
(2006) 06 J&K CK 0012

In the Jammu And Kashmir High Court

Case No : COD No. 384 Of 2004 Rev. Pet. No.

Punjab National Bank

APPELLANT

Vs

Farooq Ahmed Malik & Ors.

RESPONDENT

Date of Decision : 06-06-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 151

Citation : (2006) 3 JKJ 506 : (2007) SriLJ 81

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Advocate : N.A.Dandoo, M.Abdul Qayoom, Advocates appearing for the Parties

Judgement

1. Petitioner has moved this application for condoning the delay which had crept in filing the revision petition against the order dated 17th March,

2004 passed by learned Additional District Judge (Bank cases), Srinagar, whereby and whereunder the application for restoration came to be

dismissed, hereinafter referred to as impugned order.

2. This application came up for consideration before this Court on 11th November, 2005. After hearing learned counsel for parties, with the

consent of learned counsel for the parties, the Registry was directed to list this application along with the revision petition. Accordingly, revision

petition is taken on board. Registry to diarize the revision petition.

FACTS.

3. This case has a checkered history. It appears that petitioner/plaintiff has been dragged from post to pillar and pillar to post due to wrong advice

and inaction which has taken away the settings of law and caused delay in determining the core question involved in the lis. It also appears that the

attention of the trial court has also not been drawn towards the very important fact which would have set the controversy at rest.

4. It is beaten law of the land that procedure is the hand made in order to do justice between the parties. Rules and procedure are not themselves

an end but are means to achieve ends of justice. The procedure of law is meant to further the ends of justice and not to defeat the ends of justice.

Apex Court in case titled as Owners & Parties interested in M. V. "Vali Pero" v. Fernando Lopez, reported in 1989 SC2206, has observed as

under:

18. Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve

justice and are not hurdles to obstruct the pathway to justice. Construction of a rule of procedure which promotes justice and prevents its

miscarriage by enabling the Court to do justice in myriad situations, all of which cannot be envisaged, acting within the limits of the permissible

construction, must be preferred to that which is rigid and negatives the cause of justice. The reason is obvious. Procedure is meant to subserve and

not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed

procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result

have been inadvertently omitted in a particular case. In our view, this appears to be the pragmatic approach which needs to be adopted while

construing a purely procedural provision. Otherwise, rules of procedure will become the mistress instead of remaining the handmaid of justice,

contrary to the role attributed to it in our legal system.

Apex Court in case titled as C.B.I., Special Investigation Cell v. Anupam J. Kulkarni, reported in AIR 1992 SC 1768, has observed as under;

11. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation

which furthers the ends of justice should be preferred. It is true that the police custody is not the beall and endall of the whole investigation but yet it

is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited

policy custody. The period of first fifteen days should naturally apply in respect of

the investigation of that specific case for which the accused is held in custody. But such custody cannot further be held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused.

Plaintiff filed a suit for recovery in this Court on 8th April, 1988, which was transferred to the Court of 2nd Additional District Judge, Srinagar.

Defendants filed written statement on 16th August, 1988. Learned 2nd Additional District Judge, Srinagar, transferred the case to the Court of

District Judge (Bank Cases) Srinagar vide order dated 4th Feb., 1989. Issues came to be framed vide order dated 2nd May, 1989.

5. It appears that file was posted on 30th June, 1992 for recording the evidence of the plaintiff, but due to Hartal file came up on 1st July, 1992.

None caused appearance on behalf of the parties on the said date and on 29th July, 1992 parties had also chosen to remain absent and case was

posted on 6th August, 1992 on which date the parties had again chosen to remain absent and suit was consigned to records. It is useful to

reproduce the said order herein, which reads as under:

Urdu

6. An application was moved on 21st December, 1992 for restoration of the suit. The said application came to be consigned to records vide order

dated 18th Feb., 1995. It is profitable to reproduce the said order herein, which reads as under:

Urdu

7. Thereafter, it appears that an application for restoration was moved on 9th March, 1998 which was dismissed as withdrawn vide order dated

13.08.2002, with a liberty to plaintiff to file fresh restoration application. It is profitable to reproduce the operative part of the said order herein,

which reads as under:

Therefore, the prayer of the bank's counsel is granted and the present application is dismissed as withdrawn with liberty to the applicant bank to

file the fresh restoration application in case the bank is in a position to procure the certified copy of the order dismissing the main suit. File be

consigned to records.

