

(1988) 10 AHC CK 0019

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 8453 of 1988

Rajiv Lochan Pandey

APPELLANT

Vs

Madan Gopal Sharma and Others

RESPONDENT

Date of Decision : 14-10-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 9 Rule 13
Evidence Act, 1872 — Section 45
Limitation Act, 1963 — Section 5

Citation : AIR 1989 All 45 : (1989) AWC 181

Hon'ble Judges : K.C. Agrawal, J

Bench : Single Bench

Advocate : D.V. Jaiswal, for the Appellant;

Final Decision : Allowed

Judgement

K.C. Agrawal, J.—This petition under Article 226 of the Constitution has been filed by Rajiv Lochan Pandey for quashing the ex parte judgment and decree dated May 27, 1986 (Annexure 12 to the writ petition) and judgments and order dated March 7, 1987 and April 29, 1988 (Annexures 15 and 22 to the writ petition).

2. The petitioner was the tenant of a portion of bungalow No. 16, Clive Road, Allahabad. Pt. Gopi Nath Kunjuri the owner was residing in the remaining portion. The petitioner has been paying rent of the bungalow since 1970. After the death of Pt. Gopinath Kunjuru in 1982, Madan Gopal Sharma, respondent No. 1, forcibly occupied the portion, which was in possession of Pt. Gopinath Kunjuru without any right or authority.

3. The petitioner filed suit No. 777 of 1983 against the respondents Nos. 1 to 4 for permanent injunction restraining them from dispossessing him from the disputed premises otherwise than in accordance with law. Respondent No. 1 Madan Gopal Sharma also filed suit No. 758 of 1983 against the petitioner for permanent injunction. Respondents Nos. 2 and 3 were impleaded as defendants

in the plaint. Petitioner contested the suit and filed written statement in the same.

4. The aforesaid two suits were consolidated by an order dated November 19, 1983, and suit No. 759 of 1983 was made leading case. The two suits (suits Nos. 759 of 1983 and 777 of 1983) were transferred to the Court of XI Additional Munsif by the order of the District Judge dated February 1, 1985. The order sheet of the case recites as under :

"Transfer the case to the Court of XI Additional Munsif, Allahabad vide D.J.'s order dated January, 1985 for disposal."

These suits were again transferred on November 12, 1985. The order sheet is as under :

"..... transfer to Court of X Additional Munsif vide D.J.'s order (transfer order in O.S. No. 777/82)."

They were again transferred by the District Judge by his order dated February 19, 1986 to the Court of Munsif West," Allahabad. This order is quoted below :

"..... Transfer the case to the Court of Munsif West, Allahabad, vide D.J.'s order dated 12-2-86 for disposal."

After the two suits were transferred to the Court of Munsif West, Allahabad, suit No. 777 of 1983 filed by the petitioner was dismissed for default by judgment and decree dated May 27, 1986. By a judgment passed on the same date, the trial Court decreed the suit No. 759 of 1983. Both of these suits were disposed of by a common judgment. Since the petitioner did not have the knowledge of the suits transferred to Munsif West, Allahabad, the petitioner did not appear. In suit No. 759 of 1983 the plaintiff Madan Gopal Sharma filed his affidavit and on the basis of his affidavit the trial Court decreed the suit. The relevant portion of the judgment of the trial Court is quoted below :

*(.....)

5. Against the dismissal of his suit No. 777 of 1983, the petitioner filed an appeal on September 24, 1986. The memorandum of appeal recites :

"Appeal u/s. 96, C.P.C. against the judgment and decree dated 7-7-86 (and 27-5-86) passed by Munsif West, Sri Subhodh Kumar dismissing the Suit No. 777/83 of the plaintiff runs on the following amongst other..."

6. Counting limitation on the basis of assertion made in paragraph 10 of the memorandum of appeal, that the petitioner came to know about the ex parte decree on August 3, 1986, the Munsarim reported it to be barred by time by 89 days. It was accompanied with an application for stay as well as two affidavits. In one affidavit the petitioner stated-

"Affidavit in support of appeal for within time"

This statement was made on the assertion that the petitioner came to know of

the decree and the judgment of the trial Court on August 3, 1986. The Munsarim found it to be belated. The appeal was thereafter placed for admission on December 11, 1986. On that date the Court passed the order : --

"Nobody respondents on behalf of the applicant However, Sri Vinay Kumar Verma, Advocate, has appeared on behalf of the O.P. As the applicant himself is not present, this Civil Appeal is dismissed in default."

