

(2010) 05 AHC CK 0020

In the Allahabad High Court

Case No : C.M.A. No. 31385 of 2009 and C.M.R.A. No. 31389 of 2009 in Second Appeal No. 1396 of 1982

Gauri Shanker and Others

APPELLANT

Vs

IIIrd Addl. District Judge, Ballia (Deleted) and Another

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4(1), Order 3 Rule 4(2)

Citation : (2011) 3 AWC 2796 : (2011) 112 RD 342

Hon'ble Judges : Ran Vijai Singh, J

Bench : Single Bench

Judgement

Ran Vijai Singh, J.—Civil Misc. Application No. 31385 of 2009 and Civil Misc. Restoration Application No. 31389 of 2009 are taken up together for final disposal.

2. This is an application to condone the delay in filing the restoration application.

3. The reason for not filing the restoration application earlier has been stated in paras 2, 3, 4 and 5 of the supporting affidavit. In para 2 of the affidavit it is stated that the case was listed for hearing on 11.5.2009 but the deponent could not mark the case and the case was dismissed for want of prosecution on 11.5.2009. In para 3 of the affidavit, it is stated that as the case was not noted, therefore, Sri B.P. Singh, learned Counsel could not appear in the Court. In j para 4 of the affidavit, it is stated that on 21.12.2009 when the applicant/Appellant had inquired about the current position of the case on telephone, then after inquiry, it transpired that the case was dismissed in default.

4. Counter affidavit has been filed by Sri M.P. Sinha, learned Counsel for the Respondents.

5. Sri Sinha learned Counsel for the Respondents submitted that Sri Vivek Kumar Singh who has filed restoration application was not competent to file the application as he was not engaged to file application through signed

authorisation. He has further submitted that in view of the provisions contained under Order III, Rule 4 (1) of the Code of Civil Procedure, unless a Counsel is authorised in writing to file a case/application in the Court, he can not file an application. He has again explained the past conduct of the applicant by saying that the case was earlier dismissed for want of prosecution on 7.2.1994. To recall the order dated 7.2.1994, an application was filed, that too was dismissed on 17.9.1997. Challenging that order, SLP No. 22829 of 1997 was filed, which too was dismissed by the Apex Court on 21.12.1997. In his submissions, the applicant has throughout been negligent and non-cooperative with the final disposal of the case. He has further submitted that there is no explanation with regard to non-filing of the restoration application w.e.f. 11.5.2009 to 21.12.2009. In the submission of Sri Sinha, the application for condonation of delay as well as restoration application, both contain no ground, either to condone the delay in filing restoration or for allowing the restoration application, therefore, these are liable to be dismissed.

6. Refuting the submissions of Sri Sinha, Sri Vivek Kumar Singh, learned Counsel for the applicant submitted that previously there was mistake when the restoration application was filed, as the application was filed on oral instructions of his client, as earlier Sri B.P. Singh was Counsel and he has been later on designated as Senior Advocate and ceased to be a Counsel for the applicant and on instruction of his client he has filed the restoration application awaiting signed vakalatnama. He has also submitted that after the dismissal of SLP on 21.12.1997, a review application was filed before this Court and after hearing both the parties at length, the Court passed an order containing 14 pages and allowed the restoration application on 2.12.2004 and restored the appeal to its original number.

7. In so far, as lack of explanation in between 11.5.2009 to 21.12.2009 is concerned, he has submitted that every plausible explanation has been given, as Sri S.P.L. Srivastava who is registered clerk of Sri B.P. Singh Advocate (now Senior Advocate) was looking his cases and in his affidavit, he has stated that due to inadvertence, he could not mark the case in the cause list and when the client has inquired about the current position of the case on telephone on 21.12.2009, then after inquiry, it transpired that the case was dismissed in default on 11.5.2009. In his submissions, the explanation given in the affidavit is sufficient to condone the delay in filing the restoration application as well as to recall the order dated 21.12.2009.

