(1921) 11 AHC CK 0014

Allahabad High Court

Case No: None

Lala Jangpal Singh and Another		APPELLANT
	Vs	
Raja Kushalpal Singh and Others		RESPONDENT

Date of Decision: Nov. 17, 1921

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 17 Rule 3, 24

Citation: 70 Ind. Cas. 942

Hon'ble Judges: Walsh, J; Piggott, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Walsh, J.

This is an appeal from an order of the District Judge of Aligarh refusing to restore a case which had been dismissed by the Special Judge appointed by this Court to try the case, as he said, for default, it not being quite clear whether he meant to dismiss it under one or other of the 2nd or 3rd rules of Order XVII. The case which was undoubtedly presented before us with great ability, has a very long history and gives rise to a great many considerations, and in some respects the members of the Court hearing the appeal do not regard the questions which have come up for discussion precisely in the same light, but we have come to the conclusion that the appeal must be dismissed. It is never satisfactory to dismiss a suit without trial, but, speaking for myself, I agree substantially with every word of the very long and elaborate order passed by Mr. Kisch, the District Judge, in March 1920, refusing to restore the case, the order now under appeal. I have followed as closely as possible all the arguments and all the relevant facts and documents to which we have been referred and I cannot find any inaccuracy of statement, or any fallacy in reasoning, throughout the while of that long order of Mr. Kisch. It would be to my mind superfluous to re-state the history of the case. I could not do so more effectively than in the language of the learned Judge to the Court below. I merely propose to

refer to one or two additional topics not dealt with by the learned Judge in quite the same way as I propose to deal with them which to my mind carry great weight. Mr. G.W. Dillon has argued the case with his usual ability and fairness throughout and he based his main argument upon one point; this he described and ingeniously sought to make out as a "Mutual understanding which prevailed between the parties and the Court that evidence would not be recorded in this suit until the second suit was ready for trial." There is no doubt that the learned Judge was Anxious to please every body and this argument can no doubt, be put as Mr. Dillon put it, with a good deal of plausibility because there are traces in the communications between the Special Judge and the District Judge which show that at one time the Special Judge had himself formed that expectation. On the other hand, it must be borne in mind that if the learned Judge had, at any stage prior to the communications which he made to the District Judge to which I have referred, namely, in April, entered into any such definite understanding with the parties he would have been guilty of a grave dereliction of duty, and I come without hesitation to the conclusion that no such understanding in the real sense of the word did in fact exist although the plaintiffs may have formed hopes of reaching that stage. Therefore, the best point which one of the leading Advocates in this Court can suggest to justify this appeal fails.

2. One point which has weighed with me considerably throughout the hearing has been the efforts of the plaintiffs to amend their original, plaint. I think that was largely the fons et origo of the whole trouble which subsequently ensued and it is a pity that the learned Judge did not seem to have the necessary grasp of the situation to deal with it promptly and precisely. When one comes to examine it, it stands in this way. When the application was made the case was ready for trial; the costs had been incurred, the bulk of the witnesses had either been summoned or must have been known to the respective parties; a letter had been sent from the High Court warning the parties that owing to the special circumstances under which the Special Judge had been appointed the case would be heard de die in diem except for some very strong cause; the claim to amend arose out of a statement by the defendant in his written statement as long ago as the previous August; it was based upon an assignment from some persons with outstanding rights which assignment had been made since the case started and it raised a totally new case and apparently in some respects a totally inconsistent case. It was an unreasonable application which to my mind no Court ought to have entertained for a moment. I pass over the subsequent efforts to get a transfer of the second suit and to hold up the hearing of the first suit which I regard as merely the natural result of the partial success which attended the efforts of the plaintiffs to delay the hearing by their application to amend. Some of the incidents which have been disclosed on the evidence are far from creditable to the professional gentlemen certainly on the side of the plaintiffs, and many of them explain and justify the complaints which one hears about the delays of litigation in India. I pass on to a stage in the history of the case which I think is fatal to the

appeal, namely, the position of the plaintiffs when the case came on for hearing on the 4th of June. I quote from the judgment of the learned Judge: "The plaintiffs had exhausted ail the means that the law allowed them for obtaining a stay of proceedings in the first case and they were faced with the alternative of either submitting to the order of the Court and producing their evidence or deliberately disregarding the order of the Court and making another effort to get the case adjourned with all the risk that such a proceeding involved. They chose the latter course."

