defendant to set aside the ex parte decree by Ext.P1 order dated 26-10-1999, writ petitioner filed an appeal against the above said order. The defendant's wife and other children who approached the court for setting aside the ex parte order did not challenge the order dismissing the petition. The Civil Miscellaneous Appeal was filed against Ext.P1 order by the petitioner who was one of the sons of the late defendants and who was respondent in Ext.P1 proceedings with a delay condonation petition after a long period of one year and four months. Appeal was filed by the petitioner on a certified copy of the order obtained by the counsel for the respondent 2 to 4 in the appeal. (His mother, brother and daughter who applied for setting aside the ex parte decree).

3. By Ext.P2 judgment dated 5-9-2005 appeal filed by the petitioner was dismissed. The appellate court observed as follows:

11. A perusal of the entire records indicates that there was a concerted and willful attempt on the side of the original defendant to delay and protract the proceedings. Even after the decree was passed, his legal heirs approached the court after considerable delay. It is pertinent to note that even after the present interlocutory application was dismissed, the appellant herein approached this court after a long period of one year and four months. It is seen from the records that the present IAs were dismissed by the lower court on 26-10-1999. The copy application was filed only on 13-2-2001. The copy of application was received on 28.3.2001 and the appeal was filed only on 5-4-2001. The appeal was filed not by the original petitioner, but by the 2nd respondent in the I.A., who was another son of late Sasidharan Nair.

and according to the court 'the entire approach of the legal heirs of Sasidharan Nair indicates that one after another, they were interfering the proceedings to delay the execution of the decree' and the above application was dismissed with the following observations:

12. An appraisal of the entire facts show that there is absolutely no merits in this appeal. The petitioners are guilty of gross negligence and laches. It is seen that at every stage, delaying tactics are adopted. The law is intended to protect the bona fide litigants who due to reasons beyond their control may remain absent in a proceedings. However, the law cannot protect an unscrupulous litigant adopting every methods to delay and protract the legal proceedings and also abuse the process of law. Considering these facts, it is only to be held that the court below has dismissed the applications after a proper consideration of the entire facts. The petitioners have not shown any sufficient cause for setting aside the ex parte decree.

This Writ Petition is filed under Article 227 of the Constitution of India for setting aside the above Ext.P2 judgment and for allowing I.A.Nos.966 and 968 Of 1999 in O.S.No. 192 of 1997 filed by respondents 2 to 4 in the writ petition in which he was the second respondent.

4. Main contention raised was that when the advocate for the defendant submitted that there was no instructions, the court should have issued fresh notice to the defendant directly and in view of the decision in Jayalakshmi's case (supra) following the law laid down by Malkiat Singh and Anr. v. Joginder Singh and Ors. : AIR 1997 SC4229 , the entire proceedings should be declared as illegal. Procedure for appearance of parties and consequence of their non-appearance are detailed in Order IX of the Code of Civil Procedure. Order IX Rule 3 provides that when neither parties appears the suit can be dismissed. But, in such cases, plaintiff can bring fresh suit or file application for restoration of suit as mentioned under Rule 4. Under Rule 6, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, the court can hear the suit ex parte. The above rule is very clear that if the defendant has been absent on the posting date, the suit can be proceeded in the absence of defendant. Order IX Rule 6 reads as follows:

6. Procedure when only plaintiff appears:

(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then--

(a) When summons duly served - If it is not proved that the summons was duly served, the Court may make an order that the suit be heard ex parte;

(b) When summons not duly served - If it is not proved that the summons was duly served, the Court shall direct a second summons be issued and served on the defendant;

(c) When summons served but not in due time -- If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the court shall postpone the hearing of the suit to a future day to be fixed by the court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiffs default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

But, before disposal of the suit, he is free to file petition under Rule 7. Rule 7 reads as follows:

7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance: -- Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Even if decree is passed, he can apply to the court under Rule 13 for setting aside the ex parte decree if he is able to show that the summons was not duly served or he was prevented by any sufficient cause from appearing when the suit was called on for hearing. Rule 13 reads as follows:

