

Govind Singh Vs. Deoraj

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Court : Rajasthan

Decided On : Aug-27-1957

Reported in : AIR1958Raj128

Judge : K.N. Wanchoo, C.J. and D.S. Dave, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 3, Rules 1 and 4

Appeal No. : Civil Misc. Ex. II Appeal No. 9 of 1954

Appellant : Govind Singh

Respondent : Deoraj

Advocate for Def. : Sawaimal, Adv.

Advocate for Pet/Ap. : Kishanmal, Adv.

Judgement :

D.S. Dave, J.

1. This case comes before us on a reference made by a Single Bench of this court. The question referred is as follows:

'Whether an application for execution which as admitted and registered by the executing court and which is proper in other respects should not be considered to have been made in accordance with law simply because it was presented by a

vakil whose vakalatnama was not signed by the decree-holder.'

2. Before we proceed to answer the question, it would be proper to set out briefly the facts which have given rise to the point referred to us. On 27-11-1943, respondent Deoraj, obtained a money decree against appellant, Govind Singh. On 20th October 1949, the decree-holder presented ,an application for execution, but it was dismissed for default on 19-12-49. Thereafter, a second application for execution was presented on behalf of the decree-holder on 16-12-52.

It was registered on 20-12-52 and a notice under Order 21, Rule 22, C.P. C. was ordered to issue against the judgment-debtor. On 24-1-53 the case came for hearing before the Court. On that day, judgment-debtor was absent and so the court gassed an order, in his absence, for attachment of his property and the case was fixed for hearing on 21-3-53. On that day judgment-debtor's counsel presented an application and raised an objection that the second execution application dated 16-12-52 was not validly presented. It was pointed out that it was presented by a person who was not properly authorised by the decree-holder and so the execution application was not in accordance with law.

When this application was presented it was found that Shri Kishan Mal Vakil who had presented the execution application on 16-12-52 had got his vakalatnama signed by the decree-holder's brother, Mohan Raj instead of the decree-holder though the execution application itself was signed by the decree-holder, Deoraj, himself. On 4-4-1953, Shri Kishan Mal presented a proper vakalatnama. It was urged on behalf of the judgment-debtor that subsequent presentation of a proper vakalatnama by Shri Kishan Mal. could not cure the defect of the invalid presentation of the execution application and that if the execution application be deemed to have been presented on 4-4-1953, it would be time barred.

It was contended on behalf of the decree-holder that Deoraj and Mohan Raj were realbrothers, that there were several decrees in favour of both the brothers jointly, that the present decree was in favour of Deoraj only but Shri Kishan Mal, got the vakalatnama signed by Mohanraj under the impression that it was ii joint decree in favour of both, that this was a bona fide error which could be condoned by the court and it was, therefore, not fatal.

The executing court dismissed the judgment-debtor's objection on the ground that the error pointed out by him was only a procedural irregularity arising from a bona fide mistake on the part of the decree-holder's counsel. Against the said order dated 12-12-53, the judgment-debtor went in appeal to the District Judge, Jodhpur, but since he got no success, he filed a second appeal to this court.

3. The Judge who heard the appeal in Single Bench found that there was conflict of views amongst various High Courts on the question involved in this case and so he has referred the question set out above.

4. Learned counsel for the appellant has urged that according to Order 3, Rule 1, C. P.C. any appearance, application or act in or to any court may be made or done either by the party in person or by his recognized agent or by a pleader on his behalf and, therefore, the act of presenting the application could be made by the decree-holder's pleader, if he was properly appointed. It is pointed out that Order 3, Rule 4, C. P. C. lays down that no pleader shall act for any person in any court unless he has been appointed for the purpose by such person, by a document in writing signed by such person, and since in the present case the vakalatnama was not signed by the decree-holder or by his recognised agent or some other person duly authorised by him, his counsel Shri Kishan Mal, had no authority to act for him and present the application on his behalf.