3. What the learned Judge refers to there consists of two. separate matters either of which, in my judgment, are sufficient to dispose of this appeal. On the 10th of May the plaintiffs became aware that on the 7th of May the High Court, on the administrative side, refused to transfer the second case to the Special Judge and indicated that that question could be considered when the first case was nearing completion. As the learned Judge rightly points out, that communication turned the provisional order which the Special Judge had made-fixing the date of hearing oh the 4th of June, into an absolute order. In addition to that the plaintiffs had made on the 2nd of June a last and disparate effort to get the High Court to stay the suit which the Special Judge was going to try. That was refused. Whether from the 2nd of June, or from the 10th of May, it matters not from either data it was the duty of the plaintiffs to be ready with their evidence and to continue, the case on the, 4th of June. It is quite clear that they deliberately decided not to be ready. During the proceedings which took place on the 4th, 5th and 6th of June, one of the plaintiffs left the Court professedly to get witnesses, the other went post-haste, undoubtedly with the full concurrence of his co-plaintiff, to Allahabad to seek advice from their leading Counsel. The result of that was that a telegram was sent in the following terms, by the plaintiff in Allahabad to his Pleader at the place of trial, "Apply withdrawal get a fortnight for arguments if possible." Whether the vakalatnama authorized, the withdrawal, a point which I consider an idle one, the telegram contained express authority, and the Judge was wrong on this point. On the back of the application for further adjournment made on the 5th of, June the following endorsement was made: "A week''s time may be granted to us, during this period we will produce witnesses who will be able to attend. As to the remaining witnesses we will apply to have their summonses delivered to us personally so that the Court''s time may not be wasted. The sole object of the application is that time may be granted to us to secure the attendance of the witnesses." In spite of that deliberate statement made by a responsible Lawyer for the plaintiffs, Thakur Manak Singh, one of the Pleaders for the plaintiffs, had the effrontery to deny in Court the next day that the adjournment had been made for the production of witnesses and it has been admitted on behalf of the plaintiffs that there never was any intention to produce evidence. Pandit Sham Kishan Dar, another Pleader, aptly observed that if he had been really engaged in getting witnesses and had been prepared to produce some, he would have sent an urgent wire to the Special Judge informing him of that

fact and asking for a temporary adjournment until he had such as could a; rive. The learned Judge, whether with a desire to prolong his occupancy of the temporary post which he held, or because he lacked the necessary grip of the reins to get the parties to go on with the word, to my mind, showed exceptional, and I think unnecessary, indulgence to the plaintiffs. It was open to the plaintiffs either on the 5th or the 6th or the 7th to go on with the case and produce their witnesses. It is alleged that some of the witnesses were present in Court on the 5th. It is not denied that some of them lived in a zemindari within 6 or 7 miles of the Court. I come unhesitatingly to the conclusion on these materials that on the advice of Counsel for reasons which either do not know, or I do not consider adequate, deliberately decided to take no further steps at that stage in the prosecutor of their case. I would merely observe a introductory to what I am going to say in a moment that at the final disposal of the case they were represented by Counsel who had definite instructions to withdraw from the case and not produce evidence Both the plaintiffs, either of whom one would have expected in a case like this were necessary witnesses, voluntarily absented them selves, admittedly for purposes connected with an alternative method of disposing of the case which they preferred to the of having a trial. This brings me to the last point which has weighed with me throughout the argument, to which I see no answer, namely, what was the real disposal of the case. I accept, the view which I understand has been decided that where a patty does not personally appear, even although his Counsel originally instructed is there, if he has failed to supply his Counsel with materials or funds of, any other necessary matter for the prosecution of the suit and the Counsel states that he has no further instructions, although that situation may be drawn into the. express words used in Rule 3 of Order XVII, it ought to be treated as a default by the plaintiff for want of appearance under Rule 2 of Order XVII. The reason for this view is doubtless that Counsel no longer represents him, and in that sense Counsel is not present in the name of the plaintiff, while the plaintiff is himself absent.

