Sohanlal and anr. Vs. Devachand

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Court : Rajasthan

Decided On : Apr-06-1956

Reported in : AIR1957Raj11

Judge : Wanchoo, C.J. and; Modi, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 115 and 151 - Order 3, Rules 1 and 4 - Order 9, Rules 8 and 9

Appeal No. : Civil Revn. No. 21 of 1954

Appellant : Sohanlal and anr.

Respondent : Devachand

Advocate for Def. : Sumerchand, Adv.

Advocate for Pet/Ap. : L.N. Chhangani and; Jaigopal Chhangani, Advs.

Disposition : Revision petition dismissed

Judgement :

Modi, J.

1. This is a revision by the defendants Sohanlal and Laohchand against an order of the Civil Judge, Ratangarh, restoring on payment of certain costs a suit which had been dismissed for default of the plaintiff's appearance

2. It is unnecessary to set forth the pleadings of the parties for the purposes of this revision.Suffice it to say that the plaintiff opposite partybrought a suit against the defendants petitioners,among other reliefs, for specific performance of analleged oral contract of sale with respect to a portion of a house which was alleged to be ancestrahproperty but part of which had fallen to the sharof certain co-sharers therein and the latter hadsold the same to the defendants.The suit was instituted on 31-5-1951. Issueswere framed on 17-4-1952, and the case was postedfor the plaintiff's evidence for 24-5-1952. On thatdate by mutual consent between counsel for theparties, the case was adjourned to 6-8-1952, andowing to an intermediate application filed by theplaintiff's counsel, the case was adjourned to 16-8-1952.

Meanwhile the plaintiff had filed a list of witnesses to be summoned through Court. Some of the plaintiff's witnesses were absent in spite of service on 16-8-1952, and so fresh summonses were directed to be issued against them and the case was adjourned to 8-9-1952. On 8-9-1952, some of the plaintiff's witnesses, namely. Mohanlal and Baijnath were present but counsel for both parties went away to attend to some case' in the Sub-Divisional Magistrate's Court, and the Court ordered that all the plaintiff's witnesses (and we are informed that they were forty-seven in number) be summoned together and the case be fixed from the 12th to 14th November, 1952, both days inclusive.

It, however, transpired on the 12th November that the Civil Judge was otherwise pre-occupied and so the case was adjourned to 16-12-1952, and the witnesses who were present were directed to appear on the next date. The Civil Judge happened to be on leave on 16-12-1952, and so the case was adjourned and about half a dozen witnesses who were present were directed to be present on the next date which was 10-2-1953.

On the last-mentioned date, certain witnesses were again present but the order-sheet shows that counsel for the plaintiff suggested that he would like to have all the witnesses examined together and so the case was again adjourned to 26-3-1953, and summonses were directed to be issued to all the witnesss who were not present on that date. We cannot help pointing out at this stage that this was an amazing state of affairs and displays a deplorable mismanagement of the case in

the Court below.

Witnesses who were present a number of times were sent away every time on some excuse or another and we are altogether unable to understand why witnesses who were present on a date of hearing were not examined but were sent away without being examined, and how the learned trial Judge or learned counsel for the plaintiff could think with any reason that forty seven witnesses could be examined on one day.

3. Be that as it may, on the next date, which was 26-3-1953, the plaintiff's counsel was absent and so was the plaintiff. It may be pointed out at this place that from the record of the proceedings it appears that the parties (on either side) were never present in Court and they were content to leave the case in the hands of counsel and it was the counsel on both sides who appear to have been put in almost entire charge of the case.

It further appears that the order passed at the last hearing for summoning the plaintiff's witnesses was not carried out with the result that no witness of the plaintiff is said to have been present on the 26th March. Consequently, the Court dismissed the plaintiff's suit under Order 17, Rule 2 read with Order 9, Rule 8, Civil P. C.

