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Court : Himachal Pradesh

Decided On : Nov-28-1986

Reported in : AIR1987HP25

Judge : P.D. Desai, C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 19

Appeal No. : F.A.O. No. 123 of 1986

Appellant : Teju

Respondent : Bhadar and anr.

Advocate for Def. : B.K. Malhotra, Adv.

Advocate for Pet/Ap. : Rajeev Sharma, Adv.

Disposition : Appeal allowed

Judgement :

P.D. Desai, C.J.

1. This case illustrates how a hyper technical approach to a case without regard to the realities of life and the primary consideration of doing substantial justice results in failure to exercise jurisdiction vested by law in the court and consequently causes miscarriage of justice.

2. An appeal preferred by the appellant herein in the District Court was dismissed for default on Sept. 5, 1985. An application for restoration of the appeal was filed on Nov. 18, 1985. The application was filed beyond the prescribed period of limitation and there was a delay of about 44 days in the presentation of the application. The appellant stated in the application that the intimation with regard to the dismissal of the appeal was conveyed by his counsel under a letter dated Oct. 30, 1985 which reached him only on Nov. 10, 1985, and that he had instituted the application soonest thereafter. The application was dismissed primarily on the ground that it was barred by limitation and that no sufficient cause for condoning the delay was made out. The absence of the appellant and his counsel at the hearing of the appeal and the delayed presentation of the application for restoration were regarded as indicative of the fact that the appellant was not interested in prosecuting the appeal. The attempt on his part to seek restoration of the appeal was considered as a mere attempt to keep the litigation alive and thus an abuse of the process of the court.

3. The precise grounds which weighed with the Lower Appellate Court in taking the aforesaid view may be set-out in its own words :

'I think it is no ground to condone the delay, because when the lawyer appears in the court, he appears on behalf of the party and the party is deemed to be present through his counsel. When the appeal was dismissed in default of the appearance of the party or his lawyer, it shall be deemed that the party has the notice about the dismissal of the appeal. Simply that the lawyer has not told the party about the dismissal of the appeal for about 2 months is no ground to restore the appeal, because it is a contract between the party and the lawyer and if the party has any grievance against the lawyer, he can proceed against the lawyer in accordance with law for the breach of contract between them and the delay cannot be condoned on that account.....The suit in between the parties was with regard to injunction simpliciter and since the party or his lawyer had not appeared on the date when the case was called time and again, it was presumed that the case being of minor nature, the appellant was not interested in prosecuting the case and thus it was dismissed in default. The filing of the application for the restoration of the appeal after more than 2 months also shows that the appellant is not

interested in the prosecution of the appeal, but has filed the application simply to keep the litigation alive which abuse of process is not allowed under the law.'

4. Before examining the basis of the reasoning, it will be profitable to refer to the pertinent observations made in *Rafiq v. Munshilal*, AIR 1981 SC 1400 : (1981 All LJ 704), which have a direct bearing on the issue under consideration. The observations are to the following effect :

'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 inquire 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. ... What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate..... The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, 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. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted.'

5. If only this decision had been brought to the notice of the Lower Appellate Court, hopefully, it would not have taken the view which it has done and rejected the prayer with regard to the restoration of the appeal.