4. The learned Judge in this case decided that the case was one which was covered by Order XVII, Rule 2 in which case an application for restoration was lawfully made, if well-founded. But I have come to the conclusion that it was not, and that under whatever form the Judge may make an order disposing of a case, or however he may misunderstand what he is doing, or whatever mistaken language he may use in disposing of the case, the Court has to look at the actual facts as things were at the time, and decide under which rule the order was made. I understand that to be the view taken in the case of Lalta Prasad v. Hand Kishore 22 A. 66 : 1899 A.W.N. 176 : 9 I.C 1075 (F.B.). All I can say is, that a bare recital. of what the plaintiff did in this particular case leads my mind inevitably to the conclusion that on the 5th, 6th and 7th of June, the plaintiffs were a patty to whom time had been granted, and who failed to produce their evidence, and failed to cause the attendance of their witnesses and to perform, all acts necessary to the further progress of the suit for which time had already been allowed, and, notwithstanding that they were m

default in that respect, the Court had a right to proceed to decide the suit. It did not do so with the cars and circumspection which should be exercised on such an occasion by taking up the issues and answering them definitely one by one, a course which, personally, I always adopt even in. an undefended divorce case, which I have to try in this. Court. To quote from the notes contained in the well-known text book on the CPC by Woodtoffe and Ameer Ali under this particular rule I think this was a case of plaintiff who, "having provided the Court with materials had failed to substantiate his claim." Counsel, months before, had spent ten days in opening the case and in submitting to the Court his views of the five hundred documents involved. All that material was before the Court. Admittedly, it failed to substantiate the plaintiffs'' claim. It seems to me that it was the duty of the Court, and the only duty of the Court, under the circumstances, to dismiss the suit under Order XVII, Rule 3, and that it must be taken that this is what it really did. I am confirmed in this view by the, fact that the learned Judge, although he has separately decided that the dismissal was for default under Rule 2 of Order XVII, felt himself almost unconsciously constrained to hold the contrary when he was recapitulating his statement of the plaintiffs'' proceedings. He says, "not only have they failed to show sufficient cause for their non-appearance but they did in fact legally appear by their Pleader and refused to go on." ft has been suggested that it would be a hardship to hold the plaintiffs to Order XVII, Rule 3 because if the Court really thought it was making an order under Order XVII, Rule 2, thereby misleading the plaintiffs, the plaintiffs would have lost the right of appeal which undoubtedly they would have against a decree under Order XVII, Rule 3. I would merely point out in answer to this suggestion two things. First, it is difficult to conceive how the plaintiffs could be misled. Although it is not too much to say that by their manoeuvres in this case they did lead the learned Judge into various mistakes, they must have known better than any one else, that they had not failed to appear but that they had deliberately decided and refused to produce any further evidence or witnesses. Therefore, it was impossible that they could have been misled. Secondly, the right of appeal which they had against the decree which it was the duty of the Court to pass under Order XVII, Rule 3 was a perfectly Worthless one. Having regard to their conduct throughout and particularly on the material dates, the 4th, 5th and 6th of June, any appeal would have been a hopeless one and must have J been known to the plaintiffs and their advisers to be hopeless. For, these reasons, and for those stated by the learned Judge, I think the appeal ought to be dismissed with costs.

Piggott, J.