13. Setting aside decree ex parte against defendant: -- 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 he was prevented by any

sufficient cause from appearing 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:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

Explanation : Where there has been an appeal against a decree passed ex pane under th is rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

Similarly, consequences of absence of plaintiff despite presence of defendants is detailed in Rule 8. The procedure prescribed in Order IX is clear and there is no question of ambiguity. Scope of Order IX Rules 6, 7 and 13 is elaborately considered by the Apex Court in Sangram Singh v. Election Tribunal, Kotah and Anr. : [1955]2SCR1), Arjun Singh v. Mohindra Kumar and Ors. : [1964]5SCR946 and Rajni Kumar v. Suresh Kumar Malhotra and Anr. : [2003]3SCR66 . In this case, the case was posted in the list for evidence and defendant sought adjournment. Thereafter, it was submitted that there is likelihood of settlement and it was posted for settlement also. Then also, defendant was absent. His counsel submitted that he has no instructions and he was declared ex parte on 28-9-1998. It is true that the defendant died after about four months. But, during his life time, he did not file any application to set aside the ex parte order. He was aware that the case was posted in the list. He had a duty to enquire with the counsel what happened to the suit. If it is not compromised as submitted in the earlier proceedings, he had to tender evidence as the suit was in the list. There is no averment in various affidavits filed to show that he made any steps towards that during his life time. There is also no reason to think that the counsel made the

submission of 'no instructions' without informing the defendant. There is no such averments also in the petition for restoration filed by his legal heirs. In Exts.P3 and P4 affidavits filed in support of the petition for restoring the appeal and for setting aside the ex parte order and delay condonation petition, there is no averment that the advocate has made irresponsible submissions without informing the defendant or 'no instructions' was reported without informing the defendant. The defendant or his legal heirs did not complain to the Bar Council or to the Consumer Disputes Redressal Forum against the advocate.

5. As already noticed, petitioner herein did not file a petition to set aside the ex parte order. His brother and sister along with mother filed petition to set aside the ex parte decree. Petitioner was made a respondent. He was aware of that proceedings there. But, he did not file an appeal against that order in time. Appeal was filed against the above order after one year of Ext.P1 order and the appellate court rightly found that it was only to prolong the suit. The fact that he filed Civil Miscellaneous Appeal from the certified copy obtained from the respondent in appeal (his mother) show that appeal was filed collusively only to delay the execution of the decree. We are of the opinion that sufficient reasons for non-appearance of the defendants were not established. No satisfactory reasons were also shown to condone the delay. Therefore, on the facts of this case, dismissal of the appeal requires no interference by using the extraordinary jurisdiction of this court under Article 227 of the Constitution of India.

6. It is true that a person who stepped into the shoes of the defendants can avail the remedy under Order IX Rule 13 as held by the Apex Court in Raj Kumar v. Sardari Lal and Ors. 2004 AIR SCW 470 at page 475. But, that does not mean that a legal representative of the deceased, one after another can file petitions to set aside ex parte order without explaining delay or without showing sufficient cause for non-appearance of the defendant on the date of posting. In Jayalakshmi's case (supra), Division Bench of this Court did not prescribe a mandatory rule that whenever advocate submits no instructions, the court should issue notice. The court was also not making any statutory rule like Order IX Rule 6. The court only observed that on the facts of that case, dismissal of the suit without issuing a registered notice to the party was not justified. In that case, the

