

State of H.P. Vs. Smt. Devki

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Court : Himachal Pradesh

Decided On : May-23-1991

Reported in : AIR1992HP73

Judge : V.K. Mehrotra, Actg. C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 16, Rules 10(2), 10(3) and 12

Appeal No. : C.R. 33 of 1991

Appellant : State of H.P.

Respondent : Smt. Devki

Advocate for Def. : Lokinder Thakur, Adv.

Advocate for Pet/Ap. : L.S. Patna, Deputy Adv. General

Judgement :

ORDER

V.K. Mehrotra, Actg. C.J.

1. The State of Himachal Pradesh, defendant in a suit (No. 114/1 of 1988) filed by the plaintiff-respondent, in the court of Sub Judge, Bilaspur on February 17, 1988. has approached this court for redress against an order of the learned Sub Judge dated February 8, 1991, in the present revision petition under Section 15, C.P.C.

2. For various reasons, which need not be recounted, the suit has remained undecided, so far. However, what is relevant for the disposal of this revision is the fact that some witnesses summoned by the plaintiff included the Chief Secretary to the Government of Himachal Pradesh as also the Financial Commissioner-cum-Secretary (Revenue) of that Government. The witnesses were served for February 8, 1991. Two of them namely, Shri M. S. Mukherjee, Chief Secretary, and the Financial Commissioner-cum-Secretary (Revenue), were not present before the court on that day. Three other witnesses, were present. They were examined also.

3. In the summons issued to the aforesaid two witnesses, namely, the Chief Secretary and the Financial Commissioner-cum-Secretary (Revenue), it was not indicated whether they were summoned for giving evidence or to produce record, though it was mentioned that they were summoned to appear before the court along with the record.

4. On February 8, 1991, a request was made by the learned counsel for the plaintiff that these two witnesses be summoned through bailable warrants because they had not appeared before the Court in compliance with the summons which had been received in their office on January 15, 1991, nor was any request made for the adjournment of the case on the ground that these witnesses were unable to attend the court for some reason. The learned Senior Sub Judge, Bilaspur, passed an order on February 8, 1991, saying, inter alia:

'.....Both these witnesses are served but despite service they are not present nor any request has been sent by any of these two witnesses for the adjournment of the case showing their inability to attend the court in compliance with the summons which have been duly received in their office well within time, that is, on 15-1-1991 (incorrectly mentioned as 1990) both these witnesses be summoned through bailable warrants on filing of PF in the sum of Rs. 500/- each. Show cause notice under Order 16, Rule 12 be also issued as to why not Fine as provided under Rule 12 may not be imposed for not appearing in the court even after due service of the summons

5. It is this order which is under challenge before this court in this revision petition.

6. Order XVI, C.P.C. deals with the summoning of witnesses. Rule 10 provides for the procedure to be followed by the court when a witness fails to comply with the summons. Sub-rule (1) says that where a person to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court shall examine on oath the serving officer or the party or his agent, on a question touching the service or non-service of the summons, if the certificate of the serving officer had not been verified by an affidavit, or if service of summons had been effected by a party or his agent. Sub-rule (2), then, says :

'Where the court sees reason to believe that the evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.'

It is followed by Sub-rule (3), which says that in lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person.

7. Rule 11 provides for the course to be adopted if the witness appears after the attachment of his property. Rule 12(1), thereafter, says that where such person does not appear, or appears but fails so to satisfy the Court, Court may impose upon him such fine not exceeding five hundred rupees as it thinks fit.

8. It is clear from Rule 10(2) that the court can issue proclamation only if it has reason to believe that the evidence of the person is 'material' and further that 'such person has, without lawful excuse' failed to attend or to produce the document in compliance with such summons or has intentionally avoided service.

9. The jurisdiction of the court to issue a proclamation under Rule 10(2) depends upon recording by it of a finding that the evidence of a witness was material and further that the witness has failed to attend without lawful excuse or had

intentionally avoided service. The court gets jurisdiction to issue warrants, either with or without bail, in lieu of or at the time of issuing a proclamation, or at any time thereafter, only where it comes to a definite conclusion about the matter referred to in Rule 10(2) and not otherwise. If the court directs issue of a warrant for securing the attendance of a witness, without recording a clear conclusion in respect of the matter, aforesaid, the order passed by it would be Without jurisdiction.

10. The view, aforesaid, is shared by various High Courts and a reference may be made to the decision of a Division Bench of the Allahabad High Court in B. Hirdey Narain v. Emperor AIR 1929 All 850, where the Bench observed, (at page 854):

'Equally so the Court can issue a proclamation under Clause (2), Rule 10 only on being satisfied that the evidence of the witness or the production of the document which he is called upon to produce is material and that he has, without lawful excuse, failed to attend or to produce the document.'

and, of the Madhya Pradesh High Court in Dwarka Prasad v. Mst. Rajkunwar Bai, AIR 1976 MP 21, where it says that:

'..... The provisions contained in O. 16, Rule 10 of the Code are of penal nature and, therefore, strict compliance of the procedure laid down therein is essential.....'

as well as the Karnataka High Court in Syed Shah Mohd. Hussaini v. Khutbuddin AIR 1977 Kant 223, where it says that:

'Clause (2) of Rule 10 of Order XVI provides procedure to be followed by Courts when a witness fails to comply with the summons either to attend or to produce the document in compliance with such summons or has intentionally avoided service. On any such default, the court may issue a proclamation requiring the witness to give evidence or to produce the document. But the Court cannot in a casual manner issue a proclamation or a warrant when the witness has failed to attend the Court must have reason to believe that the evidence of the witness or the production of any document is material to the case. It must, accordingly, record briefly its reasons.'

11. Coming now to the issue of show cause notice, under the impugned order, asking the two witnesses why fine, be not imposed upon them, suffice it to say that the power to direct notice to issue for a proposed action under Order XVI, Rule 12, C.P.C. can only be exercised when the court has first come to the conclusion that the evidence of the witness, who fails to appear before the court in spite of service of summons, was material and that he had failed to attend without lawful excuse. This intendment is clear from the use of the words 'where 'such person' does not appear, or appears but fails to satisfy the court.' This aspect of the matter is also not res integra. The Allahabad decision, aforesaid, takes a similar view.

12. In sum, it must be held that the learned Senior Sub Judge, Bilaspur, acted without jurisdiction in directing issuance of bailable warrants for securing the presence of the two witnesses for the reasons mentioned by him in the order dated February 8, 1991, as well as in directing issue of notice for action under Rule 10 of Order XVI, C.P.C. The order deserves to be quashed.

13. The suit, as noticed in the earlier part of this judgment, was instituted in the month of February 1988. Let it be disposed of expeditiously. The record of the trial court shall be sent back forthwith to enable it to do so. The revision petition is accepted in that terms, aforesaid, but the parties are left to bear their own costs.