
(2009) 01 AHC CK 0156
In the Allahabad High Court

Hindustan Aeronautics Ltd.

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 09-01-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2009) 2 AWC 1464 : (2009) 122 FLR 704

Hon'ble Judges : Vineet Saran, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ashok Bhushan and Vineet Saran, JJ.—Heard Sri S. D. Singh, learned Counsel for the petitioner and Sri Harish Chand Kohli, who has appeared in person on behalf of respondent No. 2. Earlier the case was adjourned on the request of the learned Counsel for the petitioner to get the matter settled outside the Court. However, when the case was taken up today, the settlement between the parties is not seen. In view of the aforesaid, we have proceeded to decide the writ petition on merit.

2. This writ petition has been filed praying for quashing the order dated 15.11.1996 (Annexure-8 to the writ petition) by which order the Vth Additional District Judge, Kanpur Nagar has rejected the application of the petitioner for restoring the F.A.F.O. which was dismissed on 4th July, 1996. The F.A.F.O. was filed by the petitioner against the order dated 14.4.1983 by which order the arbitration award awarding a sum of Rs. 79,000 to the respondent was made Rule of the Court. When the F.A.F.O. was called on several occasion, neither the petitioner nor the petitioner's counsel appeared hence the Court dismissed the appeal. An application was filed for restoration of the appeal alongwith the affidavit of Sri A. P. Trivedi, Supervisor. The objection was filed to the said restoration application. The Court heard the parties and has dismissed the application. The Court did not believe the cause shown by the petitioner for non-appearance on 4th July, 1996. It was noticed by the Court that 4th July, 1996

was the date fixed on the request made by the petitioner and the appeal which was pending for 13 years was to be heard finally on 4th July, 1996. Neither the petitioner appeared nor his counsel appeared although respondent and his counsel were present. The explanation given by the petitioner was that there was workers' agitation in the establishment due to which, no one could come to the Court and the file of the case was with the Supervisor. The Court disbelieved the case set up by the petitioner and has observed that no senior officer has filed any affidavit with regard to extent of the workers' agitation and it has not even stated that there has been any violence resorted by the workers in the establishment. The Court also did not believe that there was no facility of telephone and the case file was not with the counsel. The Court observed that in a case where appeal was pending for last 13 years and adjourned for 4th July, 1996 on the request of the petitioner, the file of the case be not with the counsel, is not believable. Against the order dismissing the restoration application, this writ petition was filed by the petitioner on 26th November, 1996 which remained pending in this Court for another 13 years.

3. By an interim order passed on 16.12.1996, the respondent was restrained from taking the money which has been deposited in the Court in pursuance of the award.

4. Learned Counsel for the petitioner challenging the order contended that the court below has committed error in rejecting the restoration application. The Court ought to have put some conditions for restoration of the appeal. He submits that sufficient cause was shown. In support of his contention, the learned Counsel for the petitioner has placed reliance on the judgment of the Supreme Court in G.P. Srivastava Vs. Shri R.K. Raizada and Others,

5. We have considered the submissions and perused the record.

6. The appellate court vide impugned judgment dated 15.11.1996 dismissed the application filed by the petitioner refusing to recall the order dated 4th July, 1996. The following are the reasons which have been given in the impugned order for rejecting the application:

(1) The appeal which earlier fixed for 2nd July, 1996 for hearing, was adjourned at the instance of the petitioner to 4th July, 1996 for hearing;

(2) The appeal is 13 years old appeal and serious efforts were required to be taken by the appellant for hearing of the appeal but on that date no one appeared on behalf of the appellant. The H.A.L. is a reputed and a big establishment but with regard to labour unrest, no affidavit of any Senior Executive Officer was filed and affidavit of only a subordinate employee has been filed who is not expected to assess the nature and seriousness of labour unrest;

(3) It is not acceptable that no employee or officer could contact his counsel whereas there is no mention that workers resorted to rampage or violence;

(4) It is not acceptable that telephone services had become zero;

(5) The fact that file of the counsel went with Sri A. P. Trivedi alongwith other documents cannot be believed. No satisfactory reasons have been given as to why the counsel for the appellant in such important and old case could not appear on 4th July, 1996; and

(6) The party who is interested in delaying the disposal of a case absents itself to get the case dismissed in default and subsequently efforts are made to get it restored by which process he gets opportunity to delay the matter and in the present case this appears to be reason for non-appearance.

