

(1995) 10 MP CK 0001

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 223 of 1991

Nirmal Kumar Jain

APPELLANT

Vs

Dharamchand Jain

RESPONDENT

Date of Decision : 09-10-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 21, 96

Citation : (1996) JLJ 58

Hon'ble Judges : Sreesh Chandra Pandey, J

Bench : Single Bench

Advocate : N.K. Paid, for the Appellant; Sanjay Yadav, for the Respondent

Final Decision : Allowed

Judgement

S.C. Pantley, J.—This is an appeal against the Order dated 17.1.91 passed by Shri N.G. Karambelkar, District Judge, Damoh in Misc. Judicial Case No. 10/90 arising out of C.A. No. 3-A/90 decided on 30.6.90 by the District Judge, Damoh.

2. The Respondent Tiled the civil suit No. 8-A/88 for specific performance against the Appellant in the Court of IInd Civil Judge Class I, Damoh. The Appellant raised an objection that the suit filed by the Respondent is barred by time. The trial Court framed a preliminary issue and decided it against the Respondent. In other words the suit field by the Respondent was dismissed as barred by time.

3. The Respondent, thereupon filed an appeal u/s 96 of the CPC against the Judgement and decree dismissing the civil suit No. 8-A/88. This appeal was registered as civil appeal No. 23-A/90. A perusal of order sheet of civil appeal No. 3-A/90 shows that the appeal was filed on 2.5.90. It appears that the appeal was under stamped and therefore, the Appellant filed an application for extension of time for payment of Court fee on next date i.e. to say 3.5.90. The Appellant was heard on this application and he was permitted to pay the deficit of the Court fee by 4.5.90. On 4.5.90 the counsel for the Appellant appeared and filed the deficit of the Court fee. The Appellant was heard and an interim injunction

was issued by the Appellate Court to the effect that until further orders the Respondent shall not dispossess the Appellant and the land in dispute shall not be transferred by the Respondent to any body else.

The order sheet dated 4.5.90 & 13.6.90 are read as under : 4.5.90:

4-5-90 & vihykFkhZ }kjk Jh , - ds- JhokLro vfHk- A

vihykFkhZ us U;k; ?qYd ds LVki is? fd;sA

vihy fofu; eas ntZ jftLVj gksA

Jh JhokLro dks v- vk- ua- 2 ij lquk A

izdj.k ds rF;ksa o ifjLFkfr;ksa dks ns[krs gq, m?kj&nk;h ds fo:) ;g ,d i{kh; vLFkbbz fu?s/kkKk tkjh dh tkrh gS fd og vU; vkns? gksus rr oknxzLr tehu ls vihykFkhZ dks csn[ky u djs o u gh oknxzLr tehu gLrkarfjr djsaA v/khuLFk U;k;ky; lwfpr gksA ewy vfHkys[k cqyk;k tk;sA

izkjafHkd rdZ gsrq is?- rk- 13-6-90 dks A

ftyk U;k;k-

13-6-90 & vihykFkhZ }kjk Jh , - ds- JhokLro vfHk- mi- vukosnd vuq-

vukosnd dks lesr rkehy gksus ds ckn Hkh og is?h ij mifLFkr ugha mls dbZ ckj iqdkj yxokbZ xbZ ijUrq og U;k;ky; esa mifLFkr ugha gqvk vr% mlds fo:) ,d i{kh; dk;Zokgh dh thrh gSA

izdj.k vafre rdZ gsrq fnukad 30-6-90 dks is? gksA

ftyk U;k;k-

4. The Court below did not issue any notice of this application to the Appellant. He called for the record and fixed the case for admission on 13.6.90. On 13.6.90 the order sheet, which was recorded by the District Judge shows that the Appellant did not appear before the lower appellate Court till 12.15 p.m. The case was called several times. It was also stated in the Order sheet that the Appellant did not appear despite the service of summons and, therefore, the Court shall proceed against him ex-parte. The case then fixed for final arguments on 30.6.90. Order sheet dated 30.6.90 reads as under:

Appellant by Shri A.K. Shrivastava.

Respondent No. 1 absent, already ex-parte.

Respondent No . 2 absent. None appears.

Arguments heard, order passed.

Appeal allowed.

It appears that the order dated 30.6.90 was recorded by the learned District Judge in English in his own hand writing. The appeal was then allowed and the

case was decided ex-parte against the Appellant.

5. The Appellant, thereafter, filed an application under Order 41 Rule 21 of the CPC on 29.7.90 for setting aside the ex-parte decree passed by the Lower Appellate Court against the Appellant. This application was supported by an affidavit of the Appellant that he came to know about the passing of the ex-parte decree by the appellate Court on 20.7.90 and thereupon, he applied for the certified copy of the judgment and decree passed against him, and then, he filed an application on 28.7.90 within a period of limitation prescribed therefor.

6. The Respondent, after notice opposed the application of the Appellant alleging inter alia that the Appellant was served with the summons and he had full knowledge about the date of hearing of the case. He did not appear on the date fixed by the Court and thereafter, on the last date i.e. to say 30.6.90 when the order was passed. Therefore, the application under Order 41 Rule 21 CPC is liable to be rejected.