6. The case of the appellant, as earlier pointed out, was that he came to know about the dismissal of the appeal only on November 10, 1985. This case has not been disbelieved. Under such circumstances, ordinarily, the question with regard to condonation of delay and the sufficiency of cause for the condonation of delay should have been examined by confining attention to the period from Nov. 10, 1985 to Nov. 18, 1985. The observations of the Lower Appellate Court extracted hereinabove to the effect that presence of the counsel must be deemed to be the presence of the party and that, therefore, the party must be regarded as having notice of the dismissal of the appeal and that the default on the part of the lawyer to inform the party about the dismissal of the appeal soon after the event occurred is no ground to condone the delay and to restore the appeal and that the remedy of the party under such circumstances is to proceed against the advocate in accordance with law, overlook the realities of life and the practical aspect of the situation and lack in the pragmatic approach which is required to be taken in such cases as indicated in Rafiq's case (AIR 1981 SC 1400). What is the fault of the appellant, if he having done everything in his power and expected of him, fails to secure the presence of his counsel before the court on the given day and why should he suffer because of the default of his counsel? Is it just, proper and equitable that he should suffer for the inaction, omission, negligence or misdemeanour of his counsel in not only not remaining present when the appeal was called on for hearing but also in not communicating the factum of the dismissal of the appeal to him for such a long period? Can his own absence at the time when the appeal was called on for hearing be regarded as capable of attaching any blame to him when there is no legal requirement of his personal appearance before the Appellate Court? Is it not a poor, and even a futile consolation to advise him to seek his remedy against the defaulting lawyer in an independent proceeding? Is the recourse to such a remedy, if any, going to compensate him for what he has lost by the dismissal of the appeal? If only the Lower Appellate Court had looked at the matter from these relevant angles and appreciated the predicament of the appellant in the correct factual perspective, in all probability, it would not have allowed an innocent party to suffer injustice on account of someone else's default and/or inaction. It is high time that it was realised that the rules of procedure are handmaids of justice. The provisions, such

as those with which the Court is herein concerned, are designed to facilitate justice and to further its ends. They are not a penal enactment for the imposition of punishment and penalty, not a thing designed to trip people up. Too technical an approach must be guarded against, lest the very means designed for the furtherance of justice be used to frustrate it. Be it realised that our laws of procedure are grounded on a fundamental principle which ensures inter alia, that proceedings that affect the lives of litigants and their property should not continue or be decided in their absence and that they should not be precluded from participating in them, unless it is manifestly apparent that their persistent absence is wilful or contumacious or betrays lack of bona fides or gross negligence. In light of these considerations and applying these well-settled principles, there is no manner of doubt that the Lower Appellate Court misdirected itself in law in holding that there was no sufficient cause to condone the delay, at least, till November 10, 1985. The delay for the period from November 10, 1985 to November 17, 1985 does not require much debate or deliberation to satisfy the test of 'sufficient cause' for its condonation. The District Court is situate at Mandi. The appellant resides at village Jharanthi. Illaqa Tungasi, Tehsil Chacheot, District Mandi. There is no material on record as to the distance between village Jharanthi and the Mandi town. But judicial notice can be taken of the fact that in this State villages, which are ordinarily situate in the interior, are not always well-connected with the towns since the means of communication and the modes of transport are scarces and also undependable on account, inter alia, of the vagaries of weather and the climatic conditions. Besides, the rural background, poverty, ignorance and illiteracy are some of the factors which are common to almost all such litigants. The appellants had to know the remedy available to him, he had to find sufficient wherewithal to prosecute the remedy and he had to establish contact with his counsel. A reasonable interval of time has to be allowed bearing in mind all these factors. The delay of eight days cannot, therefore, be regarded as indicative of culpable inaction gross negligence or lack of bona fides on the part of the appellant. The Lower Appellate Court was therefore, in error in refusing to condone the delay even for the said period.

7. For the self-same reasons and on the same grounds, it is impossible to uphold the view of the Lower Appellate Court that since neither the appellant nor his

counsel appeared when the appeal was called on for hearing and that since the application for the restoration of the appeal was filed after more than two months, the appellant was not interested in prosecuting the appeal and that the application for restoration amounted to an abuse of the process of the Court with a view merely to keeping the litigation alive. The appellant could not be blamed for his absence for he was not required by law to be present. He cannot be blamed also for the absence of his counsel since he had done all that was within his power to ensure his presence. The delay in the presentation of the application for restoration was really not of two months but only of seven days. Such delay was not inordinate and the reasons therefore were not wanting so as to deny its condonation. The Lower Appellate Court had ample power to condone the delay. It ought to have exercised its judicial discretion in that regard in the present case in favour of the appellant, bearing in mind all the relevant facts and circumstances, to meet the ends of justice.

