RAJASTHAN HIGH COURT

Laxmi Lal

Vs.

Gulab Bai

Civil Spl. Appeal No. 35 of 2006

(N.N. Mathur and Manak Mohta, JJ.)

25.01.2006

ORDER

N. N. Mathur and Manak Mohta, JJ.

1. By the impugned order dated 23-1-2006, learned single Judge has dismissed the Restoration Application.

2. Necessary facts for disposal of the instant appeal are that the appellant filed second appeal against the judgment and decree dated 1-11-2002 passed by the learned District Judge, Rajsamand, through Mr. Manish Sisodia, Advocate. As the objections pointed out by the office were not removed, the matter was listed before the Court. Learned single Judge passed the peremptory order dated 2-12-2004 as follows:

> "Learned counsel for the appellant is granted three weeks' time to remove the defects. In case the defects are not removed within aforesaid period, the second appeal shall automatically stand dismissed without reference to the Court."

3. In view of the peremptory order, the second appeal stood dismissed on 18-1-2005.

4. The appellant filed an application under Order 41, Rule 19 read with Section 151, C.P.C. seeking restoration of the appeal on the ground that the counsel for the appellant Mr. Manish Sisodia was not aware of the peremptory order passed on 2-12-2004 as he had not appeared on the said date on account of sad demise of his father Sri D. S. Sisodia, Senior Advocate only three days' back i.e. 29-11-2004. He was under the impression that the case was adjourned. Thus, he pleaded regret for the *bona fide* misunderstanding and prayed for re-admission or restoration of the appeal to secure the ends of justice. Learned single Judge having taken note of unfortunate death of Senior Counsel shortly before passing of the peremptory order, did not consider it to be a fit case for restoration, as in his opinion, sufficient time was granted

while making the peremptory order. The impugned order dated 23-1-2006, reads as follows:-

> "Heard learned counsel for the petitioner.
> Admittedly, the peremptory order has not been complied with, and more than sufficient time had already been granted in the past right from 2003, and therefore, peremptory order was made in December, 2004.
> In these circumstances, I do not find any sufficient ground to restore the appeal. The order was passed in the presence of the counsel appearing in the Court. It is unfortunate that the Senior Counsel had died shortly before passing of the peremptory order, but nonetheless sufficient time was granted while making the order peremptory. The restoration application is, therefore, dismissed."

5. It is contended by the learned counsel that while disposing of the Restoration application, learned single Judge neither addressed to the factual aspects i.e. the reasons urged for seeking restoration nor the legal aspects i.e. binding decisions of the Apex Court and this Court laying down the parameters for the restoration of the matter dismissed in default or for non- compliance. A bare reading of the impugned order shows that the learned Judge has only justified the peremptory order passed by him. Thus, the impugned order suffers from the total non- application of mind.

6. Having heard Mr. Manish Sisodia, learned counsel for the appellant, we are of the view that the instant appeal deserves to be allowed. It will not be out of place to mention that India has written Constitution wherein powers of the three organs of the State have been demarcated and defined. It envisages separation of powers and expects each organ of the State to keep to its own area. India is governed by the Rule of law based on the principle of equity. The Legislature contemplating possible eventualities, which may arise in a litigation provided mechanism in the form of civil code for administration of justice between parties. In the present context legislative policy is to dismissal of suit under Order 9, in certain eventualities. The legislature in its wisdom also provided provision for restoration and setting aside *ex parte* decree. Legislature has provided similar provision for appeals under Order 41. Thus, the policy of the legislature is that in certain eventualities suit or appeals can be dismissed. At the same time policy is also to restore. Judiciary has no competence to declare a policy contrary to the statutory provisions. Any declaration of a policy, oral or written not to restore any petition or appeal, is beyond the competence of the Court and unconstitutional unless the provision is struck down by the competent Court.

