
(1976) 01 DEL CK 0008

In the Delhi High Court

Case No : Civil Revision Appeal No. 21 of 1976

Onkar Swamp

APPELLANT

Vs

Thakur Bikram Singh

RESPONDENT

Date of Decision : 26-01-1976

Acts Referred:

Citation : (1977) RLR 277

Hon'ble Judges : B.C. Misra, J

Bench : Single Bench

Advocate : K.K. Raizada and A.K. Kuba, for the Appellant;

Judgement

B.C. Mishra, J.

(1) Petitioner and deft. 2 were partners in a firm. Petitioner sold his share to deft. 1 for Rs. 25,000.00 and deft. 1 gave him cheque on 24-4-70 for part amount, of Rs. 15,000.00 which was to be presented on re-validation of licenses. The cheque when presented was dishonoured. On 22-2-73, deft. 1 sued petitioner for injunction that he should not encash the cheque and petitioner received its summons for 20-7-73 and filed w/s on that day and 5-11-73 was fixed for replication and issues. Petitioner filed his suit for Rs. 33,750.00 on 23-4-73 and 24-5-73 was fixed for service. Service did not take place as process fee was filed very late. For adjourned date 17-7-73, only deft. 2 was served and he was absent. For the next date 28-8-73, petitioner's counsel did not give process fee and suit against him was dismissed under O. 9, R. 3, CPC. For filing w/s of deft. 2. 12-9-73 was fixed upon costs of Rs. 100.00. Deft. 2 instead of filing W/s or paying costs filed a review application. It was dismissed and the court passed decree under Order 8 Rule 10 against deft. 2. to the other case, the plaintiff instead of filing replication withdrew the suit, when the petitioner's lawyer (DRG) stated that nothing survived between parties and the suit was dismissed. Petitioner learnt of the dismissal of his suit against deft. 1 on 18-8-74 and applied for setting aside of the same on 27-8-74 under O. 9, R. 4 CPC. Trial Court dismissed the application as barred by time, commenting that petitioner

had not produced his counsel (DRG). Petitioner moved High Court where it was held that conduct of Drg, advocate was far from normal, prudent or bonafide and there is ground to suspect that fraud had been committed on the petitioner. Para 10, onwards, judgment is : Again if the settlement of the dispute had taken place in the other suit giving rise to the revision, then the settlement ought to have been recorded in that suit and not in the suit of the respondent. The suit giving rise to the revision had been dismissed against the contesting respondent (defendant No. 1), on the ground of failure to file the process fee and not because of any settlement. How could failure to file the process fee settle the dispute between the parties ?

(2) In view of the statement of Mr. Gupta, the counsel for the respondent took up a very innocent attitude and stated that he wished to withdraw the suit. If the counsel for the plaintiff wanted to withdraw the suit, then the court should have allowed the suit to be withdrawn and it had no power to dismiss the suit. There is, Therefore, no doubt that there is something fishy in the whole affair and there is reasonable ground to suspect that a fraud has been committed on the petitioner. The conduct of Mr. D. R. Gupta, to say the least, has not been consistent with that of an advocate of ordinary prudence. I, however, do not wish to make any observations, which will prejudice him in his defense in a complaint of fraud and collusion which is alleged to have been brought against him before the Bar Council.

