Salil Dutta vs T.M. And M.C. Private Ltd on 5 February, 1993

Equivalent citations: 1993 SCR (1) 794, 1993 SCC (2) 185, 1993 AIR SCW 1178, 1993 (2) SCC 185, (1993) 2 LANDLR 30, (1993) 2 LS 12, 1993 BBCJ 123, (1993) 1 APLJ 80(2), (1993) 2 MAD LW 590, (1993) 2 PUN LR 659, (1993) 1 SCR 794 (SC), (1993) 2 CIVLJ 46, (1993) 2 COMLJ 60, (1993) 1 CURCC 635, (1993) 1 RENTLR 332, 1993 SCFBRC 243, 1993 UJ(SC) 1 743, 1993 ALL CJ 2 816, (1993) 22 ALL LR 34, (1993) 4 JT 528 (SC)

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy

PETITIONER:
SALIL DUTTA

Vs.

RESPONDENT:
T.M. AND M.C. PRIVATE LTD.

DATE OF JUDGMENT05/02/1993

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
REDDY, K. JAYACHANDRA (J)

CITATION:
1993 SCR (1) 794 1993 SCC (2) 185
JT 1993 (4) 528 1993 SCALE (1)451

ACT:
Code of Civil Procedure, 1908:
Order 9, Rule 13-Setting aside ex-parte decree against defendant-Cause for non-appearance-Improper advice of advocate-Whether a sufficient cause-Held: Cannot as a rule be accepted-party cannot disown its advocate and seek relief.

HEADNOTE:
The suit flied by the appellant for ejecting the respondents limited company, from the suit premises, was decreed ex-parte by the trial court since neither the advocate nor the

respondent-tenant, appeared when the case came up for final-hearing. Thereafter, the respondent-company flied an application to set aside the ex-parte decree, stating that the non-appearance of the respondent-tenant was due to the advice tendered by the advocate-on-record to the effect that the respondent-tenant need not be present at the hearing of the suit till the disposal of the two interlocutory applications filed by the respondent-tenant According to it, there was sufficient cause to set aside the ex-parte decree within the meaning of Order 9 Rule 13 C.P.C. The trial court dismissed the said application. The appeal against the trial court's order was also dismissed by a Division Bench of the High Court. However, before the judgment was signed by the learned Judges, an application was moved by the respondent-tenant for alteration or modification and/or reconsideration of the judgment on the ground that the respondents' counsel could not bring to the notice of the Court, the decision of the Supreme Court in the case of Rafiq and Anr. v. Munshilal and Anr., AIR 1981 SC 1400 which supported respondent-tenant's case. This was opposed by the appellant on the ground that once the judgment was pronounced in open court, it was final and that matter could not be reopened, just because a relevant decision was not brought to the notice of the court. However, the Division Bench reopened the case on the ground that technicalities should not be allowed to stand in the way of doing justice to the parties and allowed the appeal,

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relying on the decision.

In the appeal before this Court on behalf of the appellant It was contended that the decision in the case of Rafiq did not support the respondents' case and the High Court had erred in holding otherwise, Inasmuch as the respondent-tenant in the Instant case was a private limited company, managed by persons who were not only well-educated but were practical businessmen, unlike the appellant In the case of Rafiq, who was a rustic innocent villager, placing his entire trust In his advocate.

On behalf of the respondent-tenant it was submitted that when the High Court had applied and acted upon a decision of this Court, it would not be proper to set aside their order under Article 136 of the Constitution, and that the respondent-company implicitly trusted their advocate and acted according to his advice and should not be penalised therefore.

Allowing the appeal, this Court,

HELD : 1.1. The advocate is the agent of the party. His acts and statements made within the limits of authority given to him, are the acts and statements of the principal, i.e., the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set side a dismissal order or an ex-parte decree notwithstanding

the Negligence and/or misdemeanour of the advocate where It finds that the client was an innocent litigant, but there is no such absolute rule that a party can disown its advocate at any time and seek relief No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. [801G]

1.2. The instant case was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal riled by a villager residing away from the city, where the Court is located. The respondent is also not a justice ignorant villager but a private limited company with its head-office at the place where the court is located and managed by educated businessmen who know where their interest lies. It is evident that when their interlocutory applications were not disposed of before taking up the suit for final hearing, they felt piqued and refused to appear before the court. May be, it was part of their delaying tactics as alleged by the appellant. May be not. But one thing is clear they chose to non-cooperate with the court. Having adopted such a stand towards the

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Court, the respondent has no right to ask its Indulgence. Putting the entire blame upon the advocate and trying to make It out as if they were totally unaware of the nature or significance of the proceedings Is a theory which cannot be accepted and ought not to have been accepted. [802A-C]

1.3. It is difficult. to believe that the respondents implicitly believed their advocate's advice. Being educated businessmen they would have known that non-participation at the final hearing of the suit would necessarily result In an adverse decision. This Court is not prepared to believe that such an advice was in fact tendered by the advocate. No advocate worth his salt would give such advice to his client. Secondly, there are several contradictions in his deposition. Therefore, the story set up by the respondent-company in its application under Order 9 Rule 13 is an after-thought and ought not to have been accepted by the Division Bench, more particularly, when it had rejected the very case in its earlier judgment [800G-H, 801AE]

Rafiq and Anr. v. Munshilal and Anr., A.I.R. 1981 S.C. 1400, distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 429 of 1993. From the Judgment and Order dated 3.3.92 of the Calcutta High Court in A.O.O. No. 1036 of 1990.

A.K. Ganguli and H.K. Puri for the Appellant. N.S. Hegde, Anil Agrawala and L.P. Agrawala for the Respondents.

