

Haridas Basak

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Court : Kolkata

Decided On : Mar-05-1997

Reported in : AIR1997Cal371

Judge : Basudev Panigrahi, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Section 26 - Order 9, Rules 9, 13

Appellant : Haridas Basak

Advocate for Def. : Sudhis Dasgupta, Adv.

Advocate for Pet/Ap. : Tapas Kumar Mukherjee, Adv.

Judgement :

ORDER

1. One of the defendants in Ejectment Suit 967/79 has called in question about the propriety of the order passed by the learned Judge, IXth Bench, City Civil Court, Calcutta being Misc. Case No.2733/95 rejecting the application of the petitioner under O.9, R.9 of the Code of Civil Procedure. The opposite party filed the original ejectment suit on the ground of reasonable requirement, default in payment of rent and for subletting. The suit was decree ex parte on 3-9-91. The present petitioner filed an application for setting aside the ex parte decree which was registered as Misc. Case No. 979 of 1991 and it was dismissed for default on 9-5-92. Therefore, the petitioner filed another application for restoration of the Misc. Case which was registered as Misc. Case No.433 of 1992. The application for restoration of the

Misc. Case was allowed and ultimately the Misc. Case No. 979 of 1991 was restored to file. The said Misc. Case 979 of 1991 was dismissed on contest. Therefore, the petitioner filed a Misc. Appeal in this court in FMAT No. 692 of 1993 for setting aside the order of dismissal of Misc. Case No. 979 of 1991. The said appeal was allowed, consequently, the dismissal order was set aside. On 23-12-93 again the suit was decreed ex parte. Thus the petitioner filed an application for setting aside the ex parte decree under O.9, R.13, C.P.C. in Misc. Case 153/94. On 30th July, 1994 the Misc. Case 153/94 was also dismissed for default. Therefore, the petitioner filed another application in Misc. Case 2041/94 for restoration of the Misc. case 153/94 under O.9, R.9. The said Misc. case was dismissed for default. The petitioner, therefore, for the second time came to this court challenging the order of dismissed of the Misc. Case 2041/94. The revisional application was allowed and ultimately the Misc. Case 153/94 was resorted. On 7th December, 1995 the Misc. Case No. 153/94 filed under O.9, R.13 was dismissed for default. The petitioner filed another misc.case being Misc. Case No. 2733/95 filed under O.9, R.9, C.P.C. for restoration of the Misc. Case No. 153/94. The learned trial court, however, was not inclined to set aside the order of dismissal. Therefore, the revision petitioner filed the present application.

2. It is, inter alia, stated in the application under O.9, R.9, C.P.C. for restoration of the Misc. Case 153/94 that on the date of hearing of the Misc. Case i.e. 7-12-95 he filed an application for adjournment of hearing of the misc. case on the ground that his advocate Mr. Amlendu De suddenly sustained fracture on his left hand during the second half of November, 1995 for which he was undergoing treatment. Since on the date of hearing his advocate had acute pains over his broken fractured hand, he had to rush to his Doctor for medicine. Immediately following his return, he found the petitioner waiting in his house to take him to the court for hearing. When the petitioner went along with his advocate around 12-45 p.m. he noticed that the case was taken up for hearing at 11.45 a.m. and it was dismissed for default in the absence of the petitioner and his advocate. The petitioner had no laches or negligence and had been diligently pursuing the case but due to his misfortune his lawyer could not appear in court due to fracture on his hand. Therefore, there was sufficient ground for restoration of the Misc. Case and if the restoration application is dismissed and rejected, the petitioner would suffer severe

loss and damage. The opposite parties/plaintiffs had opposed the prayer of the petitioner contending, inter alia, that the application under O.9, R.9, C.P.C. does not bear any iota of truth, much less the illness of the advocate.

3. The earlier application filed under O.9, R.13 was allowed subject to payment of Rs.1700/- which was deposited by the petitioner in the trial Court. Even thereafter, when the petitioner did not attend with his advocate on the date of hearing, the said misc. case was dismissed for default. This restoration of the misc. case filed under O.9, R.13 of the Code of Civil Procedure.

4. The learned court below on careful cogitation of the matter and also on consideration of the evidence of the parties declined to set aside the order dated 7-12-95. Therefore, the petitioner has challenged the impugned order.