4. On 7-4-1953, an application for restoration of the case was presented by Mr. Kishoprasad, learned counsel for the plaintiff. He also presented an affidavit in support of the application on, 14-7-1953. The submission on his behalf was that he the has his headquarters probably at Churu) had been to Bikaner on 22-3-1953, and that although he was feeling unwell, he went to the Railway Station at Bikaner to catch the train for Ratangarh on the evening of the 25th March and he had just entered the station when the train started and that as he was indisposed, he could not run to catch the moving train (it may be remarked in passing that no body could ever require learned counsel to do anything like that).

Learned counsel then says that he immediately proceeded to the telegraph office and sent a telegram to Court to adjourn the case to any other date than the 30th March. Probably this telegram reached the Court after the case had been

dismissed and, in any case, the Court was not bound to take notice of it. It is further submitted that counsel felt more unwell on the 27th and was laid up in bed in Bikaner until 1-4-1953, and so he had to get his cases adjourned in Churu also which had been fixed for the 30th March.

Counsel further stated that the plaintiff was at Calcutta and that as the case had been adjourned a number of times, he had not thought it necessary to inform the plaintiff to be present in Ratangarh for the hearing in question and that counsel himself had undertaken the responsibility to conduct the case ^^ eqd ek + esjs Hkjksls ij Fkk**

In these circumstances, counsel submitted that there was no deliberate carelessness or negligence on his part or on the part of the plaintiff and that the default was caused by unforeseen circumstances and, therefore, he prayed that the case be restored.

Learned counsel more or less supported theseallegations by an affidavit filed later but we must point out that the Court had not called for any affidavit and Order 9, Rule 9 itself does not provide for the filing of an affidavit and so it could not have been treated as evidence and in these circumstances We do not propose to look at it.

5. The application for restoration was opposed on behalf of the defendants. It was admitted by their counsel that the plaintiff was in 'Disawar' the was in Calcutta which was probably his place of business). But the suggestion was made that the plaintiff had gone away designedly from his home town Ratangarh and that the case was being protracted on his behalf, and it was further suggested that the plea of counsel missing the train was not worthy of belief.

6. The learned Civil Judge eventually restored the suit on condition of payment of Rs. 100/- as costs by the plaintiff to the defendants by his order dated 12-11-1953. The learned Judge accepted the plea of indisposition of the plaintiff's counsel and his having missed the train and his consequent inability to attend the Court on the 26th March, but apparently the Judge was of the view that this by itself was not sufficient.

The learned Judge then went on to consider the question of absence of the plaintiff and his witnesses and was of the Opinion that there was no sufficient cause for the absence of either the plaintiff or his witnesses. But the learned Judge observed further that on two previous hearings the plaintiff's witnesses were present when they had not been examined and concluded by holding that in these circumstances it would not be proper in the interests of justice to deprive the plaintiff of the opportunity to prove his suit and consequently he restored the suit on payment of costs.

7. In this revision, the first contention raised before us on behalf of the defendants petitionersis that from the order of the learned Civil Judge, it appeared as if he was of the view that he had an inherent jurisdiction to restore a suit dismissed for default even though there was no sufficient cause for the default in appearance on the 26th March within the meaning of Order 9, Rule 9, Civil P. C., and it is submitted that this view was entirely incorrect.

8. We should like to point out at the outset that the order of the learned Judge under revision is rather unsatisfactory in its reasoning. He found or at any rate was undoubtedly disposed to find that there was sufficient cause for the want of appearance of the plaintiff's counsel on the material date but that, according to the learned Judge, was immaterial for the purposes of the case. He then considered the absence of the plaintiff himself and of his witnesses and was of opinion that there was no sufficient cause for their absence and, therefore, the suit deserved to be dismissed.

Yet the learned Judge proceeded to restore the suit and it does appear that the learned trial Judge entertained the view that he had an inherent jurisdiction to restore the suit under Section 151 Civil P. C. apart from the provisions of Order 9 Rule 9, Civil P. C.

9. If that is the correct complexion of the order passed by the Civil Judge, we should like to say categorically that in our view he was entirely wrong. The power to restore suits (or appeals) dismissed for default (or to set aside ex parte decrees) has been specifically provided for in the Code and must be governed by the provisions contained therein.