Before dismissal, Sri Vinai Kumar Verma had filed an objection on behalf of respondents Nos. 1 to 3 on October 9, 1986, for dismissal of the appeal. In paragraph 2 of the objection he stated that the appeal is not maintainable since the correct decree has not been filed and the report of Munsarim is also not correct in its absence. As such, the appeal deserves rejection for deficiency of Court-fee in addition to the fact that it is time barred as well.

7. The petitioner also filed an application under Order IX, Rule 13 of the CPC in Suit No. 759 of 1983 for setting aside the ex parte decree. The application was contested by Madan Gopal Sharma on a number of grounds, which were (1) limitation (2) no sufficient cause, (3) appeal preferred against a decree of suit No. 759 of 1983 having been dismissed, the application was barred because of the Explanation to Order IX, Rule 13 of the Code of Civil Procedure. This Explanation was added by C.P.C. (Amendment) Act 104 of 1976. It reads-

"Explanation-- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal no application shall lie under this rule for setting aside that ex parte decree."

8. The trial Court rejected the application. Against that order, the petitioner filed an appeal under Order XLIII, Rule 1(r) of the Code of : Civil Procedure. The appeal has been dismissed by the impugned order dated May 29, 1988. Against this order, the present writ : petition has been filed by the petitioner Rajiv Lochan Pandey.

9. There is a dispute between the parties about the ownership and title of Pt. Gopi Nath Kunjuru of Bungalow No. 16, Clive Road, Allahabad. It is not necessary for the present to go into that question. I do not wish to say anything on it. The question before me is as to whether the petitioner, Rajiv Lochan Pandey, had notice of the hearing of the suit No. 759 of 1983. On that date the trial Court also disposed of the amendment applications made by Madan Gopal Sharma. Madan Gopal Sharma moved three applications 73A, 75A and 77A in his suit. By way of these applications he sought the relief of possession after transposition of respondents Nos. 2 and 3 defendants to co-plaintiffs. The learned Civil Judge has found that the notice of some of these applications has not been given to Rajiv Lochan Pandey, but in his opinion it was not necessary since the petitioner Rajiv Lochan Pandey himself was responsible for the same being not present on the date of hearing.

10. The circumstances given by the learned Civil Judge would have been relevant had it been found after opportunity to the petitioner, Rajiv Lochan Pandey, that he had notice of the date on which the suit was decreed. The contest between the parties is that the petitioner had no knowledge of the transfer of the suits to the Court of Munsif West by the District Judge on February 12, 1986. The petitioner has alleged in paragraph 14 of the writ petition that he could not participate in the proceedings as he had to notice of the transfer of the cases from one Court Co another dated February 1, 1985, November 2, 1985 and February 19, 1986. The petitioner has denied his signature alleged to have been made on the order sheet of these dates and also asserted that even his counsel did not have any notice of the transfer of the cases, relief upon by Madan Gopal Sharma for establishing that the petitioner, as well as his counsel, had knowledge of the transfer of the suits. The trial Court did not believe the petitioner and rejected the application. It also issued notice to the petitioner for having filed false affidavit. In the appeal the learned Civil Judge has agreed with the trial Court.

11. Before the learned Civil Judge an application was made by the petitioner for appointment of an expert to examine the disputed signature and for its comparison with the admitted ones. The learned Civil Judge rejected the prayer by saying that the prayer made was belated and, as such, that could not be acceded to. In his opinion no case under Order XLI, Rule 27 of the CPC had been made out for appointment of the expert at the appellate stage. He held that the petitioner knew from the beginning about the controversy with regard to signatures made on the order sheet and that he should have produced expert in the trial Court when the application under Order IX, Rule 13 of the Code was being argued. He held that Order XLI, Rule 27(i)(b) of the Code is not attracted. The learned Civil Judge observed : --

"The judgment in this appeal can be pronounced finally and effectively even without such an evidence."