7. From the reasons as indicated in the impugned order as noticed above, it is clear that Court has considered the explanation given by the petitioner-appellant for non-appearance on 4th July, 1996 and the objection taken to the application by the respondent. It is not disputed that appeal was filed against an order passed by the learned civil Judge by which order, award given by arbitrator was made Rule of the Court. The dispute between the parties arose out of an arbitration proceeding. The petitioner and respondents entered into a contract for carrying out certain constructions. The dispute arose between the parties with regard to which arbitrator gave an award on 24.3.1981. The award was submitted to the Court for making it Rule of the Court on which Suit No. 140 of 1980, Kohli Construction Ltd. v. H.A.L., was registered. The learned Ist Additional Civil Judge vide his judgment and order dated 14th April, 1983, made the award granted by the arbitrator for Rs. 79,000 plus interest the Rule of the Court against which order, the appeal was filed by the petitioner being F.A.F.O. No. 378 of 1983. The appeal remained pending for long 13 years and was fixed for hearing on 2nd July, 1996 but on the request made by the appellant's counsel, the appeal was adjourned for 4th July, 1996, for hearing on which date when the case was called on several occasion, neither the petitioner nor his counsel appeared. The explanation given by the petitioner for non-appearance on 4th July, 1996 was that due to workers' unrest in the factory, the representative of the company could not contact the counsel on 4th July, 1996, hence no one appeared. It has been stated by the petitioner himself in his application filed for recall of the order that the counsel was briefed on the evening of 3rd July, 1996 for hearing of the appeal. On 4th July, 1996, when the case was called, counsel did not appear and no satisfactory explanation has been given in the affidavit for non-appearance of the counsel. The appeal which was an old appeal, pending for last 13 years and on the last occasion was adjourned at the instance of the petitioner's counsel, it was expected that the counsel would appear and argue the matter. The learned appellate court has rightly observed that in facts of the present case, a serious endeavour was required to be made on behalf of the petitioner towards hearing of the appeal which was not done. The explanation that file of the counsel was mixed up and was with official of the factory was rightly not believed. The appellate court who was to hear the appeal, was in best know of the proceedings before it. With an order having considered the explanation submitted by the petitioner and not having found it satisfactory enough to recall order dated 4th July, 1996, the scope of interference in writ

jurisdiction is too limited.

8. The judgment of Apex Court in G. P. Srivastava's case (supra) relied by the counsel for the petitioner was a case where the Apex Court laid down that for setting aside the ex parte decree under Order IX, Rule 13, C.P.C., the words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. It is useful to quote paragraph No. 7 of the judgment which is as follows:

7. Under Order IX, Rule 13, C.P.C., an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order IX, Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case.

9. There can be no dispute to the above proposition as laid down by the Apex Court. The Apex Court in the above paragraph has clearly laid down that the Court have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. Thus, whether the sufficient cause is made out in a particular case depends on the facts and circumstances of that case. Coming to the facts in the case before the Apex Court in G.P. Srivastava's case, the ex parte decree was passed on 10.3.1983. On the date fixed, the tenant could not appear due to reason that he was indisposed at a site which was 85 kms. away from Lucknow where the case was fixed and on 10th March, 1983 which was the date fixed in the case, the young nephew of the counsel met with an accident and expired which prevented the counsel to appear in the Court on that date. The facts of that case as noted in para 5 of the judgment and reasons given by Court in para 8 are as follows:

5. On 10.3.1983, the case was called on for hearing by the Court in the early hours but as no one appeared on behalf of the appellant, the same was again taken up at 2 p.m. As none appeared at that time also, the suit was decreed ex parte on the basis of evidence produced in the case. In his application under Order IX, Rule 13 of the Code of Civil Procedure, praying for setting aside ex parte judgment and decree, the appellant submitted that he was posted as an Assistant Engineer in the Irrigation Department and on account of the construction of the bridges over the casual drains he had to remain at the site in the interests of public. He became indisposed in the evening of 8.3.1982 at the

site which was about 85 kilometres away from Lucknow and could not move or return back to Lucknow till 11.3.1983 which prevented him from appearing in the trial court on 10.3.1983. Unfortunately, the young nephew of the counsel of the appellant met with an accident on 10.3.1983 and expired which prevented him (the counsel) counsel also to appear in the Court on that date.