8. In response to the submissions made by the learned Counsel for the Respondents, with regard to the maintainability of application on the behest of Order III, Rule 4 (1) Code of Civil Procedure, Sri Singh submitted that the earlier lacuna which was there at the time of filing of the restoration application has later on been cured by filing vakalatnama on 22.3.2010, therefore the requirement of Order III, Rule 4 (1) CPC stood satisfied.

9. I have heard learned Counsel for the parties and considered their submissions

and perused the record.

10. So far as the application for condonation of delay is concerned, in this regard it is to be noted that Sri S.P.L. Srivastava, Clerk of Sri B.P. Singh, the earlier counsel, now Senior Advocate had been watching the cases of Sri B.P. Singh, Advocate and inadvertently he could not mark the case in the cause list i.e. why nobody could appear when the case was listed for final hearing.

11. I am of the view that these kind of errors/slips are not any extra ordinary happening as these kind of mistakes are the part and partial of human mechanism of working. There appears to be no wilful default in not marking the case and not informing to the counsel. Sri Sinha has also not suggested that it was deliberate omission of either the clerk of Sri B.P. Singh or Sri B.P. Singh himself. In view of this I am of the opinion that the explanation given in the affidavit in support of delay condonation application is sufficient as there was sufficient reason for not filing the restoration application because of lack of knowledge, as the applicants have inquired about the case only on 21.12.2009 and thereafter the fact with regard to the dismissal of the appeal in default has came to the notice of the applicant. The Apex Court as well as this Court has taken the view that while considering an application for condonation of delay, the merit of the case has to be considered, as the Courts are meant to impart substantial justice to the parties in accordance with law and not to scuttle the process of justice on technicalities.

The Apex Court in the case of Collector, Land Acquisition, Anantnag and Anr. v. Mst. Katiji and Ors., 1987 (13) ALR 306 (SC) has given following guidelines while considering the application for condonation of delay:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. Every day's delay must be explained does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to

legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Further in the case of State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, after considering various cases of the Apex Court on condonation of delay application has held:

Para 12... The expression sufficient cause should, therefore, be considered with pragmatism in justice oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factor which are peculiar to and characteristic of the functioning of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause.

12. This Principal has been followed thereafter in numerous cases. Therefore, looking into the facts of this case, I find that there is sufficient ground to condone the delay in filing the restoration application. In view of that, delay in filing restoration application is condoned. The application for condonation of delay is allowed.

13. So far as the objections of the learned Counsel for the Respondent with regard to the maintainability of restoration application in derogation of Order HI, Rule 4 (1) of CPC is concerned, it is well settled that the procedural law are not always mandatory and sometime it is directory and curative in nature in view of the decisions of the Apex Court in Kailash Vs. Nanhku and Others, Rani Kusum (Smt.) v. Kanchan Devi (Smt.) and Ors., 2005 (99) RD 616 (SC) : 2005 (33) AIC 85 (SC) Dove Investments Pvt. Ltd. and Others Vs. Gujarat Industrial Inv. Corporation Ltd. and Another,

14. Here in this case it cannot be disputed that for appearing in the Court of law on behalf of a party proper written authorisation is necessary but under certain circumstances Counsel can put in appearance on oral instructions also provided he is authorised for the said purpose and at later stage bring on record a signed authorization i.e., vakalatnama executed in his/her favour.

15. Learned Counsel for the Respondent may be right in his submissions that no one should be heard for a party unless he is duly authorised through signed vakalatnama to appear before the Court. However in this case although the Counsel appeared but on oral instruction of the applicant and not through signed vakalatnama, now the signed vakalatname has been executed in favour of Vivek Kumar Singh and filed in the Court therefore in my view the defect if any stood cured.

16. The purpose of Order III, Rule 4 is to avoid the manipulations and fraud by putting appearance without there being any authorisation in court's proceedings but when there is a proper authorisation, may be at later stage, it cannot be said

that as, at the initial stage, there was no vakalatnama, therefore, application is not maintainable, as filing of the vakalatnama at later stage will relate back to the date of filing of application.