It is contended that Mohanraj, though brother of the decree-holder, was a complete stranger so far as this case was concerned, and his signature on the Vakalatnama was of no use. It is further urged that since the application was not presented by the decree-holder or by a properly appointed pleader it was not a mere irregularity. According to learned counsel the executing court had no authority to get the defect removed after the execution application had become time barred. In support of his argument learned counsel has referred to *Nandamani Anangabhima v. Modono Mohono Deo*, AIR 1937 Mad 239 (A). In that case an execution application was once presented in 1920, then in 1923 and lastly in 1925. When the third application in 1925, was presented, it was urged that the application filed in 1923 was not made in accordance with law since it was presented on behalf of the decree-holder by a Vakil who had no vakalatnama

authorising him to present the same.

It was contended on behalf of the judgment-debtor that the act of the pleader in presenting the execution application was a nullity. In reply it was contended on behalf of the decree-holder that want of a vakalatnama was a mere irregularity which could be cured or condoned. This argument did not find favour with the learned Judges. It was observed by the learned Judges that

'a pleader who is not appointed by a document in writing is wanting in capacity or competence to act. It is not a question of a defect in the pleader's authority; it is not a question of an irregularity or even of an illegality in anything that he does; it is simply a question of want of capacity to act. If a pleader purports to do something which he has no power of capacity to do, we think, it must be clear that what he purports to do can have no legal effect.'

It is true that these observations go in favour of the appellant; but it may be pointed out that when the learned counsel for the decree-holder further contended before the same learned Judges that on the application of 1923 the executing Court had taken action, issued notices to the judgment-debtors, posted the case for various dates of hearing and that after all this was done, the petition could not be treated as mere waste paper or as if it had not been presented at all, it was observed by the learned Judges that

'this argument we think would have great force if anything had really been done upon those execution petitions, but the end of them was that they were withdrawn and were accordingly dismissed without any execution having really taken place.'

It would appear from this observation that if the execution petitions were not withdrawn and dismissed without any execution having taken place, the learned Judges would have been prepared to consider the decree-holder's contention and perhaps condoned the error committed by him.

With great respect it may be observed that if an execution application, which is improperly presented on account of want of a proper vakalatnama on the part of a pleader presenting it, be considered a nullity, then the defect cannot be cured

simply because some proceedings have been taken in execution or even if the decree is satisfied in part. If the application be considered a 'nullity' then it should remain a nullity throughout. It, therefore, appears that although the learned Judges allowed the judgment-debtor's objection because nothing had really been done on the past execution applications, perhaps they might not have taken the same view if the execution of the decree were carried out in part.

We respectfully agree with the learned Judges to the extent that the presentation of an execution application in court is an 'act' as contemplated by Order 3, Rule 4, C. P. C. and we also agree that no pleader should act for any person in any court unless he has been appointed for the purpose by a document in writing signed by such person or by his recognized agent or by some other person duly authorised to make such an appointment. But we do not think that if there is some lacuna or defect left in the vakalatnama on account of a bona fide mistake or error either on the part of the decree-holder or his counsel the defect in presentation would make the execution application a nullity, and the court would have no power to allow the decree-holder to cure that defect. In *Wali Mohammed Khan v. Ishak Ali Khan*, AIR 1931 All 507 (SB) (B) it was held by a Special Bench of the Allahabad High Court that

'the omission to comply with the provisions regarding presentation of plaint is a mere irregularity and not an absence of jurisdiction.

The court receiving a plaint which has not been properly presented would have jurisdiction to dismiss it and pass orders on it. It would not be acting without jurisdiction if it did so. We do not mean to imply that a plaintiff has the right to, get his plaint presented by man in the street. If the person presenting it was not properly authorised the presentation would be irregular. The Court would then have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence and it is fair and just to allow the defect to be cured, the Court would undoubtedly do so. It is not absolutely helpless in the matter.'

5. Again in *Kanhaya Lal v. Panchayati Akhara*, AIR 1949 All 367 (FB) (C) the following question was referred to a Full Bench :

'Whether an application for execution which is in all other respects in order and which has been admitted and registered by the executing Court is not to be considered to have been made in accordance with law' within the meaning of Article 182 (5), Limitation Act (IX of 1908); merely because it has been handed over to the Munsarim by a pleader who has not got a vakalatnama from decree-holder.'