5. It has become necessary for us to pronounce an opinion on the question whether the order dismissing this suit was passed under Order XVII, Rule 2 or under Order XVII, Rule 3 of the Civil Procedure Code, because the respondents have not abandoned the plea on this point which they took in the Court below; they are, in fact, seeking to support the decision, of that Court, i.e., the order rejecting the application of the plaintiffs for the re-institution of the suit, on a ground taken in the

Court below but decided against them, namely, that no such application was entertainable at all, inasmuch as the dismissal of the suit was directed under Order XVII, Rule 3 of the Civil Procedure Code. I do not myself find it impossible to accept this view. The suit was down for hearing on the 4th of June 1919. The duty was on the plaintiffs of producing evidence. They applied for an adjournment. Arguments on the question whether an adjournment should or should not be granted lasted all that day and were only concluded on the day following. The Court then granted an adjournment of one day, i.e., it fixed the 6th of June 1919, for the further hearing of the suit and directed the plaintiffs to begin producing their evidence on that date. When the case was called upon a Pleader, purporting to act for the plaintiffs, put in an application for permission to withdraw from the suit with leave to bring a fresh suit. This the Court, after some argument, rejected on the ground that the Pleader representing it had no authority to make such an application. The same Pleader then asked for a further adjournment and this was also refused. The Pleader then stated that he had no instructions to do anything else in the case. It is not quite clear from the order-sheet-Whether he followed up the declaration by physically removing himself from the Courtroom or not. We were told in argument that he did do so; and I should be inclined to infer from the order-sheet that he did so, because it is noted that the Court thereupon proceeded to call for the plaintiffs and found that they did not appear. A point had, therefore, been reached $t which it was literally true that the plaintiffs were absent, neither appearing in person nor by Counsel authorised to act on their behalf. The defendants were present and the Court could there and then have dismissed the suit. I think it ought to have done so, and it could have done so in a very brief order. However, the order actually passed was that judgment would be pronounced on the following day. On the 7th of June 1919 a Barrister appeared for the plaintiffs and again presented an application for permission to withdraw from the suit with leave to file a fresh one. This was also rejected, and the gentleman in question thereupon left the room. The Court sent for him and asked him, and also the Vakil who had appeared on the previous day, whether either of them had instructions to take any step on behalf of the plaintiffs. Having received negative answers to these questions the Court proceeded to dismiss y the suit. I think the Court, believed itself to be acting on the principled laid down by the Court in the case of Lalta Prasad v. Nand Kishore 22 A. 66 : A.W.N. (1899) 176 : 9 Ind. Dec. (N.S.) 1075 (F.B.) and that it believed itself to be dismissing the suit because the plaintiffs were not present in person and not represented by Pleader instructed to take any action on their behalf. I would, therefore, bold, that the application for reinstitution of the suit was maintainable.

6. On the question whether it ought to have been allowed I do not wish to add much to what has been already said. Under the CPC the point for determination is, whether the plaintiffs had sufficient cause for non-appearance on the 6th of June, or, in the alternative, on the 7th of June 1919, the nature of that nonappearance being what I have already set forth in detail. The sufficient cause suggested on their

behalf may fairly be stated as follows. Their non-appearance on the 6th and 7th of June grew inevitably out of the failure of the plaintiffs to have any witnesses ready for examination when the suit was called up on the 4th of June. The reason that the plaintiffs were not ready on that date was, as Counsel on their behalf put it to us, that there had been an understanding, to which the Court itself was privy, that the recording of evidence in the present suit would not be commenced. until another suit filed by the same plaintiffs, and at that moment pending in another Court;, should have been transferred to the file of the same Court and should be ready for hearing. A detailed examination of the record has shown beyond all possible doubt that there was no such understanding to this effect as between the parties. The utmost that could be said; with any show of reason on behalf of the plaintiffs, was that the Trial Court itself had given them to understand that it would not commence the hearing of evidence in this suit until the other suit was, at least upon its file of pending cases, i.e., until it was seized of both the suits and in a position to entertain any application that might be made regarding the method of disposal to be applied to both of them. I think it ought to be conceded to the plaintiffs that the Trial Court had expressed at least a desire to deal with the matter in this way. I think it ought also to be conceded to the plaintiffs that they were unfortunate in one respect. Owing to pressure of work in the Courts of the Aligarh District, it had been found necessary to appoint a third Additional Subordinate Judge specially to try this present suit, there being no other Court in the District with sufficient leisure to undertake to dispose of this piece of work within a reasonable time. But for the appointment of a "Special Judge" to deal with this particular matter, the second of the plaintiffs'' suits would, in the ordinary course of things, have been filed in the Court which was already seized of the first suit, and no question of transfer would have arisen. I may add that the question of transfer was greatly complicated by the fact that the "Special Judge" had been appointed for a particular purpose, and his jurisdiction was limited under the orders by which he was appointed, so that applications for the transfer of any other suit to his Court could not be dealt with by the District Judge, but had to be referred to this Court. These considerations weighed upon my mind at various stages of the, argument to a considerable extent in favour of the plaintiffs; but on full consideration, and after hearing the judgment which has been delivered by Mr. Justice Walsh, I am not-prepared to say that they afford sufficient cause for the inaction of the plaintiffs on the 4th of June 1019. From the 1st of May of that year the plaintiffs had clear notice that they were to be ready with their evidence on the 4th of June, unless orders should be received'' from the High Court necessitating some modification of this direction. From the 10th of May, they not oily knew that no such orders had come from the High Court, but they knew further that this Court had definitely refused to transfer the second suit to the Court of the Special Judge and had issued in its executive capacity directions that the trial of this present suit, already too long delayed, should, at once be taken up and proceeded with. The only excuse which has been attempted on their behalf, which even purports to meet the point above taken, is that the orders of this Court had

