

RAFIQ & ANR.

v.

MUNSHILAL & ANR.

April 16, 1981

[D.A. DESAI AND BAHARUL ISLAM, JJ.]

Procedure—Litigant entrusted appeal to an advocate—Advocate failed to appear in Court at hearing—Appeal dismissed—Litigant, whether entitled to have the appeal restored for hearing.

Costs—Appeal dismissed on account of absence of advocate at hearing—Costs, if could be recovered from Advocate.

On knowing that the High Court had dismissed his appeal on the ground that his Advocate was not present in the Court when the matter was taken up for hearing the appellant moved an application for the recall of the order dismissing the appeal and for permission to participate in the hearing of the appeal. The High Court rejected this application stating that no satisfactory explanation had been furnished by the Advocate for his slackness in filing the affidavit for nearly 15 days after it was drafted.

On the question whether the litigant is entitled to have his case reheard by the High Court.

HELD : It is not proper that an innocent litigant, after doing everything in his power to effectively participate in his proceedings by entrusting his case to the Advocate, should be made to suffer for the inaction, deliberate omission or misdemeanour of his agent. For whatever reason the Advocate might have absented himself from the Court, the innocent litigant could not be allowed to suffer injustice for the fault of his Advocate. [511 B]

The respondent's costs should be recovered from the Advocate who absented himself from Court. [511 D]

[The Court directed the appeal to be restored to its original position in the High Court and heard.]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1415 of 1981.

Appeal by special leave from the judgment and order dated the 7th January 1981 of the Allahabad High Court in Civil Misc. Application No. 113 of 1981 in Second Appeal No. 1484 of 1973.

O.P. Rana, M. Qamaruddin and Mrs. M. Qamaruddin for the Appellants.

A *A.K. Sanghi* for Respondent No. 1.

The Judgment of the Court was delivered by

DESAI, J. Special leave granted.

B We have heard Mr. O. P. Rana, learned counsel for the appellant, and Mr. A.K. Sanghi, learned counsel for the respondent. The High Court disposed of the appeal preferred by the present appellant in the absence of the learned counsel for the appellant. When the appellant became aware of the fact that his appeal had been disposed of in the absence of his advocate, he moved an application in the High Court to recall the order dismissing his appeal and permit him to participate in the hearing of the appeal. This application was rejected by the High Court on the ground that though the application was prepared and drafted and an affidavit was sworn on 29th October, 1980, the same was not presented to the court till November 12, 1980 and that there is no satisfactory explanation for this slackness on the part of the learned advocate who was requested to file the application.

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The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his

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power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr.A.K.Sanghi.

Appeal allowed to the extent indicated with costs in the manner indicated.

P.B.R.

Appeal allowed.

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