It was held by the majority of Judges that

'the physical act of filing or presentation of an application for execution of a decree was an 'act' within the meaning of Order 3, Rr-1 & 4 C. P. C., but the improper presentation of such an application was not an illegality but a mere irregularity which did not make the application not made in accordance with law.

In other words, it was held that an application for execution which in all other 'respects was in order and which was admitted and registered by the executing court was not to be considered to have not been made in accordance with law, simply because it was handed over to the officer of the court by a pleader who had not got a vakalatnama from the decree-holder.

6. Learned counsel for the appellant has next referred to All India Barai Mahasabha v. Jangi Lal, AIR 1941 Oudh 169 (D) in support of his contention. In that case, an application under Schedule II, Paragraph 20 of the Civil Procedure Code was presented by party's counsel whose certificate had expired before the date of presentation and was renewed only after the aforesaid date. On an objection being raised by the opposite party, the trial court rejected the application on the ground that its presentation was not proper. The same decision was upheld in appeal by the learned Judges of the Chief Court; but it may be pointed out that when the attention of learned Judges was drawn to certain cases whereby the mistake in improper presentation was held to be a curable irregularity, it was observed by the learned Judges as follows:

'They no doubt lay down that the presentation of a plaint by a person not properly authorised would be an irregularity and that the court would have discretion to allow the irregularity to be cured or not; but the stage at which the irregularity in

the present case could have been cured has long passed. The appellant made no attempt whatever in the trial court to get the irregularity cured and it is now too late in the day to cure it, the application being barred by time.'

It may be observed that if the irregularity is sought to be cured when the plaint or application for execution is still in time, the opposite party's objection would be merely formal. The difficulty arises only in those cases in which the defect is sought to be cured after the period of limitation is over. The real question in such cases would be whether the court can allow a party to cure the defect. It would appear that the learned Judges in the above case did not express clearly that the court would be unable to get the irregularity cured in every such case and they only remained content with saying that it was too late in the day to cure the defect when no attempt was made in the trial court and the application has become time barred.

It may be further pointed out that this case was referred to, before the learned Judges constituting the Full Bench in AIR 1949 All 367 (C) that it was not followed. It may also be pointed out here that another case of the Allahabad High Court viz., *Chitta v. Mt. Jafoo*, AIR 1931 All 767 (E) which took a similar view was also referred in the above case but it was not followed. It may be further pointed out that the Bombay High Court has also taken the same view, as the Allahabad High Court in *Hirabai Gendalal v. Bhagriath Ramchandra & Co.*, AIR 1946 Bom 174 (F). In that case an advocate who was enrolled on the original side of the High Court acted on behalf of his client in a court in the mufussil without filing a vakalatnama under a bona fide impression that the presentation of the vakalatnama was not necessary like the High Court. It was held under these circumstances that

'the presentation of the plaint by Mt. Patil without a vakalatnama has caused no prejudice to the defendant, and has not affected the merits) of the case or the jurisdiction of the Court. If the omission is only an error, defect or irregularity in the proceeding then according to the provisions of Section 99, Civil P. C., the decree is not liable to be reversed in Appeal.'

In that case also, the above decision of the Oudh Chief Court was referred. Adverting to the same, it was observed that

'there are some cases like AIR 1941 Oudh 169 (D) where a different view was taken, but the preponderance of judicial opinion, with which we fully agree, establishes that failure to comply with the provisions regarding presentation of a plaint is a mere irregularity, so that if the person presenting it is not properly authorised to do so, the presentation would be irregular, but does not oust the jurisdiction of the Court. In such a case the Court would have a discretion to permit the irregularity to be cured, and if the plaintiff has acted in good faith and without gross negligence, the Court would allow it to be cured. The suit must then be deemed to have been filed when it was first instituted and under S, 99, Civil P. C., the decree passed in favour of the plaintiff will not be reversed in appeal on the ground of the said irregularity.'