8. Shri B. K. Malhotra submitted that the application for restoration was not accompanied by a formal application for condonation of delay and that, therefore, the appellant was not entitled to any relief. The impugned decision does not record this fact. No objection on that ground appears to have been taken before the Lower Appellate Court. The question of condonation of delay was, in fact, gone into and decided on the footing that such a prayer was made to the Lower Appellate Court. Under such circumstances, I do not think that it is open to the respondents to raise such a dispute at this stage of the proceeding.

9. Shri Malhotra tried to draw sustenance for his opposition to the grant of the present appeal from the decision of a learned Single Judge of this court in *Sundru v. Naubat Rai*, ILR (1985) Him Pra 884. The facts of that case are eloquent, rather peculiar, and they require to be set out in some detail in order to appreciate the basis of the said decision. In that case, two respondents had died during the pendency of the appeal. Respondent No. 2 had died on July 9, 1980 and respondent No. 3 had died on Jan 12, 1976. When actual date notices were issued to the respondents for January 6, 1984, they were returned with a note of the postal authorities made sometime in the month of December 1983, that both those respondents had died. No steps were, however, taken by the appellants to

implead the legal representatives of the deceased respondents. The appeal came on for hearing thereafter on January 10, 1985. The learned counsel appearing on behalf of respondent No. 1 apprised the Court about the death of respondents 2 and 3 and the appellants' learned counsel was also informed regarding the same on that day. The Court allowed to the appellants time to move proper applications within a period of two months with a specific order that the period for filing the applications was being allowed subject to the clarification that it shall not mean that the delay in filing the applications had been condoned and that the applications were to be decided on merits if and when the same were filed. In view of the intervening winter vacation from Jan. 12, 1985 to March 3, 1985 and in light of the aforesaid order, the appellants were required to file the applications after making due inquiries, on March 4, 1985. Even if the order dated January 10, 1985 was interpreted to mean that the appellants were allowed two months' time to file the applications, still the applications were required to be filed on March 11, 1985 and not later. The applications were, in fact, filed on March 12, 1985. No explanation was furnished as to why so much delay had occurred in filing the applications. Under these circumstances, the learned Judge held that he had 'no alternative but to hold that there are no grounds to condone the delay in filing the applications'. I am unable to appreciate the relevance of this decision so far as the present case is concerned. The facts of that case speak for themselves. One of the respondents was dead for as many as 9 and the other for as many as 5 years. There was a gross and inexplicable delay in the presentation of the applications, even after the factum of those deaths came on record when the actual date notices were returned unserved and also when the learned counsel of one of the surviving respondents made a statement to that effect before the Court and informed the learned counsel of the appellants, and even thereafter, although the Court granted as long as two months' time to present the applications. Under such circumstances, as observed by the learned Judge, there was no alternative but to hold that sufficient cause to condone the delay was not made out. But in the face of such persistent inaction also, the legal representatives of one of the deceased respondents were allowed to be brought on record for the reason that two of them were already on record and the estate was, therefore, sufficiently represented. The facts of the present case are entirely different and bear no comparison with the

facts of that case. The decision relied upon cannot, therefore, assist the respondents.

10. There is an important aspect which cannot be overlooked and which must be adverted to in this connection. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it (See *State of Orissa v. Sudhansu Sekhar Misra*, AIR 1968 SC 647). As observed by Earl of Halsbury LC in *Quinn v. Leathem*, 1901 AC 495, every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found therein are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found, and it cannot be quoted for a proposition that may seem to follow logically from it. Such reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all. The decision in *Sundru's case* (ILR (1985) Him Pra 884) must, therefore, be confined to the facts of that case and it is not to be regarded as laying down any general proposition of law to the effect that the delay, even if it be of one day, cannot be condoned at all.

11. For the foregoing reasons, the appeal succeeds and it is allowed. The impugned decision is quashed and set aside. The application for the restoration of the appeal is granted and the appeal is directed to be restored to the file and decided with the utmost expedition and not later than January 31, 1987, in any case. No order as to costs.