17. Otherwise also if the argument of Sri Singh is allowed to sustain it will lead to serious injustice which will defeat very object of the judicial functioning of Courts. The procedure provided in the CPC to my mind is to regulate the proceedings of the Court in the decent manner and it can not be permitted to twist over the very object of the establishment of Courts in order to impart substantial justice to the parties. In plain and simple words of common people, the procedure is neither food nor food stuff which is essential for survival of life (which can be put at par with substantial justice to the parties for smooth functioning of society) may be of mankind or any other living being. It only provides a method of cooking. Therefore, I do not find any force in the submission of learned Counsel for the Respondent with regard to the non maintainability of the application filed through Sri Vivek Kumar Singh without signed vakalatnama on oral instruction.

18. The view taken by me finds support from the judgment of the Apex Court Uday Shankar Triyar v. Ram Kalewar Prasad Singh and Anr. 2006 (62) ALR 308 (SC) : 2006 (100) RD 253 : 2006 (37) AIC 942 (SC)

Where the Apex Court observed as under:

15. It is, thus now well settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the vakalatnama executed by the Appellant, along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the memorandum of appeal or the presentation thereof before the appellate Court was with the knowledge and authority of the Appellant. Such omission or defect being one relating to procedure, can subsequently be corrected. It is duty of the officer to verify whether the memorandum of appeal was signed by the Appellant or his authorised agent or pleader holding appropriate vakalatnama. If the officer does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the Appellant to rectify it. The requirement that the appeal should be signed by the Appellant or his pleader (duly authorised by a vakalatnama executed by the Appellant) is, no doubt, mandatory. But it does not mean that noncompliance should result in automatic rejection of the appeal without giving an opportunity to the Appellant to rectify the defect. If and when the defect is noticed or pointed out, the Court should, either on an application by the Appellant or suo motu, permit that Appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the vakalatnama. It should also be kept in view that if the pleader signing the memorandum of appeal has appeared for the party in the trial Court, then he need not present a fresh vakalatnama along with the memorandum of appeal, as the vakalatnama in his

favour filed in the trial Court will be sufficient authority to sign and present the memorandum of appeal having regard to Rule 4(2) of Order III, Code of Civil Procedure, read with Explanation (C) thereto. In such an event, a mere memo referring to the authority given to him in the trial Court may be sufficient. However, filing a fresh vakalatnama with the memo of appeal will always be convenient to facilitate the processing of the appeal by the office.

17. An analogous provision is to be found in Order VI, Rule 14 Code of Civil Procedure

1. 2006 (62) ALR 308 (SC) : 2006 (100) RD 253 : 2006 (37) AIC 942 (SC).

which requires that every pleading shall be signed by the party and his pleader, if any. Here again, it has always been recognised that if a plaint is not signed by the Plaintiff or his duly authorised agent due to any bonafide error, the defect can be permitted to be rectified either by the trial Court at any time before judgment, or even by the appellate Court by permitting appropriate amendment, when such defect comes to its notice during hearing.

Non compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are

(i) where the statute prescribing the procedure, also prescribes specifically the consequence of noncompliance;

(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

(iii) where the non-compliance or violation is proved to be deliberate or mischievous;

(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the Court;

(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the Appellant.

19. So far as the reason for non appearance of the learned Counsel on the date fixed i.e. 11.5.2009 is concerned, in this regard, Sri S.P.L Srivastava, clerk of Sri B.P. Singh, Advocate (now Senior Counsel) who had throughout been appearing in this case, has stated in his affidavit filed in support of restoration application that case could not be marked in the cause list i.e. why nobody could appear in the case and in the result the appeal was dismissed in default and the applicant

was unaware of the dismissal of the case and came to know on 21.12.2009 and immediately after coming to know the restoration application has been filed.

20. In view of the averments in the affidavit, I find there was sufficient reason for non appearance of the Counsel on the date fixed.

21. In view of that the restoration application is allowed and the order dated 11.5.2009 is recalled. The appeal is restored to its original number.

22. The interim order passed on 12.3.2010 shall remain operate till further order of this Court.

23. Sri Sinha in last submitted that this is an old appeal of the year 1982 and requires final disposal. Therefore, on the request of Sri Sinha, list this case in the month of August, 2010 before appropriate Court for final hearing.