

(1959) 08 MP CK 0020
In the Madhya Pradesh High Court
Case No : C.R. No. 19 of 1959

Nathumal Himatlal

APPELLANT

Vs

Kunjilal Mathuraprasad

RESPONDENT

Date of Decision : 31-08-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 151

Citation : (1960) J LJ 209 : (1959) MPLJ 33

Hon'ble Judges : Shiv Dayal, J

Bench : Single Bench

Advocate : Swamisaran, for the Appellant; B.D. Gupta, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal, J.

This revision is directed against an order passed by the Civil Judge First Class, Shivpuri u/s 151 of the Code of CPC setting aside the decree which had been passed in Civil Suit No. 15 of 1955 on January 3, 1956. This suit was instituted on September 9, 1955 by Kunjilal and Mahesh Prasad against Nathumal on the allegation that the Defendant had borrowed Rs. 1,071 on April 17, 1953 and Rs. 2,500 on May 1, 1953 and had executed bonds in favour of the Plaintiff for those amounts.

November 25, 1955 was fixed for the Defendant's appearance. As he was not served, 31st December was fixed. The process was not served again and so February 3, 1956 was fixed. However, between the last mentioned two dates the suit was dismissed on January 3, 1956 by the following order:

MUKHTAR AM RAGHUNATH DAS NE PRARTHNA PATRA PRASTUT KIYA HAI KI VADIGAN KO KUL RUPIYA WASUL HO CHUKA HAI JO TASDIQ KIYA GYA ATAH PRAKARAN HASB DARKHWAST MUKHTAR AM VADI KUL WASULI MEKHA R tJ KI JATI HAI.

The Plaintiffs, alleging that the above dismissal was fraudulent, filed an appeal to the High Court of Madhya Bharat under Order 43, Rule 1(m). The High Court by its judgment dated March 23, 1956 in Civil Miscellaneous Appeal No. 6 of 1956 dismissed the appeal as incompetent.

In the meantime, on February 23, 1956 the Plaintiffs" moved the trial Judge u/s 151 of the Code of CPC on the ground that the suit pertained to personal transactions and had nothing to do with the firm Phoolchand Mathura Prasad and that Raghunath Das was not an attorney for the Plaintiff namely, Kunjilal and Mahesh Prasad. His action in getting the suit dismissed was unauthorised and fraud had been practised upon the Court. As such, the order dated January 3, 1956, dismissing the suit was null and void and, therefore, should be set aside.

A notice was issued of the said application u/s 151 of the Code to the Defendant Nathumal. He contested the application by filing objections in writing on July 23, 1957. The trial Judge after hearing arguments of the parties allowed the application and set aside the order by which the suit had been dismissed.

Aggrieved by the same, the Defendant has come in revision to this Court. Shri Swamisaran contends that the application u/s 151 did not lie. His first argument is that when the High Court of Madhya Bharat dismissed the appeal filed by the Plaintiffs under Order 43, Rule 1 it observed that the only remedy available to the Plaintiffs was to file a regular appeal against the decree framed in the suit dismissing the Plaintiffs" claim. That being so the Plaintiffs cannot resort to any other remedy except the one indicated in that order and the learned trial Judge was not competent to exercise his inherent powers u/s 151 of the Code. In my opinion this contention cannot be accepted. The only question which the High Court of Madhya Bharat decided was whether the appeal which was before them was competent under the first rule of Order 43 or not. The Division Bench held in the negative. To hold what other remedy was available to the Plaintiffs was not necessary for the decision of the question before it. If there was an observation indicating what the proper remedy was, it was only obiter; it is not binding on the parties or on this Court, nor can it be pressed as a precedent.

Here I would recall some observations as to the application of precedents. In the leading case of *Quinn v. Leatham* 1901 A.C. 495 Earl of Halsbury L.C. has observed:

Now, before discussing the case of *Allen v. Flood* and what was decided therein, there are two observations of a general character which I wish to make and one is to repeat what I have very often said before, that 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 there 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. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

These observations were relied on in the (1940) 8 ITR 635 (Privy Council) In *Knatbhubull v. Hallett* (1879) 13 Ch. D. 712 Jessal M.R. stated:

First of all, what is the proper use of authority? This is almost elementary but I am bound, to state it..... The only use of authorities, or decided case, is the establishment of some principle which the Judge can follow out in deciding the case before him.

Again in *G & C Kreglinger v. New Patagonia Meat & Cold Storage Company Ltd.* 1914 A.C. 25 (4c), Viscount Haldene L.C. observed:

To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in a system where the paramount authority is that of a code. But when a previous case has not laid down any new principle but has merely decided that particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent.