8. It appears that petitioner bank accordingly filed application for restoration of

the suit on 4th December, 2002. The said application came to be dismissed in default vide order dated 4th March, 2003. It is profitable to reproduce the said order herein, which reads as under:

Urdu

9. Petitioner/plaintiff filed an application for restoration on 12th March, 2003, for restoration of the application for restoration of the suit dismissed on 4th March, 2003 and the said application came to be dismissed on 17th March, 2004.

10. While going through the minutes of trial court file, it appears that this case is really a terrible commentary of the negligence inaction and wrong advice. Not only case of inaction, negligence and ill advice/wrong advice but it appears that trial court has also lost sight of the orders passed in the main suit and the applications.

11. I am of the considered view that in terms of order dated 26th August, 1992, the suit stands consigned to records.

It is profitable to reproduce Rules 3 and 8 of Order 9 of Civil Procedure Code, hereinafter Code, herein, which read as under:

3. Where neither party appears, suit to be dismissed. Where neither party appears when the suit is called on for hearing, the Court, may make an order that the suit be dismissed.

8. Procedure where defendant only appears. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof in which case the Court shall pass the decree against the defendant upon such admission, and, where party only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

12. When a suit is simply consigned to records, the procedure contained in Order 9 Code read with Order 17 of the Code, will not govern the field. Order 9 of the Code will come into play when the order of dismissal is passed, whether in absence of both the parties or in absence of plaintiff only. Here the suit is still alive but has been consigned to records. The Court can exercise inherent jurisdiction in terms of Section 151 of the Code and can recall the order and call the suit from the record which is still alive but lying in the records without any decision.

This Court in case titled as Mst. Hajira vs. Mst. Hanifa, reported in 1998 SLJ 236, has held that suit consigned to records is alive and not

dismissed and can be called from the records. It is profitable to reproduce paras 6 and 17 of the said judgment herein, which reads as under:

6. So by reading the order of 26.12.1995, the contention of learned counsel for the petitioner Mr. Kuchay is belied that the previous suit between

the parties over the same subject matter was dismissed and is not well founded. From the perusal of the order referred to above, it seems that the

suit has been only consigned to records and has not been dismissed. Had the order been that the suit is dismissed in default and ordered to be

consigned to records, then it would be deemed that the suit was dismissed. Thus vide order dated 26.12.1995, the suit has only been consigned to

records and not dismissed. The file is still alive and can be called from the records for further proceedings, in case the plaintiff or the court so

desires.

17. The orders passed by the learned Subordinate Court in the circumstances of the case where as per averments of the petitioner that the person

of the plaintiff has filed a 2nd suit, when her 1st suit on the same subject matter as per averments was dismissed in default on 26.12.1995. The

Plaintiff had filed another suit on the same subject matter and this subsequent suit has also been dismissed in default on 15.2.1997. Application for

restoration of the suit has been moved along with the application, an application praying the court to direct the respondents not to forcibly eject

or evict the plaintiff from the possession of the portion of the property in their possession and in the alternative ask the parties to maintain statusquo

till disposal of the application for restoration. The subordinate court having considered the application and has passed the order of status quo on

spot as on date till objections are filed and considered. The order is inconspicuous and is falling within the purview of the order having been passed by

the subordinate judge by exercise of powers vested in him under section 151 CPC as no other provision of law has been pressed into service and

by such order, even otherwise also I do not find that any injustice has been caused by the order impugned, the order being one passed under

section 151 of Civil P.C.

Orissa High Court in case titled as Andhra Bank v. Susanta Kumar, reported in

AIR 1989 Orissa 168, has observed as under:

4. In the result, I would follow the decision reported in AIR 1964 Ori 134 and hold that the trial court had jurisdiction under S.151, C.P.C. to

restore the suit dismissed for nonpayment of courtfee and the learned trial court having failed to exercise jurisdiction vested in it by law this revision

is bound to succeed. I, therefore, set aside the impugned order and allow the revision. The application for restoration of the suit is allowed.

13. Applying the test, in this case also the suit had been consigned to records and not dismissed in default. Not only this, even the application for

restoration had also been consigned to records vide order dated 18th Feb., 1995.

It is profitable to reproduce Section 151 of the Code herein, which reads as under:

151. Saving of inherent powers of Court. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to

make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

14. This Section mandates that Court can exercise inherent powers at any stage in order to do justice between the parties and to redress the

grievances. Court has also power to recall an order in order to do substantial injustice.