been passed in its executive capacity and that it was still open to the plaintiffs to move this Court to take judicial action. What this really means requires to be considered with reference to the terms of Section 24 of the Code of Civil Procedure. This Court had refused to make of its own motion the order of transfer which the plaintiffs desired. It was, no doubt, still open to this Court''s to make the same order on the application of the plaintiffs and after notice to the opposite party. Now, putting aside all question of the likelihood of this Court''s proceeding to do on the application of the plaintiffs what it half refused to do of its own motion in the teeth of the strong recommendation of the District Judge, one thing at least is clear, that it became incumbent on the plaintiffs, if they were not prepared to produce their evidence in the Trial Court on June the 4th, to move this Court with the least possible delay. Their application for transfer was presented, in this Court on the 2nd of June. I think it impossible to avoid the inference that they purposely delayed making it in the hope that in one way or another, either by means of a Stay order from this Court, or by the favour of the Trial Court, they would after ail secure an adjournment of the hearing fixed for the 4th of June. They hoped, Rule 3 I think, to make such an adjournment inevitable by delaying their application to the High Court. In coming to this conclusion I have taken into consideration a great deal of what was laid before us as to the actual facts of the two suits, one of which has now been decided against the plaintiffs on the ments, which I do not think it necessary to set forth in any detail. In so far as these matters bear on the question now in issue before us they do so only as suggesting the reasons which influenced the plaintiffs for not wishing to enter upon the production of their evidence in the present suit until after the defendants had filed their written statements in the other suit. Now, it may or may not have been a reasonable desire on the part of the plaintiffs that they should see the written statement in the other suit before they begin to produce evidence in the present one but when, they had failed to achieve that object by means of an order transferring the second suit to the file of the Court which was trying the first, they were bound to accept the position and to go on with all proceedings necessary for the trial if the first suit. In my opinion, they deliberately preferred to take the risk of this present suit being dismissed for default, or for failure of prosecution, rather than begin leading their evidence before the written statement in the other suit had been filed. They hoped that the consequences might not after all prove as serious as they have been. I am not prepared, particularly in consideration of the strong view of my learned brother, to say that the plaintiffs have any claim upon the indulgence of this Court, if the question be treated as one of special indulgence. I am prepared to hold, and I do hold, that the plaintiffs have not shown sufficient cause for their failure to enter an appearance on the 6th or 7th of June 1919 in the Trial Court. I agree, therefore, in dismissing this appeal.

7. The order of the Court is that the appeal be dismissed with costs including in this. Court fees on the higher scale.

8. This being a first appeal from order the question of its valuation does not affect the Court-fee, but it does affect the Pleaders'' fee chargeable, and there is nothing in the memorandum of appeal to explain ,why the appellants, have elected to value this appeal at Rs. 30,000 when the suit was valued at Rs. 30,00,000. We think that, for the purpose of calculating Pleaders fees, this appeal should, be valued at Rs. 30,00,000 and we direct accordingly.