5. Mr. Mukherjee, the learned advocate appearing for the petitioner has submitted that in the instant case it was beyond the reach of the petitioner to participate in the hearing of the misc. case inasmuch as his lawyer was under medical treatment and on the date of hearing when he went to the learned lawyer's house found he had been to doctor for treatment and had to wait till his arrival. When both of them came to court, they noticed that the misc. case was already dismissed for default. Therefore, in the present background it cannot be said that there was deliberate negligence on the part of the defendant for not participating in the hearing.

6. Mr. Dasgupta, the learned senior advocate while repelling the contention of the petitioner has submitted that it is not for the first time the application for restoration was dismissed for default. The defendant is in the habit of getting the matter dismissed for default and then again filing an application for restoration of the same. He only with an intention to see that the plaintiff does not reap the fruits of the decree has been filing frivolous application. From his contention, it further appears that the learned trial court taking all such circumstances into consideration rejected his prayer. It has been also stated in the order that the learned counsel showing undue-partisan, interest in the case had gone to the extent of deposing in court in favour of the petitioner. But in fact the opposite parties had seen him practising in the City Civil Court and also Metropolitan Magistrate's Court. Therefore, there was no reason, much less sufficient cause for

restoration of the misc. case filed under O.9, R.13, C.P.C.

7. Mr. Dasgupta has strongly contended that the medical officer who allegedly treated Mr. Amalendu De, advocate had not been examined in the court below. Therefore, the learned trial Court was justifiably rejected the contention of the petitioner. Mr. Dasgupta in support of his contention has relied upon a Division Bench decision reported in : AIR1950 Cal173 in the case of Sris Chandra Nandy v. Smt. Annapurna Ray and contended that since the medical officer having not been examined to certify the illness of the advocate, therefore, the findings of the court below are quite logical that the petitioner could not prove the illness of the advocate. I carefully went through the judgment. This was in respect of examination of a witness by commission on the ground of illness. The illness could not be proved and the court held that mere production of the medical certificate would not absolve the party from getting a witness examined on commission. Such analogy cannot be stretched to the present case. The provision of S. 26, R.1 has undergone amendment and under the present provision even filing of the medical certificate would be sufficient for proving the illness of a witness and there is no necessity for examining the Doctor. In the instant case the lawyer had allegedly sustained fracture on his left hand for which he filed the medical certificate in Court. The only question that arises in this case is whether the learned advocate of the trial Court was in fact in disposed-of or not. The lawyer has been examined in this case apart from producing the medical certificate whose statement has been corroborated by the petitioner. In the peculiar situation the statement of the lawyer, the solemn testimony of the petitioner and also the medical certificate showing his illness, prima facie would establish that there was sufficient ground for not attending the court at the time of hearing. The plaintiff/opposite party has examined himself but his testimony remain uncorroborated. In the above situation I hold that there was sufficient ground for not remaining present at the time of hearing of the misc. case.

8. Mr. Mukherjee, the leaned advocate appearing for the petitioner has relied upon a judgment reported in : [1981]3SCR509 in the case of Rafiq v. Munshilal where it has been held as follows (para 3):

'The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to enquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he presented. The problem that agitates us is whether it is proper that the party whose interest he presented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate commission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the

question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K. Singh'

9. Therefore, in the above situation I hold that there was sufficient cause for not attending the court on the date of hearing of the Misc. Case No. 153/94 on the date of hearing. According the Misc. Case is allowed subject to payment of Rs. 1,000/- as cost which shall be paid by the learned advocate personally to the plaintiff/opposite party to his learned lawyer since for his default the case was dismissed following the observation of the Supreme Court in the above quoted decision on or before 17th March, 1997, failing which the present revisional application would stand dismissed and thereby the impugned order shall stand confirmed.

10. In case the petitioner or his learned advocate deposit/pay the cost, the misc. case be disposed of within 27th of March, 1997.

11. The trial court in hereby authorised to refuse unnecessary adjournments sought for by either party, unless it is unavoidable, in that event it must assign good and sufficient reasons and hearing of the misc. case shall continue from day to day till it is concluded.

12. With the observations made above the revisional application is disposed-of.

13. Office is directed to communicate this order to the court below by Special Messenger at the cost of the petitioner which shall be put in within three days.

14. Learned advocate appearing for the parties are permitted to take down the gist of the order for the purpose of communication and on such communication the learned court below shall do well to act in accordance with law.

15. Order accordingly.