(2006) 08 DEL CK 0080

Delhi High Court

Case No: IA No''s. 2897 and 2898 of 2005 in CS (OS) No. 1103 of 2004

Shailendra		APPELLANT
	Vs	
Kanhiyalal and Others		RESPONDENT

Date of Decision: Aug. 26, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 32 Rule 15

Citation: (2006) 91 DRJ 572

Hon'ble Judges: Manju Goel, J

Bench: Single Bench

Advocate: A.B. Dial and Mavneet Mishra, for the Appellant; H.L. Tikku and Yashmeet, for the Defendants No. 1 and 2, Ganesh and Tanvi Sudan and T.V.S. Raghavendra for the Defendants Nos. 3 and 4, for the Respondent

Judgement

Manju Goel, J.
Heard.

2. The two IAs seek review of the order of 17th February, 2005.

3. The review petition challenges the order dated 17th February,2005 whereby this Court declined the prayer of the petitioner to pass an order under Order 32 Rule 15 of the Civil Procedure Code.

4. Before coming to the review application, it may be said that the application was taken up on 4th October, 2004 when notice was ordered to be issued. Thereafter, the application was taken up on 4th November, 2004 as well as on 13th December, 2004 and on 28th January, 2005. The order records that these applications were for appointment of guardian ad litem as well as medical examination of defendant No. 1 on the ground that due to his age and ailments, defendant No. 1 was not in a position to take conscious decisions about the defence to be raised by him in this suit. The order then records that the Court was of the considered view that before &#65533;

taking any decision on these applications, it would be in the fitness of things if defendant No. 1 appears in person before this Court so that this Court may notice his mental and physical condition.

5. On 7th February, 2005, the court interviewed the defendant No. 1 and passed the impugned order.

6. The impugned order begins by narrating the prayer. The submission of the plaintiff that the medical examination is necessary has also been narrated. The opposition is recorded. The order then goes on to say to safeguard the interest of defendant No. 1, the Court had called defendant No. 1 and had a talk with him. The-Court observed that though the defendant No. 1 was quite aged and suffering from various ailments and as such was not in a position to speak properly but could answer questions put to him in regard to his residential address, the doctor giving him treatment and his interest in litigation and that his answers reflected that he understood the nature of litigation. In the opinion of the Court, he was not in that mental stage which disabled him from contesting his suit or presenting his case effectively before Court. Answers given by defendant No. 1 in writing pad were taken on record here as Mark ''A'' and ''B''. The Court recorded that there was no merit in the application for medical examination of defendant No. 1 or in the application for appointment of guardian ad litem. Both the applications for medical examination as well as for appointment of guardian were accordingly dismissed.

7. The error apparent pointed out by defendant No. 1 in this order is that the order has been passed without affording an opportunity to the plaintiff to address arguments. The second error apparent is said to be failure on the part of the Court to make an enquiry.

8. So far as first contention is concerned, the order dated 28th January, 2005 clearly indicates that the Court had been addressed on the application for appointment of a guardian as well as on the application for medical examination. The Court, then, said "this Court is of the considered view that before taking any decision on these applications, it would be in the fitness of things if defendant No. 1 appears in person before this Court so that this Court may notice his mental and physical condition".

9. Obviously, it cannot be said that on 28th January, 2005, the Court did not apply its mind to the submissions of the parties. On 7th February, 2005, the Court examined defendant No. 1 personally and arrived at a conclusion that defendant No. 1 did not need a guardian ad litem.

10. Even otherwise, it will not be proper to say that the omission of the Court to hear the parties, even if it was so, on 7th February, 2005, would be deemed to be an error apparent on the face of the record.

11. Reliance has been placed on the judgment of the Supreme Court in the case of A.R. Antulay Vs. R.S. Nayak and Another, to argue that an order without hearing the

party is a nullity. Suffice it to say that this judgment was not rendered by the Supreme Court on any provision of review. The judgment was rendered in a Criminal Appeal being Crl.A.No. 468/1986 and is of no avail to the petitioner in this case.

12. Reliance is being also placed on the judgment of a Division Bench of this Court in the case of Union of India Vs. Santosh Jain and Others, in which it was held that the review petitioners who were not heard in a matter were entitled to have the order set aside. The facts in that case were that the petitioners whose seniority in services were affected by the litigation were not even parties. ''Hearing'' there has been used in this context. It was accordingly an error apparent to pass a decree against persons who were not parties to a lis. I find no merit in the submission of the plaintiff that there was absence of hearing or that there is any error apparent on the face of the record on that account.