(3) The petitioner moved an application before the court below for setting aside the exparte order of dismissal of the suit for non-prosecution. The petitioner had stated that his counsel had played a fraud on him and had colluded with the first defendant and was liable for misconduct. The plaintiff petitioner had made his statement which has not been rebutted. The court has rejected the same on the ground that it was true that the petitioner had filed a complaint against Mr. D.R. Gupta for his negligence in not pursuing the suit, but that fact by itself would not absolve the plaintiff from producing the counsel as a witness in support of his allegations as Mr Gupta was alive and was a very important person to depose in favor of the plaintiff. By advancing this reason, the court below has legally misdirected itself on the issue raised before it. If the party is charging his counsel with fraud, negligence and collusion, naturally he could not expect the same Advocate to appear as his own witness, particularly as he had explained that proceedings for misconduct had been instituted against the Advocate with the Bar Council. This is a sufficient Explanation for the non-production of the Advocate by the party and the court has erred in law in drawing an adverse inference against the party for his failure to produce a hostile witness, who is alleged to be colluding with the opposite party. u/s 114 of the Evidence Act, the court is not bound to draw an adverse inference against a party for non-production of a witness and the matter rests in the discretion of the court and if the non-production is sufficiently explained, no adverse inference can be drawn (see illustration (g) u/s 114 of the Evidence Act). In Srichand K. Khetwani Vs. State of Maharashtra, , the Supreme Court held that adverse inference could be

drawn only if it withheld certain evidence and not merely on account of its failure to obtain certain evidence. In *Bhuban Bijay Singh Vs. Emperor*, it was held that it was absurd to expect the prosecution to call witnesses who would speak against that case and if the prosecution found that a number of those who were present would not support the prosecution case. They must make up their minds whether they were truthful witnesses or not. Reference may also be made to *Stephen Senivaratne V. The King*, Air 1936 Pc 289, and *Habeeb Mohammad Vs. The State of Hyderabad*. These cases lay down the law in criminal cases. They apply with stronger force to a civil case where the matter is to be decided on probabilities and not beyond reasonable doubt. The court below erred in ignoring important circumstances of the case and drawing an adverse inference against the petitioner for failure to produce a hostile witness who was charged with collusion and fraud.

(4) The court" below has further noticed that the plaintiff remained out of Delhi for quite some time on his professional duties, but he and his father were residents of Delhi and had an easy access to the counsel and no Explanation has been given as to what prevented them from instructing the counsel. This again is a misdirection. The knowledge must be of party and not of his father. Again if the counsel had, as alleged, played fraud, he would naturally not inform his client about the matter till the same becomes irretrievable. This is apparent from the fact that although the suit against defendant No. 1 was dismissed on 28th August, 1953, nothing was allowed to happen for more than a month and it was only on 5th November, 1973 after the expiry of the ordinary period for making an application for restoration of the suit that Mr. Gupta made a statement in the other suit. Under the circumstances court fell into an error in failing to take into consideration the unusual circumstances of the case and the court forgot that if the counsel had committed misconduct he was not likely to inform the party unless and until the party came to know about it later. Moreover, nothing has been brought out on the record to show that petitioner did not want to prosecute the suit against defendant No. 1 at any stage or was negligent in doing so excepting alleged conduct of Mr. Gupta. The court below has, Therefore, acted with material irregularity in exercise of its jurisdiction and "its order is not sustainable. The court below has held that the application of petitioner is barred by time. The limitation prescribed for such application under Art. 122 is 30 days from the date of order. But fraud resulting in absence of knowledge of the order may give a new starting point of limitation. Further the court has power under sec. 7 to condone the delay in the facts and circumstances of the case. For exercise of this power I have in revisional jurisdiction to "leave" the question to the discretion of the court below and do not wish to express any opinion, Hence, the revision is allowed and the order of the court dated 6th November, 1975 is set aside. The case is remanded to the Additional District Judge to decide the matter according to law on the material already placed on the file. This disposes of Cr 21 of 1975 which arises out of the order passed in S. No. 149 of 1973.

(5) This takes us to the consideration of the order passed in the other suit (No.

148/73) which had been instituted by first respondent against the petitioner. This has been withdrawn by the counsel for the respondent following upon the statement of Mr. D. R. Gupta made on 5th November, 1973. This statement seems to be closely connected with the results of the suit (No. 149/73). No revision or appeal has been filed against the same.

