

(1957) 11 MP CK 0013

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 172 of 1955

Manohar Prasad Mishra

APPELLANT

Vs

Chandulal alias Jagdish Prasad and Others

RESPONDENT

Date of Decision : 25-11-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 19, 107, 153

Citation : AIR 1958 MP 257 : (1957) ILR (MP) 648 : (1958) JLJ 315 : (1958) 3 MPLJ 156

Hon'ble Judges : M. Hidayatullah, C.J;B.K. Choudhari, J

Bench : Division Bench

Advocate : R.K. Pande, for the Appellant; P.K. Tare, for Non-applicants 7 and 8, for the Respondent

Judgement

This application arises out of First Appeal No. 33 of 1946 which has had rather an unfortunate and chequered career in this Court. It appears that in that appeal there were several respondents and two of them, viz., respondent No. 7 and respondent No. 8, were minors. During the pendency of the appeal one of the minors became major and an application was made by the appellant informing the Court about this. On 10th December, 1951 that application was put up before this Bench.

The Bench required the office to report if an affidavit was necessary in view of a ruling of Mangalmurti and Mudholkar, JJ. in First Appeal no. 2 of 1949. It appears that the application was not accompanied by an affidavit which, according to the Rules of this High Court has to be filed along with every application stating a fact. The case was put up before the same Bench on 10th December, 1951, and the Bench ordered as follows :--

"Shri P. S. Pultambkar for the appellant. We have seen the ruling of the Division Bench in F.A. 2/49. That case covers the present point. There is thus no reason to hold that the appellant had any duty in this matter. However, Shri Pultambkar says that he will file an affidavit out of abundant caution. Adjourned for a

fortnight. He will also pay P. F. within the same time.

Sd/- M. Hidayatullah, J.

Sd/- B. K. Choudhuri, J."

This offer of the appellant to do something out of abundant caution led him into troubles which were far greater than if he had just simply left the matter as it was.

The affidavit not having been filed and the process-fee not having been paid, the case was again laid before the Court on 21st January, 1952. On that date the Bench consisting of Sinha, C. J. (as he then was) and Mudholkar J. passed the following peremptory order :

"Shri D. T. Mangalmurti for the appellant heard.

TWO weeks" time is allowed to carry out the Bench"s order of the 13th December, 1951, failing which the appeal shall stand dismissed without further reference to a Bench.

Sd/- B. P. Sinha C. J.

Sd/- J. R. Mudholkar J."

The office received the affidavit on 25th January, 1952 but the process-fee was not paid. It being in doubt as to whether the appeal was ordered to be dismissed or the application, which was being kept alive out of abundant caution, put the matter before the Judges in chambers. The learned Chief Justice, it appears, was at first of the opinion that neither could be dismissed and he wrote an order to that effect which he scored out in view of the opinion of Mudholkar, J. which reads as follows :--

"Our order must take effect. We have no power to alter it.

Sd/- J. R. Mudholkar J."

The Chief Justice added :

"Yes, according to our order dated 21-1- 1952 the appeal stands dismissed.

Sd/- B. P. Sinha C. J."

The office on that noted as follows :--

"As ordered by the Court the appeal stands dismissed. Proceed further.

Sd/- C. M. Kondiah 8-2-1952."

We carefully looked into the case to find out what the proceedings further were, but it appears that nothing was done and no decree of dismissal of the appeal was ever drawn up.

After this the appellant made an application on 30th December, 1953 which

purported to be against the order made in chambers on 6th February, 1952. He stated in that application that the affidavit was being made and the process-fee was being paid, out of abundant caution and not under the orders of the Bench. The affidavit having been filed and no notice to the major respondent being necessary he did not concern any further with the matter and the order of dismissal of the appeal took place behind his back.

He averred that when he inspected the record for the first time on 10th December, 1953 the dismissal of the appeal was discovered and hence the application was being made for its restoration: (Miscellaneous Civil Case No. 56 of 1954, decided on 5-7-1955). This case dragged on for over a year till it came before a Bench of Mudholkar and Naik, JJ. who on 5th July, 1955 dismissed the application for restoration of the appeal.

In dealing with the matter their Lordships observed that what the applicant before them wanted to be set aside was an order made in chambers on 6th February, 1952, whereas what he ought to have asked to be set aside was the order dated 21st January, 1952. Inasmuch as the earlier order could not be described as *ex parte* because Shri D. T. Mangalmurti, counsel for the appellant (applicant) was present when the order was dictated in court, the application before them could not be treated as an application for setting aside that order. They therefore without going into the merits of the application dismissed it, leaving the appellant free, if they cared, to make a further application in the case.

The present application was therefore filed within two days of the last order. It purports to be under Rule 1 of Order XLVII read with Section 151 of the Code of Civil Procedure. It seeks a review of all the orders which had been passed in the case, including the order which the learned Judges passed on the last occasion. It is this matter which we have to decide.

It appears (and we say it respectfully) that the Bench of Sinha, C. J. (as he then was) and Mudholkar, J. entirely misapprehended the effect of the order which had been made by us earlier. A perusal of that order clearly shows that we ourselves made no order in the case but acceded to the request of the appellant that he might safeguard his position by filing an affidavit and paying process-fee.

We had already held that the appellant had no duty in the matter in view of the decision of Mangalmurti and Mudholkar, JJ. in First Appeal No. 2 of 1949. The order made by the learned Chief Justice, which he scored out, clearly brought out this aspect of the matter but it seems that he was persuaded to the view of his colleague because he put down a second order agreeing with him.