A Full Bench of the Nagpur High Court, following the observations of Halsbury L. C. in *Quinn's case* 1901 A C 495 observed further:

The ratio decidendi of a case alone is a binding authority as a precedent. The statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand, have no binding authority on another Court though they may have some merely persuasive efficacy.

[AIR 1943 340 (Nagpur)].

Applying these principles, it is to be considered whether the observation of the Madhya Bharat High Court can be used as a precedent. Although decisions of the Madhya Bharat High Court are not binding on this Court, yet they are certainly entitled to great respect. Here, I find that the two learned Judges who constituted the Bench wrote separate judgments, arriving at the same result. In one of them while holding that an appeal under Order 43, Rule 1, CPC was not competent, it was observed that a regular appeal against the decree framed on the dismissal of the suit was "the only remedy". It is obvious enough that the learned Judge, who indicated that possible remedy (he) did not hold that a suit for setting aside the decree or an application u/s 151, CPC for that relief did not lie. Indeed there was no occasion for deciding those points.

I am, therefore, of the opinion that the Plaintiffs were free to take recourse to such other remedy as they were advised.

It is next contended by Shri Swami Saran that Section 151 of the Code of CPC could not legitimately be invoked in a matter like this. He relies on a number of reported cases in support of his contention. After examining the authorities I have formed the view that distinction must always be made between a case where fraud is practised upon parties and a case where fraud is practised upon the Court. The first category does not fall within the purview of Section 151 of the Code, but as regards the second a Court certainly has jurisdiction to look into the matter and set right a mistake committed by it and the effect of the fraud practised upon it.

Shri Swamisaran has strongly relied on the decision in *Binodilal Bishambhardayal and Others heirs and legal representatives of Lala Bishambhardayal Bhawanisahay Vs. Virendra Singh Anandrao and Others*, where it is held:

Where consent decree is sought to be set aside on the ground either of fraud or collusion or both, said to have been committed by a party to the suit, the appropriate remedy is that of a suit and not an application u/s 151.

Fraud or collusion vitiates most solemn transactions. Where a decision is alleged to have been effected by either of them the aggrieved party can seek Court's assistance by means of a suit specially designed for the purpose. The particulars of fraud in such a case have got to be alleged and if traversed proved. In the matter of proof complicated question of facts and law are likely to arise. The decision given becomes subject to the right of appeal. On the other hand when resort is had to a remedy u/s 151, the decision practically becomes final with no right of appeal. Proceedings u/s 151 from its very nature is not meant to be a substitute for a suit. That section in a way expresses what already vests in Court to be availed of by it to meet the ends of justice where rules of procedure expressly provided do not meet the situation.

The power under the section is discretionary and in considering the question of propriety in invoking this residuary power the Court would take into account several matters such as complexity of the questions involved, availability of a more complete and efficacious remedy by means of a suit and the apparent justice of the claim.

The facts of that case were quite different. There fraud was practised upon parties and a counsel. The Division Bench has cited the decisions of the Patna High Court reported in A. I. R. 1934 Patna 229 and 1943 Patna 13, where this distinction was pointed out. Further, applying the principles applicable to such a case, in para. 24 of the decision, *Nevaskar J.* has pointed out that the case before them is not a case where before the other side is in the picture a party commits fraud upon the Court and obtains a decision in his favour. In the latter case the Court which itself is deceived may be prompted to take an action to undo the wrong brought about by the abuse of process of the Court. Thus it is very clear that the jurisdiction of the trial Judge u/s 151, CPC has not been ruled out by the Division Bench in a case where the allegation is of fraud upon the

Court. And in the present case, that precisely is the ground on which the order dismissing the suit has been assailed by the Plaintiffs in their application u/s 151, CPC Code.

Learned Counsel also relies on AIR 1949 366 (Nagpur) That too was a case of fraud committed by one party against the other.

It is uncontestible that in either case whether fraud is practised upon the Court or upon a party the remedy of a regular suit is always open. What I have to see today is whether the trial Judge had no jurisdiction to enter into an enquiry u/s 151, CPC Code. To exercise or not inherent powers is certainly a matter in the discretion of the Court. In a given case the Court may decide the question u/s 151 or it may elect not to enter into it at all, in view of the difference in the rights of the parties as regards appeal and in the scopes of enquiry. Here, the trial Judge chose to look into the matter and see whether it was really defrauded. In *Dajiba Marotrao v. Champat Nagorao* 1960 N L J 648 : A I R 1951 Nag. 216Mudholkar J. held:

In a proper case, Section 151 can be resorted to and an ex parte order can properly be set aside thereunder. But the section can only be resorted to in exceptional cases for preventing injustice or for rectifying a mistake of the Court or for relieving a party against the consequences of a fraud practised on the Court.