7. Learned counsel for appellant has lastly referred to a decision of this court in Rajasthan State v. Nathmal ILR (1952) 2 Raj 492: (AIR 1952 Raj 180) (G). In that case, an application was filed by the State for leave to appeal to the Supreme Court. It was opposed on the ground of limitation and also on the ground that it was not properly presented. Regarding the second ground it was urged that although the application was signed by the Government Advocate, it was presented before the Registrar by his clerk and, therefore, there was no valid presentation as required by Order 3 Rule 1 C. P. C. It was observed that the act of the presentation of the application should have been done by the Government Advocate who represents the State, that his clerk can neither be called a recognized agent of the State nor a pleader acting for the State and the presentation, therefore, was not according to law. It was found by the court that there was a practice according to which applications were being presented on behalf of the Government Advocate by his clerk.

This practice was not approved and it was observed that it must be stopped in future. At the same time it was thought that it would be unfair that the Government should suffer on account of a wrong practice and therefore, the period between the date of the presentation of the application and the appearance of the Government Advocate was condoned under Section 5 of the Limitation Act. It may be pointed out that in the case of appeals and certain applications like an application for leave to appeal or an application for review, Section 5 of the Indian Limitation Act applies

and in such cases there can be little difficulty in condoning delay relating to limitation. Section 5 of the Limitation Act, however, does not apply to a plaint on an application for execution and, therefore, it cannot be invoked in a case like the present one.

In the present case the direct question is not one of condoning the delay under the limitation Act but the question is whether the mistake in presentation of an execution application can be regularised after the period of limitation for presenting a fresh application has expired. It is obvious that this point was not considered in ILR (1952) 2 Raj 492: (AIR 1952 Raj 180) (G) because the necessity did not arise on account of the applicability of Section 5 of the Limitation Act. That case is no authority for holding that the court is helpless in allowing the decree-holder to cure the defect arising out of an irregular presentation of an execution application.

We still hold that a plaint or an appeal or an application for execution or other applications cannot be presented in the court by an unauthorised person because Order 3 Rule 1 C. P. C. requires that an appearance application or act in or to a court must be made or done either by the party in person or by his recognised agent or by a pleader except where it is otherwise expressly provided by any law for the time being in force. We also hold that the presentation of a plaint, appeal or application is an 'act' in the court and, therefore, the person presenting the plaint, appeal or application should either be the party itself or its recognised agent or a pleader duly appointed under 'Order 3 Rule 4 C. P. C. Order 3, Rule 4, C. P. C., requires that no pleader would act for anybody in any court unless he has been appointed by a document in writing signed by such person or his recognised agent or by some other person duly authorised.

Every pleader must, therefore, file his Vakalatnama duly signed by his client or his recognised agent or any other duly authorised person before he comes to the Court to act on behalf of his client. These provisions must be strictly enforced and the court must refuse to accept a plaint, appeal or application which is not properly presented. There should be no slackness on the part of the court or its officers in observing the law; but at the same time we have to consider whether in cases where such a mistake creeps in by inadvertence, a breach of this rule would be

an irregularity which can be allowed to be cured by the court or every such mistake howsoever bona fide must be considered to be fatal'.

We have given our earnest consideration to this question and we feel that while we must adhere to this rule of procedure it should not be so used as to defeat the ends of justice, because observance of procedure, is after all meant to advance the cause of justice and not to negative the same. It may be pointed out that by the time a plaint, appeal or application is presented the opposite party does not come in the picture. It is only after the case is instituted and a process is served on the opposite party that it comes to the Court.

At the time when a plaint, appeal or application is presented it becomes the duty of the court also to see that the person presenting the plaint, appeal or application is either the party or a pleader holding a proper vakalatnama or a recognised agent. In the same manner it is also the duty of the pleader who is an officer of the court to see that he files his vakalatnama in the court before he proceeds to act on behalf of his client and also that the vakalatnama is properly filled up and signed.

If the court accepts a plaint, appeal or application from a pleader without a vakalatnama it also contributes to the error. Similarly, a pleader who does not get his vakalatnama properly filled up or signed by his client is negligent in his duty. We think that a party should not be made to suffer in cases where the court or a pleader has contributed to the negligence leading to wrong presentation of a plaint, appeal or application. We are further of opinion that an irregular presentation of a plaint, appeal or application does not prejudice the case of the opposite-party in any manner since it does not affect the merits of the case.