court was satisfied that the party was not informed about the action taken by the counsel and in the application for setting aside the decree and delay condonation application were allowed as sufficient reason to condone the delay in filing the application to set aside the ex parte decree was shown by the defendants. The court relied on mainly the decision in Malkiat Singh and Anr. v. Joginder Singh and Ors. : AIR 1997 SC4229 . In that case, appellants were tried for the murder of one Harpal Singh and they were convicted and sentenced to undergo imprisonment for life by the Sessions Court. Respondent filed a suit in the court of Sub Judge for Rs. One lakh for deprivation of the income to the family members which they used to get from the deceased Harpal Singh. The claim was contested by the appellants. They filed written statement and engaged a counsel. Two witnesses were examined and cross-examined. Thereafter, counsel for the appellant submitted that he has no instructions and ex parte decree was consequently passed. The court observed that on the facts of the case, appellants were neither careless nor negligent as their counsel did not inform them the date of posting and further noticed that after counsel reported no instructions, the court did not issue fresh notice and, therefore, they have got a sufficient cause on the facts of the case to set aside the ex parte decree. The ex parte decree was set aside as sufficient reasons for their absence was established as provided under Order IX Rule 13. In Tahil Ram Issardas Sadarangani and Ors. v. Ramchand Issardas Sadarangani and Anr. 1993 Suppl (3) SCC 256, the court found that the advocate withdrew the appearance after filing vakalath and there was nothing to show that the petitioner had notice of the date of hearing. The court observed that application for restoration was dismissed on the ground that it is not proper for the advocate to report no instructions without informing him. It was found that defendants were not aware of the postings and on the facts and circumstances of that case, the suit was restored as ingredients of Order IX Rule 13 CPC are established.

7. No mandatory rule or rule of universal application is prescribed in Jayalakshmi 's case (supra) that whenever counsel reports 'no instructions', fresh notice should be issued. Observation in a judgment considering the facts of the case cannot be treated like provisions in a Statute. In Herrington v. British Railways Board 1972 (2) WLR 537 Lord Morris said:

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterance made in the setting of the facts of a particular case.

In Union of India and Anr. v. Manor Bahadur Singh 2005 AIR SCW 6113, it was held as follows:

Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not be interpreted as statutes.

Courts cannot prescribe procedural rules of universal application like legislature or rule making authority as held in Ramachandra Rao v. State of Karnataka 2002 (2) KLT 189 SC. We also refer to the Division Bench decisions of this Court in Shaji v. State of Kerala : 2006(3)KLT567 and Martin v. State of Kerala : 2004(2)KLT1037 .

8. It is for the parties who want to set aside the ex parte decree to satisfy the court the conditions made under Order IX Rule 13 are established and there are sufficient reasons for non-appearance of the defendants as held in Radha Mohan Datt, Silk Merchant v. Abbas Ali Biswas and Ors. AIR 1931 All. 294 FB at 296 and Rajni Kumar v. Suresh Kumar Malhotra and Anr. : [2003]3SCR66 , in this case, there is no averment that counsel did not inform the defendant regarding the submission of 'no instructions' or date of postings. The Apex Court in G.RSrivastava v. R.K.Raizada and Ors. : [2000]2SCR97 held that unless 'sufficient case' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. But, the words 'was prevented by any sufficient cause from appearing' must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Normally, the court must assume and presume that the report of 'no instruction' is being made by counsel

after sufficiently notifying the party for whom he appears. There may be an exceptional case where the party may be able to show successfully that for no fault of his, such report of 'no instruction' was made by his counsel. The members of the noble profession of law must be assumed to act nobly and with consciousness of their professional responsibility. Therefore, we hold that when an advocate submits 'no instructions' normally, it is for the court to enquire with the advocate whether he had informed the party about the posting or to ascertain whether the party was aware of the date and in appropriate cases the court can order fresh notice or when petition to set aside the ex parte order comes, if there are sufficient reasons, ex parte order can be set aside and even a lenient view also can be taken. But, there is no rule that in all cases merely because fresh notice was not issued when counsel reported 'no instructions' ex parte decree should be set aside. But, as observed in the reference order:

Not giving instructions to the counsel cannot be permitted to be a safe strategy to oblige the court to adjourn the case.

All depends upon the facts of each case. We agree with the following opinion of the learned single Judge in the reference order:

I am of opinion that Their Lordships in Jayalakshmi do not appear to have laid down any such inflexible rule. Their Lordships were also only considering whether there is sufficient reason to condone the delay in filing the ex parte decree and to set aside the ex parte decree. Those questions alone were answered in favour of the party in that case. The Division Bench, according to me, had only intended to express opinion on the question whether there is sufficient reason to condone the delay and set aside the ex parte decree.

The reference is answered accordingly clarifying the decision in Jayalakshmi's case. The Writ Petition is dismissed.