8. In the instant case, it is not disputed that the nephew of the counsel of the appellant had died in a road accident on the date of hearing and that the appellant himself was not at the station on account of his employment and illness.

10. From the facts of the above case, it is clear that the explanation given for non-appearance of both the tenant and his counsel were held to be sufficient by the revisional court and the ex parte decree was set aside. The High Court interfered with the findings of fact recorded by the revisional court which order was set aside by the Supreme Court. In the above case, the non-appearance of the counsel on 10th March, 1983 was due to death of nephew of the counsel on the very same day. The case of G. P. Srivastava is on its own fact and does not help the appellant in the present case.

11. In the present case, this Court is to examine the correctness of the impugned judgment given by the Vth Additional District Judge on the parameters which have been laid down for exercise of jurisdiction under Articles 226 and 227 of the Constitution of India. The present is a writ petition challenging the order of the Vth Additional District Judge, Kanpur Nagar. The order of Additional District Judge was well within the jurisdiction of the Court and has been passed after considering the affidavit filed by the petitioner and other materials on the records.

12. The Apex Court in Jagdish Prasad Vs. Smt. Angoori Devi, , has considered the scope of issuing a writ of certiorari by the High Court in exercise of jurisdiction under Article 226 of the Constitution. Following was laid down in paragraph 3:

3. In the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, a Constitution Bench of this Court indicated the scope of interference in a certiorari proceeding by saying that a writ of certiorari is issued for correcting the errors of jurisdiction committed by the Courts or Tribunals in cases where they exceed their jurisdiction or fail to exercise it or exercise it illegally or improperly, i.e., where an order is passed without hearing the party sought to be affected by it or where the procedure adopted is opposed to principles of natural justice. A caution was indicated by saying that the jurisdiction to issue a writ of certiorari is a supervisory one and in exercising it, the Court is not entitled to act as a Court of appeal. That necessarily means that the findings of fact arrived at by the inferior Court or Tribunal are binding. An error of law apparent on the face of the record could be corrected by a writ of certiorari but not an error of fact, however grave it may appear to be. The rule in Syed Yakoob Vs. K.S. Radhakrishnan and Others, when applied to the present facts would lead to the conclusion that the High Court exceeded its jurisdiction in interfering with the order of the Additional

District Judge.

13. The Apex Court has also laid down the scope and parameters of exercise of jurisdiction by this Court under Article 227 in *Surya Dev Rai Vs. Ram Chander Rai and Others*, It has been laid down by the Apex Court in the said judgment that jurisdiction under Article 227 is a supervisory jurisdiction and not an appellate jurisdiction. The High Court while exercising its jurisdiction under Article 227 shall not interfere with the impugned judgment even though two views are possible out of which one has been followed by the subordinate court. The High Court in exercise of jurisdiction under Article 227 shall not reappraise the evidence and can interfere only when the findings are based on no evidence or perverse. The Supreme Court while summing up the scope of exercise of jurisdiction under Article 227 laid down in para 38 (4, 5 and 6) which are as follows:

38 (4). Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law; and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

14. Applying the parameters as laid down by the Apex Court in above two cases, the impugned judgment of Vth Additional District Judge cannot be said to be a judgment which can be interfered with in exercise of jurisdiction by this Court under Articles 226 or 227 of the Constitution of India. The subordinate court has neither assumed a jurisdiction which it does not have nor has failed to exercise jurisdiction which it does have nor there is any manifest error apparent on the face of record committed by the court below. The appellate court has given cogent reasons for rejecting the application as noted above. The appeal was pending for hearing for last 13 years and was adjourned at the instance of the appellant for 4th July, 1996. The appellate court has found that no satisfactory explanation was given for non-appearance of the counsel on 4th July, 1996.

15. We are satisfied that in passing the impugned judgment, the appellate court has not committed such error which may warrant interference by this Court in exercise of its jurisdiction under Article 226/227 of the Constitution of India. The writ petition is dismissed.