We desire to point out in this connection that the principle is well established that where a Code makes provisions to govern a particular situation, such provisions must as a rule be interpreted to be exhaustive and it would be entirely wrong to travel outside them and have recourse to the so-called inherent power. There is no scope whatever for the introduction of the doctrine of inherent power in such cases.

The reason is perfectly obvious, ana that is that if there were scope for the exercise of inherent powers in matters specifically dealt with in the Code, then the provisions made in the Code would be rendered almost meaningless and it would be indeed futile to enact them in the Code.

This view, we are glad to find, is shared by almost all the High Courts in India and in support of the conclusion at which we have arrived, we may invite reference to the following cases. Neeiaveni v. Narayana AIR 1920 Mad 640 (PB) (A), Ram Sarup v. Gaya Prasad AIR 1925 All 610 (FB) (B), Umesh Chandra v. Amar Nath AIR 1929 Cal 158 (C). Sharaf Jahan Begum v. Yaqub All AIR 1947 Lah 409 (D) and Gajraj Singh v. Suraj Bux Singh AIR 1948 Oudh 116 (E).

10. As to the contrary view, reference may be made to the decisions of the Bombay High Court in Bilasirai v. Cursondas AIR 1920 Bom 337 (F) which has been followed in subsequent cases in the same Court such as Sonubai v. Shivajirao AIR 1921 Bom 20 (G) and Abdullabhai v. Isabhai AIR 1932 Bom 634 (H). Macleod C. J. in AIR 1920 Bom 337 (F) relied on the view of the Allahabad High Court in Lalta Prasad v. Ram Karan ILR 34 All 426 (I) which has itself not been followed in Allahabad in later decisions and held that Order 9 Rule 9, Civil P. C. makes it compulsory on a Court to set aside a dismissal under Order 9 Rule 8 where the plaintiff satisfies the Court that there was sufficient cause for non-appearance ; but the learned Chief Justice held that the rule did not take away the Court's inherent jurisdiction to restore a suit for the ends of justice or for any other valid reason provided the defendent was amply compensated by costs.

With respect, we are unable to agree with thisview inasmuch as we are definitely of the opinion that the Code would be completely set at naught or at any rate largely rendered nugatory if the doctrine of inherent powers were to be introduced

in those matters which are dealt with and provided for specifically in the Code.

11. We would now refer to some decisions of our own Court, though they do not deal directly with the question before us.

12. The first case is Abhey Singh v. The State 1951 Raj LW 44 : (AIR 1951 Raj 81) (J). This was a case for restoration of an application to Bet aside an ex-parte decree which application was itself dismissed for default. It was held, after reviewing the case law on the point, that such an application was competent, not under Order 9 Rule 9, Civil F. C. but under Section 151, No exception can be taken to this decision as there is no provision in the Code for restoration of an application for setting aside an ex parte decree which has been itself dismissed for default.

13. The second case is Ramdhan v. Gobindram ILR (1951) 1 Raj 607 (K) in which it was held by a learned single Judge that an application for revision dismissed for default may Re restored under Section 151, Civil P. C. This decision again proceeds on the reasoning -- and rightly -- that there is no specific provision, in the Code for restoration of revisions dismissed for default, to which we may perhaps add that there is no clear or at any rate specific provision for dismissing such applications in default either.

14. Both these decisions are in line, with the conclusion at which we have arrived though the exact points for decision therein were different.

15. We, therefore, hold that an application to restore a suit dismissed for default, inasmuch as it has been specifically provided for in Order 9 Rule 9 falls, to be governed by the provisions of that rule; [that is, the plaintiff must advance sufficient cause for his absence at the crucial time as a condition precedent to the restoration of the suit and that there is no inherent power in the Court under Section 151 Where the existence of sufficient cause is not shown to restore a suit dismissed for default.

16. Learned counsel for the plaintiff opposite party did not seriously contest the correctness of the proposition laid down by us above, but he strongly contended

that the ultimate conclusion arrived at by the Court below was on the whole correct and did not call for any interference from us even though its reasoning was far from satisfactory.