Under the circumstances, it would not be proper in our opinion to call an irregular presentation a nullity or an illegality which should be fatal to the case itself unless it is cured within the period of limitation. It may happen in several cases that the defect of irregular presentation may not be detected till the case has advanced to the stage of judgment. It may also happen that such a defect may be detected only at the stage of appeal. In our opinion, it would be denial of justice if such a defect is called a nullity or illegality and the case is thrown out even though improper presentation has not affected the case of the opposite party on merits in any

manner.

We are, therefore, disposed to call this defect an irregularity and we think that the court has the power to allow the party to cure this defect at any stage of the case. As pointed out in AIR 1946 Bom 174 (F) Section 99 of the Civil P. C. makes a distinction between an error, defect or irregularity which affects the merits of the case or the jurisdiction of the court and an error, defect or irregularity which does not affect the merits of the case or the jurisdiction of the court. This section no doubt applies to appeals and provides that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal if the error, defect or irregularity does not affect the merits of the case or the jurisdiction of the court.

It does not in terms refer to an error arising out of an improper presentation of a plaint, appeal or application; nor does it give any power to the trial court. But it certainly points out the scheme of the Code and it may be used as a guide to determine what kind of error or irregularity should be considered material or otherwise. If the framers of the Code thought that the defect in the presentation of a plaint, appeal or application should be considered as fatal, they could expressly say so.

In the absence of any such prohibition in the Code we consider that it is within the inherent powers of the court to allow a party to cure such a defect.

8. Coming to the specific case of an application in execution it may be pointed out that the scheme of the Civil Procedure Code appears to be still more liberal because Order 21, Rule 11 says that an application for execution of a decree may be signed not only by the applicant, i.e., a decree-holder but even by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. Similarly Order 21 Rule 17 provides that if the court finds that the requirements of Rules 11 to 14 as may be applicable to the case have not been complied with, the court may either reject the application or allow the defect to be remedied then and there or within a time fixed by it.

It further provides that if an application is amended under the provisions of Sub-rule (1), the application, would be deemed to have been made in accordance with

law and presented on the date when it was first presented. Learned counsel for appellant has urged before us that this rule does not empower the court to allow the decree-holder to cure the defect arising out of improper presentation of the application. It is true that this rule does not refer to the powers of the court to allow a decree-holder to cure the defect of wrong presentation. But we have referred to it to show that the court has got the power to allow a decree-holder to remedy even graver defects.

It need hardly be stressed that if a decree-holder does not present an application so as to comply with the requirements of Rules 11 to 14 his application may be considered not made in accordance with law and his case is likely to founder on one of the defects. When the law allows a court to permit a party to cure even such defects which are likely to prejudice the case of the opposite party on merits, it follows as a corollary that the law contemplates that the court can allow minor defects to be cured. As we have already stated above, the defect about presentation of an application in execution is minor one in comparison to the defects which would affect the case on merits. We, therefore, think that the defect in presentation does not make the application a nullity; nor can it be called an illegality. It is only an irregularity which can be allowed to be remedied by the court and when it is removed it should be taken that the execution application was validly presented on the date on which it was originally brought before the court.

9. This does not, however, mean that the decree-holder would be able to remedy the defect as a matter of right. The removal of such a defect would be in the discretion of the court and the court would exercise such a discretion only when it finds that the error has been committed on account of a bona fide mistake and not because of gross negligence on the part of the party or his pleader or any other agent.

10. We, therefore, answer the question as follows:

In a case where an application for execution is admitted and registered by the executing court and which is proper in other respects but which is defective in its presentation on account of the absence of the signature of the decree-holder on the vakalatnama of the vakil presenting the application, the application is not

altogether a nullity; nor can the defects be called an illegality which must be necessarily fatal to the case. It would be an irregularity which may be allowed to be cured by the court but only in those cases where it finds that the mistake has been committed bona fide and where the party has not committed gross negligence. The party will not have the power to correct the error as of right but it may be remedied if the court allows it to be cured after exercising proper judicial discretion.

11. The case will be sent back to the Single Bench to be decided in the light of the above observations.

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