Calcutta High Court in case titled as Ajoy Kumar Rit v. Iswar Dharma Thakur, reported in AIR 1995 Cal.370, has observed as under:

11. Section 151 of the Code of Civil Procedure is an enabling section. It was not possible for the Legislature to cover each and every case which

may come up before a Court for consideration and it is for that purpose to enable the Court to cover such cases that this enabling provisions was

put in the Code. There may be cases where the ex parte disposal of an application may result in substantial injustice to a party. The Court in such

circumstances should not fail to exercise its power to restore such case to their original position and then dispose the same according to merits

upon hearing both sides.

12. It is true that while disposing the revisional application the Court took into consideration the submission made by the learned counsel for the

opposite party/plaintiffs but in doing so the Court had not the advantage of hearing the submission of the other side.

14. In the aforesaid view of the matter I am of the opinion the recalling application should be allowed.

Apex Court in case titled as Rafiq and another v. Munshilal and another, reported in AIR 1981 SC 2400, has observed as under;

3. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of

his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no

material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an

innocent party suffering injustice merely because his chosen advocate defaulted

Apex Court in case titled as Jet Ply Wood Private Ltd. & anr. v. Madhukar Nowlakha, reported in 2006(3) JT 60, has observed as under:

24. From the order of the learned Civil Judge (Senior Division) 9th court at Alipore, it is clear that he had no intention of granting any leave for

filing of a fresh suit on the same cause of action while allowing the plaintiff to withdraw his suit. That does not, however, mean that by passing such

an order the learned court divested itself of its inherent power to recall its said order, which fact is also evident from the order itself which indicates

that the court did not find any scope to exercise its inherent powers under Section 151 of the Code of Civil Procedure for recalling the order

passed by it earlier. In the circumstances set out in the order of 24th September, 2004, the learned trial court felt that no case had been made out

to recall the order which had been made at the instance of the plaintiff himself. It was, therefore, not a question of lack of jurisdiction but the

conscious decision of the Court not to exercise such jurisdiction in favour of the plaintiff.

26. Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameshwar Sarkar's case,

allowed the application for withdrawal of the suit in exercise of inherent powers under Section 151 of the Code of Civil Procedure, upon holding

that when through mistake the plaintiff had withdrawn the suit, the court would not be powerless to set aside the order permitting withdrawal of the

suit.

It was the duty of the trial court to have perused the file in order to ascertain

whether the suit was dismissed in default and what type of order was passed. It appears that trial court lost sight of, the said order and even, the order passed on restoration application dated 18th February, 1995.

15. In the given circumstances, the impugned order came to be passed illegally and erroneously and has caused miscarriage of justice. The trial

court has failed to exercise the jurisdiction in terms of the mandate of law.

16. Learned counsel for respondent argued that the order is not in terms of Order 9 of the Code but in terms of Order 17 of the Code. Learned

counsel for respondent while elaborating the argument, argued that plaintiff had to lead evidence and he had failed to lead evidence and accordingly

suit came to be dismissed in terms of Order 17 Rule 2 of the Code. It is profitable to reproduce Rules 2 and 3 of Order 17 of the Code, herein,

which reads as under:

2. Procedure if parties fail to appear on day fixed. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail

to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it

thinks fit.

3. Court may proceed notwithstanding either party fails to produce evidence, etc. Where any part to a suit to whom time has been granted fails to

produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for

which time has been allowed, [the Court may, notwithstanding such default,

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under rule 2]

17. In terms of the mandate of Rule 3 of Order 17 of the Code, the trial court had to proceed in terms of Rule 2 of Order 17 of the Code. Rule 2

Order 17 of the Code mandates that the trial Court had to dispose of the suit in one of the modes provided by Order 9 or had to make such an

order as the Court thinks fit. The suit cannot be dismissed in terms of Order 17 Rule 3 of the Code, when neither plaintiff nor witnesses were

present but is to be dismissed in terms of Order 17 Rule 2 of the Code.