7. Under Order 41, Rule 17, Civil Procedure Code the Appellate Court has a power to dismiss an appeal for default of the appellant. Order 41, Rule 19, Civil Procedure

Code provides for re- admission of appeal dismissed in default. The consideration for dismissal of an appeal for default and consideration for re-admission of an appeal, are different. If a sufficient cause is shown for non-appearance when the appeal was called, a duty is cast on the Court to re-admit the appeal. The very existence of the Courts are for doing justice. Thus, the approach has to be justice oriented. The legislature has armed the Courts to do justice bestowing powers under Section 151, Civil Procedure Code which provides that nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of this Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of Court. Thus, it is evident that legislature in its wisdom after taking a policy-decision has bestowed discretion on the Court to exercise the same judiciously. The judicial discretion cannot be exercised in a close mind under a self-evolved policy. The Courts have no option, no authority but to exercise the powers judiciously and not capriciously or arbitrarily, otherwise, it is bound to result in undesirable consequences. The jurisdiction of the Court must be dictated by exigency of the situation and fair play and good sense appears to be the only safe-guides/and requirement of justice. One of the considerations may be to discipline the lawyers, but to do justice with the people approaching the Court must be the paramount consideration, for the very purpose the Courts exists. We have dealt with this aspect in great detail in our order dated 29-9-2005 passed in *Ratan Singh v. State of Rajasthan* [1] The decision in the said case is based on an earlier Division Bench judgement of this Court in *Rajasthan State Industrial Development and Investment Corporation v. Modi Trade Mills, reported* [2] *in* It is observed therein that a little more sensitive approach is required to be adopted by the Courts in process of dispensation of justice. The Court also desired that a party should not be driven out from the Court by way of punishment for whatever reason. It will be travesty of justice if the Court fails to exercise the power in restoring the proceedings except for rare and exceptional reasons. We may remind an age old well established principle that every Court has inherent power to act *ex debito* justitiae to do real and substantial justice for which it exists. It has always been the anxiety of the Courts to decide an issue on merit instead of driving out a party from the Court for one or the other technical reason. Even if the party was remiss in complying with the directions of the Court, the petition could have been restored on payment of cost. On refusal to restore a petition is bound to result in meritorious matter being thrown out and the cause of justice being defeated. In an identical situation a Division Bench of this Court refused to restore the petition dismissed as a consequence of peremptory order being not complied with. When the matter was carried to the Apex Court, the Special Leave to Appeal (*State v. Sal Khan*) [3] was allowed restoring the petition by a brief order dated 8-2- 2004, saying :

> "High Court ought to have condoned the delay and restored the matter. High Court not having done so, we do it now."

8. In the instant case, the learned single Judge has not said a word as to the ground for restoration i.e. ignorance of the peremptory order dated 2-12-2004 and plea of *bona fide* misunderstanding. It cannot be disputed that ordinarily Mr. Manish Sisodia could not have been in the Court on 2-12-2004 on account of sad demise of his father on 29-11-2004. We are of the view that there cannot be any better case than the instant one where applying the law of the land, the petition for restoration has to be allowed without slightest hesitation. We are satisfied that there is truth in saying that there was a *bona fide* misunderstanding on the part of Mr. Manish Sisodia that on 2-12-2004 case was adjourned, as such, he was not aware of peremptory order dated 2-12-2004. The appellant has right to be heard and considered his case on merit in right perspective. The impugned order has caused grave prejudice to him, consequently there has been serious miscarriage of justice. Under the circumstance the impugned order cannot be sustained.

9. Following the course adopted by the Apex Court in *State v. Sal Khan* (supra), we say "Learned single Judge ought to have restored the matter. Learned single Judge not having done so, we do it now".

10. Consequently, the special appeal is allowed. The order of the learned single Judge dated 23-1-2006 is set aside. The restoration application filed by the appellant is allowed. The Civil Second Appeal is restored to its original number. Let the matter be placed before the learned single Judge. The interim order granted by this Court dated 24-1-2006 shall continue upto 28th February, 2006.
Appeal allowed.

Cases Referred.

1. D. B. Civil Special Appeal No. 382/2005,(reported in 2006 (1) AIR Jhar R (NOC) 255)
2. RLW 2003 (4) page 2192 (AIR 2003 Raj 227)
3. (Civil Appeal No. 872/2004)