In I. L. R. 1953 Hyd. 70 it was held that where a compromise decree is obtained by practising fraud on the Court, it has inherent power to set it aside.

In *Gajanand Sha and Others Vs. Dayanand Thakur*,) it was held that where an order was induced by misrepresentation against party ex parte, the Court had inherent power to set it aside.

In ILR (1941) 1 Cal. 405 it was held that where a decree was obtained by fraud on Court, it could entertain an application for setting aside the decree u/s 151, CPC though the remedy by way of a separate suit was open.

In A. I. R. 1915 Cal. 622 it was held that in the case of a compromise by suppression of service of summons and filing of false Vakalatnama, the Court could exercise its inherent powers.

In A. I. R. 1915 Mad. 281, it was held that where a satisfaction was recorded by fraud on the Court, it could be set aside u/s 151, CPC Code.

In A. I. R. 1926 Oudh 315, it was held that where a decree was obtained on the basis of a compromise signed by the pleader who was not authorised to enter into a compromise, the decree could be set aside u/s 151, CPC Code.

In A. I. R. 1947 Sind 4, it was held that where a Court was misled into recording a compromise by a wrong statement of a pleader of the party that he had special authority to compromise, the Court could set aside the compromise u/s 151. It was further held:

The mere fact that an appeal lies against the order of the Court recording the compromise does not debar it from acting u/s 151.

I agree with the above views and I hold that having regard to the allegations contained in Plaintiff's application dated February 23, 1956 u/s 151, CPC the trial Judge was undoubtedly competent to enquire into their truthfulness and find out whether fraud was actually practised upon it or that it had committed a mistake in dismissing the suit on the basis of Raghunath Das's application. I feel fortified in this view by the observations of their Lordships in Keshardeo Chamria Vs. Radha Kissen Chamria and Others,

It is argued in the alternative by Shri Swamisaran that even if it is held that the trial Judge had jurisdiction to use his power u/s 151, CPC this was not a fit case for interference. The argument is that in order to decide whether any fraud was practised or not, whether Raghunath Das was empowered to withdraw the suit as satisfied and whether the Defendant had made a payment could legitimately and properly be tried only in a suit. It was open to the Plaintiffs to institute a regular suit for setting aside the decree dated January 3, 1956 on the ground of fraud. I have given very anxious thought to this argument. It is no doubt true that if the Plaintiffs had instituted a regular suit all these questions would have been tried after framing proper issues on the basis of the pleading of the parties and after recording evidence which the parties chose to produce. It also cannot be denied that it is necessary to record the finding whether Raghunath Das was in fact competent or not to make that application. This question involves several things; whether Raghunath Das was a duly constituted attorney of the Plaintiffs Kunjilal and Mahesh Prasad, whether it was within the ambit of his powers to get the suit dismissed or to withdraw the suit; whether the alleged loans, for which suit in question was instituted, could be connected with the firm Phoolchand Mathuradas (in case it is found that Raghunath Das was the Mukhtar Am for the business of the said firm only) and such other questions as the trial Judge may consider necessary to decide in order to reach a conclusion whether a fraud was practised upon it or not.

Shri B. D. Gupta, Learned Counsel for the Respondents, in frankness and fairness, does not dispute that the parties should have been given an opportunity for production of evidence but he strenuously contends that the trial Judge acted within his jurisdiction.

Since I have reached the view that questions of fact were involved and the Plaintiffs and the Defendant had set out their respective cases in their applications mentioned above, and the learned trial Judge decided the matter merely after hearing arguments of both sides, the case must go back to him for recording evidence in support of and in rebuttal of the allegations made in the application dated February 23, 1956 u/s 151, CPC Code. I have already indicated what questions may legitimately arise for deciding that application. I may, however, observe that the question whether the Defendant had made the payment or not is not a question to be enquired into at this stage. If Raghunath

Das had power or authority to withdraw the suit it does not matter so far as the scope of the application of Section 151 is concerned, that the suit claim had not been satisfied. On the other hand, if the attorney had no such authority or power he could not get the suit dismissed even if the suit claim had been satisfied.

This revision is, therefore, allowed, the order dated December 31, 1958 is set aside and the case is sent back to the trial Judge for proceeding in the light of the observations made above. Costs in this revision shall abide by the ultimate decision of the Plaintiffs" application u/s 151, CPC Code.