13. The second contention that an enquiry was required to be held is based on a judgment of the Madras High Court in the case of P.P. Ar. Rm. Sp. Ramanathan Chettiar by mother and guardian Meenakshi Achi Vs. A.R.R.M. Somasundaram Chettiar, . The Madras High Court in the case of P.P. Ar. Rm. Sp. Ramanathan Chettiar (supra) and A.S. Mohammad Ibrahim Ummal @ Shahul Hameed Ummal of unsound Mind by next friend M.T.S. Mohammad Thambi v. Shaik Mohammad Marakayar and Anr. AIR 1949 Mad 292 has opined that judicial enquiry is necessary before an order is made under Order 32 Rule 15 of the Civil Procedure Code. What kind of a judicial enquiry is stipulated is not clear from the judgment. It is contended on behalf of the petitioner that before passing any order on an application under Order 32 Rule 15 of the CPC judicial enquiry by examining witnesses in the box should be held. The practice stipulated, if at all, by the 1941 Judgment of the Madras High Court cannot be applied to Delhi because no such procedure has been laid down for disposal of any application under Order 32 Rule 15 of the CPC by the High Court Rules and Orders of this High Court. Nor is there any enquiry stipulated by the provisions of Order 32 Rule 15 of the Civil Procedure Code.

14. The judgments P.P. Ar. Rm. Sp. Ramanathan Chettiar by mother and guardian Meenakshi Achi Vs. A.R.R.M. Somasundaram Chettiar, and Duvvuri Rami Reddi Vs. Duvvudu Papi Reddi and Others, relied upon by the petitioner cannot be applied to proceedings in Delhi.

15. The judgment AIR 1949 Mad 292 which is based on the P.P. Ar. Rm. Sp. Ramanathan Chettiar by mother and guardian Meenakshi Achi Vs. A.R.R.M. Somasundaram Chettiar, decision that is the judgment was referred to this Court in the case of Surinder Kaur and Others Vs. Sardar Rajdev Singh and Others, affirmed the judgment of this Court passed in that matter was upheld by Division Bench reported in Smt. Surinder Kaur and Others Vs. S. Rajdev Singh and Others, . The Court did not endorse the opinion of the Madras High Court that an enquiry by calling witnesses in the box was necessary before making any order under Order 32

Rule 15 of the Civil Procedure Code.

16. Reliance is then placed on the case titled Narayan Mishra Vs. Pramod Kumar Gupta and Others, . It makes no mention about the nature of enquiry that is stipulated in Order 32 Rule 15 of the Civil Procedure Code. In that case, the trial court did not make any enquiry before rejecting the application under Order 32 Rule 15 of CPC and subsequently the High Court again without making any enquiry appointed the guardian. The Supreme Court opined that it was wrong on the part of the High Court to appoint a guardian in that circumstances and thought it proper that the High Court should have remanded the matter to Trial Court for holding an enquiry.

17. In the present case, an enquiry has been held by the Court itself by calling the concerned persons in the chamber and by putting questions to him and even by taking his writing on paper. It is pertinent to note that in one of the papers, defendant No. 1 has even written "I NEED MY AND MY WIFE''S SHARE. REST BE GIVEN TO MY SONS".

18. This Court is not an appellate court and cannot decide as to whether the opinion formed by the Court about the ability of defendant No. 1 to protect his interest in the suit is incorrect.

19. In view of the above, I find that there is no ground for review of the order in question. The application bearing IA No. 2898/2005 filed by plaintiff for review is accordingly dismissed.

20. The application bearing IA No. 2897/2005 filed by defendants No. 3 and 4 has also made for review of the same order. The application also stands dismissed.

21. Both sides have filed medical documents in support of their claims and counter claims. I find it proper to put it here on record the view that was expressed during arguments. The order dated 7th February, 2005 cannot be deemed to be final for the entire tenure of the suit and the plaintiff is not precluded from making fresh applications for appointment of a guardian ad litem, if at any time the condition of defendant No. 1 so deteriorates as to make him incapable by reason of his mental infirmity of protecting his interest in the suit.

22. The matter be listed before the Regular Court subject to the orders of Hon''ble the Acting Chief Justice on 4th September, 2006.