12. What did the learned Civil Judge do was that he compared the admitted signature with the disputed one and found that the disputed signatures appeared to be like that of the petitioner. The learned Civil Judge held that in any view of the matter the expert's opinion had to be tested by the Court itself and, as such, there was no point in wasting the time of the Court in permitting the petitioner to produce the expert. Order XLI, Rule 27(1) reads as under :

"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a)

(aa)

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial

cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

13. This means that the Appellate Court may admit additional evidence in appeal to enable it to pronounce judgment, which, according to the Court passing it, would be correct and satisfactory. The word "requires" in Clause (b) means "finds it needful". See AIR 1931 143 (Privy Council) . The two tests to be applied is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into account the additional evidence sought to be produced. No doubt, the petitioner did not apply for examination of the expert at the trial Court stage, which he should have done. But the question is whether on the facts and in the circumstances of the present case omission on his part to move an application for examination of the expert could be such a ground that even though justice required it the Appellate Court should not have granted the prayer for examination. In my opinion, the lower appellate Court erred grossly in not permitting the expert to be examined. The evidence of the petitioner hinged upon whether the petitioner had knowledge of the transfer of the case from one Court to another and that could be established only by arriving at a finding whether the order sheet was signed by him and his lawyer.

14. About the utility of an expert report, it has been observed by Cross in his book "Cross on Evidence", Sixth Edition page 441 as follows : --

"The Court of Session repudiated the suggestion that the Judge or jury is bound to adopt the views of an expert, even if they should be uncontradicted, because: "The parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert." This case reaffirmed the view that an expert might adopt statements made in scientific works as part of his testimony, and portions of such works might be put to him in cross-examination. To this extent they may be used as evidence in the case, but the Judge is entitled to form an opinion on the basis of other parts of the book."

15. "Phipson on Evidence, 1963, says about the utility of handwriting expert's opinion :

"Experts may, as we have seen, give their opinions upon the genuineness of a disputed handwriting, whether ancient or modern, after having compared it with specimens proved to the satisfaction of the Judge to be genuine....."

16. An eminent author writes :

"The real expert.....when guided and assisted by the competent lawyer, will make the facts themselves testify and stand as silent, but convincing, witnesses pointing the way to truth and justice". Osborn questioned Documents, P. 23.

17. Of this author's work Wigmore says :

"The feature of Mr. Osborn's book which will perhaps mark its most progressive aspect is its insistence upon the reasons for an opinion, not the bare opinion

alone". LRA 1918 647 (Baird v. Shaffer, 101 Kan 585, 168 P. 836.

8. The expert would have expressed the opinion as to whether the order sheet had been forged or not. The learned Civil Judge brushed aside this important aspect of the matter by observing that the Court since had to pass the order ultimately by applying its own mind, there was no use in appointing the expert. He committed a gross error in taking the above view. Where there are expert opinions, they will aid the Court. *Murari Lal v. State of Madhya Pradesh* AIR 1980 SC 531, does lay down that the Court had to compare the disputed writings with the admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written, but it has at the same time, opined that expert's opinion will aid the Court. Where there is expert's opinion it will guide the Court in arriving at a correct conclusion. In my opinion the Court below wrongly rejected the application filed by the petitioner under Order XLI, Rule 27(i)(b) and incorrectly held that since both the sides were likely to produce experts and each one of them would have supported his client, therefore, there was not use in calling for the expert's opinion. Even if there would have been two varying reports, the Court could find out the truth and that could never be a ground for rejecting the application.

19. The other question, which was vehemently submitted by respondents' counsel, was about the Explanation added to Order IX, Rule 13 of the Code. I have already quoted said Explanation. Counsel urged that since the appeal filed by the petitioner against the ex parte decree passed in Suit No. 759 of 1983 and been dismissed, the application under Order IX, Rule 13 of the Code was not maintainable. That is the view taken by the learned Civil Judge as well. The argument of Sri Murlidhar, counsel for the petitioner, was that the appeal was not preferred against the judgment passed in Suit No. 759 of 1983 and that it was an appeal against the decree of Suit No. 777 of 1983.

20. I have gone through the record and find from the memorandum of appeal, which I have quoted above, that the appeal was preferred against the decree in Suit No. 777 of 1983 and not in Suit No. 759 of 1983. The appeal did not accompany the decree of Suit No. 759 of 1983 and, in fact, that when the objection of the respondent No. 1 taken by his counsel in the Court below. In the absence of a copy of the decree, there could be no competent appeal. Finally of a copy of the decree is mandatory and in the absence of the same, the appeal will be incompetent.