7. The learned District Judge by the impugned order has rejected the application of the Appellant and, therefore, in this appeal the learned Counsel for the Appellant Shri N.K. Palel pointed out that it is clear from the order sheet of civil appeal No. 3-A/90 that the Appellate Court never ordered for issuance of notice to the Appellant. The appeal was not admitted by the learned Judge it was merely fixed for admission on 13.6.90 as is clear from order sheet dated 4.5.90. He further urged that under such circumstances question of issuance of notice to the Appellant did not arise and therefore, it was a mystery how the order sheet of ex-parte was recorded. He also pointed out that it is peculiar that the learned District Judge passed an order that the case will proceed ex-parte against the Appellant. According to the counsel for the Appellant the learned District Judge ought to have simply adjourned the case on 13.6.90 in case he would not hear the case which he thought was ripe for final hearing for the next date. The question of an ex-parte order on 13.6.90 in appeal did not arise because such a procedure is not warranted by the provision of Order 41.

8. It is clear from the order sheet dated 4.5.90 that on 13.6.90 the case was not fixed for final hearing. It was not admitted and therefore, there was no Court order for serving notice on the Appellant. In such a situation it would be an mystery how the notice was issued. The Appellant had pleaded in the application neither he nor his wife was served with summons of the case for final hearing on 13.6.90. This application was opposed by the Respondent as already stated.

9. It appears that the learned District Judge who passed the order in MJC No. 10/90 did not read the order sheet whereby the Court proceeded ex-parte against the Appellant. It is clear from the order sheet dated 4.5.90 that the case was fixed for admission on 13.6.90 and then it was further adjourned to 30.6.90 therefore, the question of issuance of summons or notice on 4.5.90 did not arise because there was no order of the Court for that purpose and the case was fixed for admission only on 13.6.90. The learned District Judge had made grave error

in not perusing the order sheet dated 4.5.90 when he proceeded ex-parte on 13.6.90. This Court has constrained to observe that the learned Judge again made the same error when he decided the application of the Appellant under Order 41 Rule 21 of the Code of Civil Procedure

10. The order of the Court below on 13.6.90 in C.A. No. 3-A/90 was passed under total misapprehension and the same error perpetuated on 30.6.90. The order sheet dated 30.6.90 also shows that the learned Judge, had written order sheet in his own hand writing. He is not careful even in other matters. The order sheet dated 30.6.90 has already been reproduced by this Court with a view to point out the negligence on his part in this behalf. It is clear from the array of parties in this case that there are only two parties in this case but the order sheet records that Respondent No. 2 is absent. How could the learned District Judge record such an order sheet when he had heard the case on merits is beyond my comprehension.

11. Even otherwise, the learned Judge has not given proper reasons for refusing to set aside the ex-parte Judgement and decree. He has taken shelter under a very technical ground that affidavit of the Appellant is not admissible in evidence because it was not properly verified according to rules. In such circumstances, the learned Judge should have given the Appellant an opportunity for filing a fresh affidavit in case he thought that it was not in accordance with law.

12. Moreover, the learned Judge, has referred to service of summons. It is clear from the earlier paragraph in this order that question of issuance of summons or notice did not arise as there was no order of the Court and the Appellant was not bound by any notice got issued by the Respondent fraudulently. In such circumstances the notice was issued by the office of the District Judge to the Appellant could not be for final hearing. Even if the Appellant had chosen to ignore such a notice there would be no default on his part for which an appeal could be heard ex-parte. There appeared to be mistake of Court when the notice was issued to the Appellant. The case was not fixed for final hearing and could not be fixed for final hearing before admission. In absence of specific order of issuance of notice to the Appellant, who was Respondent in the lower appellate Court was not bound to appear.

13. Thus, there was sufficient cause for not appearing before the Court as no legal notice was served upon him for final hearing on 13.6.90 or thereafter. Therefore, the application of the Appellant under Order 41 Rule 21 of the CPC is liable to be accepted.

14. The learned Counsel for the Respondent has filed a certified copy of the judgment and decree dated 25.11.91 in civil suit No. 8-A/S8. It appears that after remand, the trial Court has decreed the suit, since there was no order of stay of further proceedings in trial Court. However, the order of Judgement of remand is liable to be set aside, the consequential judgment and decree of the trial Court would be non est. Even if such a decree is executed the Appellant can

claim restitution. Therefore, the Respondent cannot derive any advantage from passing of Judgement and decree on the basis of illegal remand.

15. Before parting with the case I may, observe in this case that the learned District Judge did not lake care to read the order sheet before passing the order. Had he done so, I, am sure, he would have restored the case to file. The learned District Judge is advised to take care in future. He would realise that such ordinary mistakes are likely to cause unnecessary expense and waste of time to the parties in fruitless litigation. A copy of this order be sent to the District Judge by the office wherever he is posted.

16. As a result of the discussion aforesaid the judgment and decree (sic) dated 30.6.90 passed by the learned District Judge is set aside and the civil appeal No. 3-A/90 is restored to file. The appeal is, therefore, allowed with cost of this Court as well as of the Court below and the counsel fee is fixed at Rs. 500/-. The office is directed to take effective steps to send back the record of the case immediately, and the parties are directed to appear before the District Judge, Damoh on 13.11.95 for taking further dales from him.