(6) u/s 115 of the CPC the High Court is entitled to call for the records of any case, decided by the court subordinate to it if a jurisdictional error has occurred. This power can be exercised by the High Court *Suo motu* without the application of any party if it appears to be desirable to do so and it is not necessary that it should be put in motion by the party aggrieved, (see *Mt. Jaimala Kunwar and Another Vs. Collector of Saharanpur and Others*, *Ramchandra V. Pannalal*, Air 1954 Rajasthan 191, and *Katragadda China Ramayya Vs. Chiruvella Venkanraju and Another*, .

(7) The limitation on exercise of this power "placed by the statute is that it cannot be exercised if an appeal lies to this court. In S. No. 148 of 1973, instituted by respondent No. 1, the valuation of the suit for purpose of court fee and jurisdiction is vide para 21 of the plaint fixed at Rs. 22 and the suit was tried by a sub-Judge and as such an appeal does not lie to this court. This court has, Therefore, jurisdiction to exercise its powers u/s 115 of the CPC *Suo motu*. Consequently, I sent for the record of the suit and by order dated 14th September, 1976 gave notice to the parties to show cause why order of Sub-Judge, dated 5.11.73 be set aside in "exercise of revisional jurisdiction of the court.

(8) "ALTHOUGH the said order had been passed against the respondent he has protested, while the counsel for the petitioner has expressed no objection to it. I have carefully considered the matter. In the order passed by Mr. Chawla, which has been set aside by this revision, the court has relied upon the statement of the counsel made in the other suit No. 148 of 1973.

(9) The statement made in that suit on 5th November, 1973 is also made by Mr. Gupta. He stated that there was no dispute surviving between the parties relating to the subject matter of the suit. He did not indicate what was the statement of the parties and how it was that the dispute did not survive. It is, Therefore, in the interests of justice that this order must also be set aside and both the suits must be tried together. In his reply to the notice by this court, as to why the order in the other suit be not revised the respondent has made an interesting statement that the present respondent had paid Rs. 100,000.00 in cash to petitioner when he had made the statement. The reference to payment of Rs. 10,000.00 is made for the first time and is not borne out on the record. Had this amount been paid as alleged, the respondent must be able to produce a receipt and this fact must have been brought to the notice of the court at that very time that the dispute had been settled on payment of "Rs. 10,000.00. Surely, it could not be the intention of the parties that the petitioner must get not only the full amount claimed in the suit (No. 149/73) decreed against

defendant No. 2, but must also get an additional sum of Rs. 10,000.00 from defendant No.1 without event obtaining the receipt or return of the cheque which defendant No. 1 had issued. The reply is again not signed by party nor is supported by an affidavit. But, it gives an indication that what the respondent wishes to convey is not true. Again the statement made by Mr. D. R. Gupta, Advocate, is that there has no subsisting dispute between the parties about the subject matter of the suit and the parties were left to bear their respective costs. The counsel for the first respondent stated that he had heard the statement of the counsel for the plaintiff which was correct and he withdraws the suit and the parties were left to bear their respective cost. the order that has been passed by the court is that the suit is dismissed. The court had no jurisdiction to pass the order. Had the suit been withdrawn under Order 23 the correct order should have been that the suit had been withdrawn or was dismissed as withdrawn. The order passed by the court dismissing the suit gives an impression that the suit has been dismissed either on merits or on compromise in view of the statements of the parties. This order suffers from a jurisdictional infirmity. The order dated 5th November, 1973 passed by (he Sub-Judge dismissing the suit is consequently set aside. It will be open to the court to consider whether it will accept the statement of Mr. D.R. Gupta in the circumstances of the case or it will insist upon recording the statement of the party in person as to whether or not any dispute survived or had been compromised and then it will proceed to decide the suit according to law. It is further directed that the District Judge will transfer this suit (No. 149/73) to the same court for further proceedings. Costs of this revision will abide by the result of the suit. The parties appearing before me are directed to appear before the District Judge on 23rd December 76 for appropriate proceedings.