21. In *Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others*, , the Supreme Court held that if a copy of the decree was not filed along with the memorandum of appeal, the appeal was incompetent. This decision was followed by the Supreme Court in *Phoolchand v. Gopal Lal* AIR 1967 SC 470. It was held that requirement of Order XLI, Rule 1 of the Code is mandatory and that the appeal would be incompetent, defective and incomplete in the absence of a copy of the decree.

22. In *Shakuntala Devi Jain Vs. Kuntal Kumari and Others*, , it was held that :

"Under Order XLI, Rule 1 the appellate Court can dispense with the filing of the copy of the judgment, but it has no power to dispense with the filing of the copy of the decree."

23. In the instant case, it appears from the abovesaid that the decree of Suit No. 759 of 1983 was not filed. Consequently, the Civil Appeal No. 640 of 1986 was incompetent. As the appeal was incompetent, the application under Order IX, Rule 13 of the Code could not be rejected because of the Explanation added to it. Filing of the memorandum, without the decree, would mean that there was no appeal. Since, there was no appeal, Explanation added to Order IX, Rule 13 of the Code could not apply.

24. It may also be noted that Civil Appeal No. 640 of 1986 was filed against the judgment and decree in Suit No. 777 of 1983. Even the Court-fee paid on the memorandum of appeal was Rs. 12.50 as paid in Suit No. 777 of 1983, whereas the Court-fee payable in the appeal of Suit No. 759 of 1983 should have been Rs. 640/-. The Munsarim reported the memorandum of appeal to bear proper Court-fee stamps as it arose out of Suit No. 777 of 1983. Had it been arising out of Suit No. 759 of 1983, the report must have been different". It has already been pointed out that one of the objections raised by respondents was that the Court-fee was not sufficient.

25. Sri S. S. Tyagi, learned counsel for the respondent, argued vehemently, by taking me through the grounds of appeal and the stay application, that as the decree of the trial Court is a decree of a suit dismissed for default, no appeal could lay and, as such, it had to be held that the appeal arose from Suit No. 759 of 1983. As to whether the appeal was maintainable or not is besides the question. What was filed is the question relevant for deciding the applicability of the Explanation to Order IX, Rule 13 of the Code. It is correct that some of the grounds taken in the memorandum of appeal could arise only from Suit No. 759 of 1983 and that is also a fact with regard to the stay application. But that is not conclusion of the controversy. In the memorandum of appeal it has been very clearly stated that the same arose out of Suit No. 777 of 1983. The decision of the Supreme Court relied upon, reported in *Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury*, , arose on different facts. The Supreme Court held that the disposal of the appeal on any ground except the solitary ground of disposal of appeal by withdrawal of the same by the applicant will create a bar to the maintainability of the application under Order IX, Rule 13 of the Code. I have given two reasons in the instant case for negating the argument of the respondent No. 1 for applying the same.

26. Sri S. S. Tyagi urged that since the petitioner had knowledge, and there was no application for condonation of delay, therefore, the trial Court did not commit any mistake in rejecting the application under Order IX, Rule 13 of the Code. The petitioner had stated clearly in the affidavit, whether that was relied or not that

he did not have the knowledge of the date of hearing of the suit and if that is ultimately found established. the application filed by him under Order IX, Rule 13 of the Code could not be held to be time barred. Similarly, for condonation of delay, not in all the cases, it is always necessary to move an application u/s 5 of the Limitation Act. But if from the affidavit of a particular case, the delay is found explained fully, the Court has ample power to condone the same.

27. Suit No. 759 of 1983 had been decreed by the trial Court on the basis of affidavits filed by Madan Gopal Sharma, Order XIX, Rule 1 of the Code enable a Court to order that any particular fact may be proved by affidavit. But that can be done only when there is sufficient reason for it and there must be specific order of b the Court for taking the evidence. In the instant case there was no order of the Court. Consequently, what was done by the Court was illegal. However, I am not called upon to express any concluded opinion on this controversy.

28. For what I have said above, the writ petition is allowed, the judgment of the two courts below dated March 7, 1987 and April 29, 1988. are set aside and I direct the trial court do decide the application under Order IX Rule 13 of the Code, as the amendment applications Nos. 73A, 75 A and 77 A afresh. The petitioner will be entitled to get costs of this petition from the respondent No. 1.