NAGPUR HIGH COURT

Krishna kumar

Vs

Jawand Singh

(Bose, J.)

05.08.1946

ORDER

Bose, J.

1. On 4-1-1945 the trial Court directed the plaintiff to make discovery of his account books on 291-1945. On the next hearing, 29-1-1945, the defendant complained that no discovery had been made. The Court then fixed the case for 9-4-1945. Since no discovery was made even on that date the defendant asked that the suit be dismissed for want of prosecution under Order 11, Rule 21, Civil Procedure Code This was done for the following reasons set out in the order-sheet:

> The plaintiff was very negligent. He should have, if he had no account books, filed an affidavit to that effect. Now the defendant (sic) cannot give evidence that 'the plaintiff has no account books.
> (The word 'defendant' in the order-sheet is clearly a slip for 'plaintiff.') It seems that the plaintiff entered the witness-box and wanted to depose on oath that he had no account books. The Court would not allow him to do this because, in its view, he had not complied with the provisions of the Code of Civil Procedure and had not filed an affidavit as the Code requires. The order was then signed.

2. Later in the day, after the order had been signed (the time of the signing of the order is given as 12-12 P.M.) the plaintiff's counsel made two applications asking that the order be set aside. The main grounds given were, first that the plaintiff's counsel had informed the defendant's counsel that the plaintiff had no account books as he never maintained any. This according to the plaintiff's counsel occurred in January 1945. Another ground given was that the plaintiff's pleader was under the impression that as the plaintiff was entering the witness-box he would state on oath that he had no account books and consequently was unable to give discovery. The application also states that when objection was taken to the want of an affidavit the plaintiff stated that he would be prepared to make an affidavit within half an hour. But the Court did not grant this and dismissed the suit under Order 11, Rule 21, Civil Procedure Code

3. The Court entertained this application on the same day and set aside its order on 26-6-1945. The question I have to decide in revision is whether it had jurisdiction to do so and whether it

was otherwise proper for it to make such an order.

4. On the question of jurisdiction I am clear that the Court had no jurisdiction. Order 43, Rule 1, Civil Procedure Code, provides an appeal from an order dismissing a suit for want of prosecution under Order 11, Rule 21 of the Code. Order 47, Rule 1, provides for a review. Therefore two distinct remedies are provided in the Code, against an order made in the circumstances like the present. That being the case, it is not possible to attract the provisions of Section 151 and invoke the inherent jurisdiction of the Court. This was stated in emphatic terms by me in a Division Bench case, (which in any event binds me), reported in *Sheolal v. Jugal Kishore*[1], I stated there, (the Honourable the Chief justice concurred):

> ... what we desire most emphatically to emphasize is that not only must the power so conferred be sparingly used but that Courts have no power whatever to resort to Section 151, when the matter is expressly dealt with in the Code, and that if they do so they act without jurisdiction and their orders are revisable.

5. Much the same principle is laid down by their Lordships of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh,*[2] a case under the Limitation Act. The proposition contended for before their Lordships was that in a case of hardship the Courts had some judicial discretion to relieve a party from the operation of the Limitation Act, but the argument would of course apply to any Act. Their Lordships stated:

> It is enough to say that there is no authority to support the proposition contended for. In their Lordships' opinion it is impossible to hold that, in a matter which is governed by the Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions.

6. Other High Courts have taken a similar view and I need only refer to *Abdul Karim Abu Ahmad Khan v. Allahabad Bank Ltd*[3]. *Maung Khant Gyi v. Ma Thet Hnin*[4]. *Asutosh v. Indu Bhusan.*[5], *Mt. Rahmat Bibi v. Chandu Lal*[6], and *Mallappa v. Alagiri*[7]

7. I was, however, referred to two decisions of this Court, *Narayan v. Mitharam*[8], and *Ramchandra v. Bhiniji*[9] where a reference under the inherent jurisdiction of the Court was permitted even though an appeal was provided under the Code. Those cases are, however, distinguishable on other grounds. If there is one principle more fundamental than any other underlying the whole system of the jurisprudence which we administer, it is this. No party is to suffer for a mistake of the Court when that party is not in any way to blame. That principle overrides even the principles to which I have referred to above. In *Ramchandra v. Bhiniji Civil Revn. No. 34 of 1945, D/-7-1-1946(sup)* it seems that the Court had informed the pleader that it would deal with the

[1] AIR 1940 Nagur 349
[2] AIR 1935 PC 85 : 155 Ind. Cas. 205 : 1935-41-LW 629
[3] A.I.R. 1917 Cal. 44
[4] A.I.R. 1925 Rang
[5] AIR 1927 Cal 158
[6] AIR 1939 All 497 : 1939 AWR (H.C.) 9 365
[7] A.I.R. 1931 Mad. 791
[8] AIR 1934 Nag 234 : 152 Ind. Cas. 211
[9] Civil Revn. No. 34 of 1945, D/-7-1-1946

application for review presented by him after it had decided another matter. It completely forgot its promise it had made to the pleader and dismissed the application in default. That of course, would at once attract the provisions of Section 151, Civil Procedure Code The party was in no way at fault. He made an application and had a right to have it decided. Instead of hearing it, as the Court was bound to do, the Court through a mistake of its own, forgot that it had postponed the hearing and proceeded to dismiss the application in default. That is not a case like the present; here there is no fault of the Court and the plaintiff was at fault in that he had not complied with the provisions of the Code of Civil Procedure. *Narayan v. Mitharam*[10]*,* was a similar case. Pollock J. remarked there that inherent powers can be invoked:

> ... to correct errors that have led to injustice through no fault of a party.
> The underlining (here italicised) is mine. I stress "through no fault of a party." Of course if the plaintiff had not been at fault the order we find here would be proper.