It was urged that there was sufficient cause for the absence of the plaintiff's counsel on 26-3-1953, and that the learned Civil Judge had in the earlier part of his order himself accepted that version and that that was enough for the success of his application and the further findings of the learned Judge that there was no sufficient cause for the absence of the plaintiff or his witnesses were unnecessary and these latter considerations should not have been taken into account at all; and that if the learned Judge had adopted the right approach, he would have still come to the final conclusion to which he did.

On the other hand, learned counsel for the defendants petitioners strenuously contended that there was no sufficient cause for the absence of the learned counsel for the plaintiff opposite party and likewise there was no cause for the absence of the plaintiff and his witnesses, and that it was also necessary to account for the absence of the plaintiff satisfactorily before the suit could be restored and, therefore, the learned Judge below was not justified in coming to the conclusion to which he came on his finding that there was no sufficient cause for the plaintiff's absence on the material date.

17. We may point out straightway that the absence of witnesses of the plaintiff would or can be no ground for dismissing a suit under Order 9 Rule 8, & the learned Judge was wrong in so far as he based his decision to dismiss the suit on this ground.

18. Next we should like to observe that sitting in revision, we are not prepared to interfere With the finding of the learned trial Judge that there was sufficient cause for the non-appearance of the plaintiff in Court on 26-3-1953. The learned Judge was within his jurisdiction in coming to that conclusion.

Further, there was material before him to induce him to arrive at that conclusion. The matter was largely within his discretion. Consequently, we see no valid justification for interfering with his conclusion as regards the sufficiency of cause

for the absence of the plaintiff's counsel on 26-3-1953. We accordingly over-rule the contention of learned counsel for the defendants petitioners on this point.

19. The next and the more difficult question is whether as a matter of law, we should hold that the plaintiff should have also shown or be required to show sufficient cause for his non-appearance in Court on the 26th March, in addition to and apart from similar explanation from his counsel for the latter's absence on the relevant date.

20. We may mention here that almost all the cases to which our attention was invited in this connection have not dealt with the matter from this aspect and, therefore, they are not helpful and we do not propose to refer to them.

21. Let us concentrate our attention on the language of o. 9 Rr, 8, 9, and 13 and Order 41 Rule 11(2) and Rule 17(1) and (2) and Rr. 19 and 21. They speak of the absence of the plaintiff & the defendant so far as a suit is concerned, and of the appellant or the respondent in the matter of appeals; as to the consequences of such absence; and, lastly as to the restoration of the suit or the appeal or the setting aside of the ex parte decree passed in suit or appeal, where sufficient cause is shown for the absence of the party concerned, that is, the plaintiff or the defendant, or the appellant and the respondent, as the case may be.

22. Primarily, therefore, it is the absence of the party himself which must be accounted for in restoration matters, and we quite see that the wording of the rules should have been like this because there would be cases where a party conducts his own case unaided by counsel. But it cannot be forgotten that in most contested cases parties do engage counsel to conduct their cases and to act and plead for them in law Courts.

Apart from the provisions of Order 3 to which we propose to refer in a moment Order 9 Rule 1 is itself clear and provides that on the day fixed for the appearance of the parties in Court they shall be in attendance in Court either in person or by their respective pleaders.

23. Turning to Order 3, the Code provides therein that a party (i.e., plaintiff or defendant or appellant or respondent) may instead of appearing in person appoint a pleader by a Vakalatnama signed by the party and filed in Court, and an appearance application or act required to be done by a party (except where the law specifically provides otherwise) may well be made by such pleader on behalf of his client.

Rule 4 of this order further provides that every such appointment when made shall remain in force as regards the client throughout the suit until terminated with the permission of the Court or until the client or the pleader dies. By Sub-rule(3) an appeal from any decree or order in the suit or an application for review of judgment, among other matters, are to be deemed as proceedings inthe suit, Sub-rule (5) also makes service of process on the pleader as equivalent on the party himself.

In this state of the law, we are bound to hold that generally speaking the presence of counsel for a party is equivalent to that of the party himself according to the scheme envisaged in our Civil Procedure Code. This, to our mind, is subject to one limitation, namely, where counsel for a party pleads no instructions to Court, his mere physical presence is of no avail and a default in appearance must be deemed to have been committed in such a situation.