Apex Court in case titled as Mohandas and others Vs. Ghisia Bai and others, reported in 2002 SC 2436 has held as under:

1. The plaintiffappellant herein filed a suit for declaration and for permanent injunction in the Court of Civil Judge, Class II, Harsud, District

Khandwa, M. P. The said suit was filed on 26th October, 1984. 3rd May, 1994 was the date fixed for adducing evidence by the

plaintiffappellants. Instead of leading evidence, the plaintiff appellants filed an application for seeking better particulars of the written statement. The

said application was rejected. Immediately thereafter an application was moved under Order 17, Rule 16 for deletion of certain paragraphs of the

written statement. The said application was also rejected. On 7th May, 1994 the plaintiffappellants remained absent. The counsel for the

plaintiffappellants on the said date moved an application for a short adjournment for filing revision against the order passed on 3rd May, 1994

rejecting the application of plaintiffappellants. The said application for adjournment was dismissed. Thereafter the counsel for the plaintiffappellants

moved an application under Order VII, Rule 1 on the ground that the plaintiff is seriously ill and, therefore, the case may be adjourned. The said

application was also rejected. Thereafter the trial Court dismissed the suit under Order XVII, Rule 3 of the Code of Civil Procedure. The

plaintiffappellants preferred a first appeal before the first appellate Court, but the same was dismissed. The second appeal preferred by the

plaintiffappellants was also met with the same fate. The High Court was of the view that the suit was dismissed not under Order XVII, Rule 2, but

was dismissed under Order XVII, Rule 3. The validity of the judgment of the High Court is impugned in this appeal.

3. In the present case what we find is neither the plaintiffappellant nor his witnesses were present on 7th May, 1994. Therefore, the case has to be

dismissed under Order XVII, Rule 2. Even Rule 3 itself provides that if the parties or any of them absent, the Court shall proceed to decide the suit

under Order XVII, Rule 2. In view of the said legal position, we are of the view that the view taken by the Court below was erroneous and

deserves to be set aside. We, therefore, set aside the judgment under appeal and sent the case back to the trial Court to decide the matter in

accordance with law.

18. While going through the order dated 6th August, 1992, the said order, as discussed hereinabove, is not order of dismissal but is order of

consigning the case to records. It is also worthwhile to mention herein that case was fixed on 30th June, 1992 but due to Hartal it could not be

taken up on the said date and was taken up on 1st July, 1992. On the said date, parties were not present and case was adjourned to 29th July,

1992 and on the said date also the lawyers were on strike and case came to be consigned to records vide order dated 6th August, 1992. Thus in

the given circumstances, it cannot be said that plaintiff had to lead evidence on 6th August, 1992.

In the given circumstances, it cannot be said that suit was dismissed in terms of Order 17 Rule 2 of the Code.

Learned counsel for respondents also argued that by the conduct of the parties, the case has been treated as dismissed in default. Court has to

ascertain and see what was the order passed and what directions have been passed and what is held and laid down.

19. As discussed hereinabove, the public money is involved in the Us. The public money should not be fretted away in any way. It is duty of the

Court to see, watch and safeguard the interests of public and to protect the interests of the Society.

20. The question is whether this Court while exercising revisional powers can exercise inherent powers in order to do substantial justice. It is

profitable to reproduce subclause 1 of Section 115 of the Code, herein, which reads as under:

115. Revision. (1) The High Court may call for the record of any case which has been decided by any Court subordinate to the High Court and in

which no appeal lies thereto, and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, or

(d) to have caused failure of justice the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this section vary or reverse any order made, or an order deciding an issue, in the course of a suit or

other proceeding, except where

(a) the order, if it had been made in favour of the party applying for revision,

would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.]

[(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to

any Court subordinate thereto.

Explanation In this section, the expression ""any case which has been decided"" includes any order made, or any order deciding an issue, in the

course of a suit or other proceeding.]

21. This provision of the Code mandates and provides that High Court can exercise revisional powers where it appears that subordinate court had

exercised jurisdiction not vested in it by law or had failed to exercise the jurisdiction so vested in it or had acted illegally or with irregularity or had

passed such an order which has caused miscarriage of justice. As discussed, hereinabove, the trial court failed to exercise jurisdiction to recall the

case which is yet alive.

22. Keeping in view the revisional powers of this Court and inherent powers as enshrined in Section 115 and 151 of the Code, I deem it proper to

condone the delay and allow the revision petition and recall all orders passed by the trial court in the applications for restoration and the order

dated 6th August, 1992 passed in the suit.

23. In the given circumstances, the delay is condoned and the revision petition is allowed and the impugned order is set aside. Accordingly, the

order dated 6th August, 1992, passed in the suit and all other orders passed in the restoration applications are recalled. The suit shall now come

up for further proceedings before the trial Court on 17.05.2006. Parties are directed to cause appearance before the trial court on the said date.

24. While parting I deem it proper to make an observation herein that if plaintiff succeeds in the suit, the plaintiff is not entitled to interest from 6th

August, 1992 till date.

25. Registry is directed to diarize the revision petition. Send down the record along with a copy of this order. Accordingly, COD and the revision

petition are granted.