8. As regards the other cases cited, I have not seen *Mohanlal & Co. v. Yolibai*[11] but *Khajah Assenoola Joo v. Khajah Abdul Aziz*[12] is a case in which no decision was given. The learned Judge struck out the defence under Section 136 of the old Civil Procedure Code and at the same time mentioned that the appellant might come in and make an application to set aside the order on showing good grounds. He did not however, decide what would happen when the application was made. He could not have granted the application without hearing the other side and consequently he could not in advance have decided the matter without affording an opportunity for argument to the other side, as the law requires. Consequently that is not a decision on this point.

9. *Sundara Sivarao v. Gangamma*[13] is another case of the type which falls under the general exception to which I have just referred. That was a case in which the Court passed orders under a mistaken belief that both parties had been fully heard whereas in fact it turned out that that was not the case. Neither side was at fault there and the orders were passed owing to misapprehension.

10. The lower Court relies on *Raghunath v. Khatum Bi*[14]*,* but the learned Judge has omitted to notice the important qualification contained in the sentence:

> .....though it has no such jurisdiction in respect of a suit dismissed for default.
> What Macnair J. held in that case was that a Court has inherent powers to review or modify its orders in respect of a matter while it is still seized of the case and retains jurisdiction. Once, however, the case has been dismissed then the jurisdiction of the Judge ceases and it cannot retake seisin except in the modes provided by the Code.

11. It was then argued that if that be the case then at least the plaintiff had a right of review under Order 47, Rule 1, and since an application was made which in substance amounted to an application for review, lower Court's order should be treated as

[10] AIR 1934 Nagp 234 : 152 Ind. Cas. 211
[11] A.I.R. 1932 Bom. 271
[12](83) 9 Cal. 923
[13] A.I.R. 1934 Mad. 506
[14] AIR 1933 Nag 176

having been made under Order 47, Rule 11 quite agree that the mere labelling of an application

would not in most cases operate to a party's disadvantage provided the other side is not prejudiced. And I would have been prepared to treat this as an application for review and treat the order as one of review had the matter fallen within the terms of Order 47, Rule 1. But it has to be remembered that a Court's powers of review are extremely limited, and unless the matter can fall directly within the provisions of Order 47, Rule 1 it has no power to review its decision, still less can it resort to its inherent jurisdiction.

12. The ground of the decision under Order 11, Rule 21 was that the plaintiff had been negligent and that though the law requires the filing of an affidavit he had made none. There was no mistake or error in respect of that and consequently whether right or wrong the matter was final and the learned Judge had no power to review it. The ground of review given was that the plaintiff's counsel had informed the defendant's counsel that the plaintiff had no account books. That, however, is not what the Code requires. That argument was considered in the previous order and rejected. A deliberate decision was thus reached and having been reached, it could not be reviewed.

13. It was argued that in point of fact there was an error because the Code does not require an affidavit in cases where there are no books. The affidavit is only required where the party is in possession and control of the documents of which discovery is sought. Even if that had been so it would have not afforded a ground for review, because it would at most have amounted to an error of law, and an error of law is not a ground on which a Court can review its decision. But in point of fact the argument itself is incorrect. Order 11, Rule 13 requires an affidavit and Appendix C No. 5 shows that the affidavit must disclose that the party has no document if in fact he has none. Clause (5) of the Form runs:

> According to the best of my knowledge, information and belief I have not now and never had, in my possession, custody or power, etc..., any account, book of account, etc...whatsoever, relating to the matters in question in this suit or any of them...other than and except the documents set forth in the said Schs. 1 and 2 hereto.
>
> Schedules 1 and 2 referred t6 above require the party to set out such documents as he has in his possession or power relating to the matters in question in the suit. It is clear, therefore, that there was failure to comply with the provisions of the Code and that, therefore, the order of 9-4.1945 was legally correct, though, of course, the Court could in the exercise of its discretion have granted further time if it had thought fit. That question, however, was also considered and it refused to grant time because it held that the plaintiff had been very negligent. Having reached those deliberate decisions it could not in review alter its mind and change its order. Right or wrong its decision is final.

14. The application is allowed. The order of the lower Court is set aside, and its previous order dismissing the suit for want of prosecution under Order 11, Rule 21 is restored.

15. Costs of this application will be paid by the plaintiff non-applicant. Counsel's fee ₹ 40.

Application allowed.