When we come to the next order-sheet on 21-1-1952 we find that time was given to the appellant to make good the default in payment of process-fee within two weeks on pain of his appeal being dismissed without further reference to a Bench. We need not go into the question whether the Bench meant the application or the appeal. Probably the result would be the same. The order of the learned Chief Justice and Mudholkar J. can only be referred in the

circumstances to Rule 15-A introduced by this High Court in the 41st Order of the Code of Civil procedure.

According to that rule, appeals may be dismissed for want of prosecution when something which is required by the rules of this High Court is not done. The application for setting aside such an order is to be made thereafter under the 19th rule of that Order for which no time limit is prescribed.

The office being in doubt as to whether the application or the appeal was to be considered as dismissed without further reference to a Bench pointed out that it should be the application. The learned Judges thought, and we say it very respectfully, erroneously that they had no power to recall their order and change the word "appeal" into "application". It looks from the way in which the orders were recorded in chambers that they were inclined to take a view which the office took but that they felt compelled for want of power to hold that the order of 21-1-1952 directing dismissal of the appeal should stand.

In this, we say it very respectfully, the learned Judges were entirely in error. They had the necessary power u/s 153 read with Section 107 of the Code of Civil Procedure. It is not only the law but the duty of every court to see that its procedure if it is found defective does not harm a litigant. With considerable respect for the learned Judges we feel that at that stage they could have determined, if they desired, whether the appeal should be dismissed or the application, and in view of the orders made by this Bench earlier it would have been proper to hold that the application was to be dismissed.

That, however, is another matter. The matter went before the Court again on an application purporting to have been made against the order made in chambers on 6-2-1952. On that occasion it was a simple matter to allow an amendment in that application and to get the order of 21-1-1952 set aside. But we say it with regret, and also with profound respect for the Bench, that the application was thrown out on a technical consideration that it was directed against another order and not against the order dated 21-1-1952. Even on that occasion the provisions of Rule 19 of Order XLI and of the rule introduced by this Court, viz., Rule 15-A of that order, were completely overlooked.

With the dismissal of the application it appears that the appellant himself did not know what to do. Instead of invoking the 19th rule of Order XLI he went to the pain of putting in an application for review under Rule 1 of Order XLVII read with Section 151 of the Code of Civil Procedure. That application is before us today. We think that we should not take it in the technical way in which the appeal has been dealt with, and we permit the appellant therefore to mould his application around the 19th rule of Order XLI of the Code of Civil Procedure. Having done so we feel that this is eminently a case in which we should interfere.

This Bench on the earlier occasion did not compel the appellant to do anything but he was acting out of abundant caution on his own, and any order which this Bench made was therefore not an order compelling the appellant to any course

of conduct. The appellant could have said that he did not wish to go on with the matter at any stage and in view of the decision of this Bench that there was no duty on the appellant the matter would have stayed as it was and would have been out of the way.

However, we cannot overlook the fact that the Division Bench on 21-1-1952 made peremptory order for payment of process-fee on pain of being dismissed summarily. We consider that that order was in terrorem. Most of the time these appeals are restored to file on sufficient cause being shown, and on that occasion even if the appeal was to be peremptorily dismissed the dismissal could not be carried beyond Rule 15-A of Order 41 of the CPC introduced by this Court.

That being so all applications for restoration could be judged under the 19th rule of Order XLI, and if sufficient cause was shown, the appeal could have been restored to file subject to any order as to costs which the Court should have deemed fit to make. We think that it was unfortunate that on the first occasion the application was not allowed to be moulded around Rule 19 of Order XLI. In this connection it is worth noting what their Lordships of the Privy Council said when a High Court went out of its way to mould an application around a provision of law which the party had not invoked : See AIR 1924 198 (Privy Council) . However, there is another application before us and Rule 19 of Order XLI does not lay down any limitation. We think that sufficient explanation was tendered by the appellant to a restoration of his appeal to file.

Considering the entire case in its history we are satisfied that the default was one which could have been condoned under the 19th rule of Order XLI if an application under that rule had been made. The fault is shareable but the greater responsibility must of course be taken by the appellant who engaged counsel who could not inform the Court about the action which it could take in the matter.

It appears that at no stage of the case were Rules 15-A and 19 of Order XLI of the CPC brought to the notice of the Court nor were the provisions of Section 153 read with Section 107 *ibid* laid for consideration. In view of this the appellant has to thank himself, at any rate, for all the expenses to which he has been put in making these numerous applications.

We, however, think that in the interest of justice we should interfere in this case. We are in the best position to say that we had never ordered the appellant to do anything but to further his own desire of safeguarding himself by paying process-fee and filing an affidavit. There was no breach of any order of this Court, except non-payment of process-fee for which the dismissal of the appeal cannot possibly be taken beyond Rule 15-A of Order XLI. In any event the appeal could only be dismissed in respect of the minor respondents and not in toto.

A further duty remained upon the Court to decide whether by the dismissal of the appeal against the minor respondents the whole of the appeal failed or only a part of it. We think in the circumstance we should allow this application, and we do so. But we think that the laches of the party should not go unpunished as was

also observed by their Lordships of the Privy Council in the case to which we have referred. We impose therefore all the? costs of the respondents upon the appellant and also a further sum of Rs. 100/- as adjournment costs.

These two costs shall be lodged in this Court on or before the expiry of this month. On the costs being lodged in this Court, the appeal shall be restored to File not on its original number but on a fresh number because it is an appeal of 1946 and we are not dealing with cases of 1946 and it would displace all office orders to have this case registered on its original number. After the costs are paid as ordered and the appeal restored to file, it can be listed for hearing without a paper-book in the first week of December.