24. The position, therefore, amounts to this that a party when he has engaged counsel by a proper writing and has briefed him for the case, the latter is perfectly competent in law to represent the party in Court and act and plead on his behalf and the personal appearance of the party is not necessary and cannot be insisted upon unless by virtue of a specific provision of law the Court calls upon the party to appear personally.

But apart from such a special requirement, a party can always properly arrange for his representation in Court by a member of the legal profession duly appointed, remunerated and instruct-ed by him and can legitimately count on such appearance in Court on his behalf. We also wish to emphasise that where counsel appears on behalf of his party and the latter is absent, it would be entirely wrong to dismiss the suit or appeal for default unless, as we have pointed out already,

counsel states that he has no instructions from his client.

Now, it may be desirable for a party particularly in the case of an original action, many a time to be present in Court, but that is in its ultimate analysis a matter between him & his counsel and it may turn out that due to the absence of the party, counsel may not be able to proceed with the case and if in such an eventuality the suit is dismissed, such dismissal cannot be under Order 9 Rule 8 but will have to be for lack of proof or some such other cause.

25. That being the position in law, we are of opinion that where counsel has failed to put in appearance on the date of hearing for some reason & the suit has been dismissed for his default, what is reasonably necessary to be done as a condition precedent to the restoration of the suit or appeal is that he should satisfy the Court that there was sufficient cause for his non-appearance when the suit or appeal was called for hearing.

We are further of opinion that the party concerned whether he be plaintiff or defendant or appellant or respondent who has already arranged for his due representation in Court through a duly instructed pleader, need not be called upon also to assign sufficient reason for his own absence at the hearing, the reason being that the party has made all reasonable arrangements for his representation in Court, and he should not stand to be penalised for his own absence in such circumstances.

It further follows from what we have laid down above that the position would be materially changed where counsel pleads 'no instructions' in a particular case and the suit or appeal is dismissed for default, and in such a case it must necessarily be for the party himself to satisfy the Court that there was sufficient cause for his own non-appearance in Court.

We wish to add that if the case of a party could not have been dismissed for default in the presence of his counsel and it is so dismissed owing to the absence of counsel at a certain hearing, it would be unreasonable for the purposes of restoration to require satisfactory explanation not only as to the non-appearance of the erring counselbut also of the party who had in the normal course of things, --

and rightly, -- pinned faith on his counsel appearing for him but for some unfortunate reason counsel was unable to do so.

26. Let us now judge that facts of this case in the light of the principles discussed above. The plaintiff had briefed Mr. Kesho Prasad an advocate of this Court practising in Churu for conducting his case in the Court of the Civil Judge, Ratangarh, by a duly executed vakalatnama filed in Court.

It appears that this learned counsel appeared at almost all earlier hearings in the case from 2-6-1951 to 10-2-1953, and the plaintiff does not appear to have been personally present at any one of them. Probably being a businessman, it was not possible for him to tie himself down to his home town for the duration of the suit and consequently he was relying on his counsel to conduct the case on his behalf. As it transpired, counsel went to Eikaner a few days before to attend to professional work there and for certain reasons defaulted in appearance on 26-3-1S53, ending in the dismissal of the suit.

Counsel adduced certain reasons for his default and those reasons have obviously found favour with the Court below, and, already stated above, it is not for us to re-scrutinise them here. In his application for restoration, counsel for the plaintiff stated inter alia that he was in entire charge of the case and that the plaintiff was putting complete reliance on him for the management of the case in the trial Court, but that is really not of much consequence.

In view of the legal position which we have discussed at length, we hold that the plaintiff was entitled to have his case restored, of course on terms, when the learned trial Judge was inclined to accept the absence of counsel at the relevant hearing as being due to sufficient cause, and we further hold that the plaintiff opposite party was not required in law to adduce sufficient cause for his own non-appearance or for the non-appearance of his witnesses as a condition precedent to have his suit restored.

27. The result is that in our judgment thetrial Court's order restoring the suit does not callfor any interference though we uphold it for different reasons, and we accordingly dismiss this revision but without any order as to costs.