The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J. Heard the counsel for the parties. Leave granted.

The appeal is preferred by the plaintiff against the judgment and order of a Division Bench of the Calcutta High Court allowing the appeal preferred by the respondent/defendant. The appeal before the High Court was directed against an order of the City Civil Court, Calcutta dismissing an application filed by the defendant to set aside the ex-parte decree passed against him, under Order 9 rule 13 of the Civil Procedure Code.

The relevant facts may be noticed briefly.

The plaintiff/appellant filed a suit for ejecting the defendant-tenant on the ground of default in paying rent and also on the ground that the such premises are required for his own use and occupation. The suit was posted for final hearing on June 9, 1988 seven years after its institution. On an earlier occasion, the defendant had filed two interlocutory applications, one under Order 14 rule 5 and the other under Order 6 rule 16 C.P.C. On 19th May, 1988 the City Civil Court had passed an order on the said applications observing that the said applications shall be considered at the final hearing of the suit. According to the defendant (as per his statement made in the application filed by him for setting aside the ex-parte decree) his advocate advised him that he need not be present at the hearing of the suit on 9.6.1988, and thereafter till the applications filed by him under Order 14 rule 5 and Order 6 rule 16 C.P.C. are disposed of Be that as it may, on 9th June, 1988, the advocate for the defendant prayed for an adjournment till the next day. It was adjourned accordingly. On 10th June, neither the advocate for the defendant nor the defendant appeared, with the result the defendant was set ex-parte. Hearing of the suit was com- menced and concluded on 11th June, 1988. The suit was posted for delivery of judgment to 13th June, 1988. On 11th June, 1988, an application was made on behalf of the defendant stating the circumstances in which his advocate had to retire from the case. This application, however, contained no prayer whatsoever. The suit was decreed ex-parte on 13th June, 1988. Thereafter the defendant filed the application to set aside the ex-parte decree. In this application he referred to the fact of his filing two inter- locutory applications aforesaid, the order of the court thereon passed on 19th May, 1988 and then stated "due to the advice of the learned advocate on-record that your petitioner need not be present at the hearing of the suit on 9.6.1988 and thereafter till the disposal of the application filed under Order 6 rule 16 and Order 14 rule 5 read with Section 151 of the Code of Civil Procedure in the above suit," the defendant did not appear before the Court. It was stated that Mr. Ravindran the Principal Officer of the defendant Company was out of town on that date. It was submitted that because the defendant had acted on the basis of the advice given by the advocate-on-record of the defendant, there was sufficient cause to set aside the ex- parte decree within the meaning of Order 9 rule 13 C.P.C. The Trial Court dismissed the said application against which an appeal was preferred by the defendant to the Calcutta High Court. The appeal was heard by a Division Bench and judgment pronounced in open court on 8.7.1991 dismissing the appeal. However, it appears, before the judgment was signed by the learned Judges constituting the Division Bench, an application was moved by the defendant for alteration or modification and/or reconsidera- tion of the said judgment mainly on the ground that the defendants' counsel could not bring to the notice of the Division Bench the decision of this Court in Rafiq and another v. Munshilal and another, AIR 1981 SC 1400 and that the said decision

clearly supports the defendants, case. The counsel for the plaintiff opposed the said request. He submitted that once the judgment was pronounced in open court, it was final and that matter cannot be reopened just because a relevant decision was not brought to the notice of the Court. After hearing the counsel for both the parties, the Division Bench reopened the appeal on the ground that "technicalities should not be allowed to stand in the way of doing justice to the parties.' The Bench observed that when they disposed of the appeal, their attention was not invited to the decision of this Court in Rafiq v. Munshilal and that in view of the said judgment they were inclined to reopen the matter. The Division Bench was of the opinion that "after a judgment is delivered by the High Court ignoring the decision of the Supreme Court or in disobedience of a clear judgment of the Supreme Court, it would be treated as nonest and absolutely without jurisdiction..... when our attention has been drawn that our Judgment is per incuriam, it is our duty to apply this decision and to hold that our Judgment was wrong and liable to be recalled." (We express no opinion on the correctness of the above premise since it is not put in issue in this appeal). Accordingly, the Division Bench heard the counsel for the parties and by its Judgment and Order dated 3rd March, 1992 allowed the appeal mainly relying upon the decision of this Court in Rafiq. In this appeal Shri Ganguli, learned counsel for the appellant/plaintiff submitted that the decision in Rafiq does not support the defendant's case and that the Calcutta High Court has erred in holding otherwise. It is submitted that the defendant in this case is a private limited company, managed by persons who are not only well-educated but are practical businessmen unlike the appellant in Rafiq who was a rustic innocent villager placing his entire trust in his advocate. On the other hand, Shri Santosh Hegde, the learned counsel for the defendant/respondent submitted that when the High Court has applied and acted upon a decision of this Court, it would not be proper to set aside their order under Article 136 of the Constitution. He submitted that the defendant/company implicitly trusted their advocate and acted according to his advice and should not be penalised therefore.

Since the judgment under appeal is exclusively based upon the decision of this Court in Rafiq it is necessary to ascertain what precisely does the said decision say. The appellant Rafiq had preferred a second appeal in the Allahabad High Court through an advocate. His advocate was not present when the second appeal was taken up for hearing with the result it was dismissed for default. The appellant then moved an application to set aside the order of dismissal for default which was dismissed by the High Court. The correctness of the said order was questioned in this Court. The matter came up before a Bench comprising D.A. Desai and Baharul Islam, JJ. D.A. Desai J. speaking for the Bench observed thus:

> "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 watch-dog of the advocate that the latter appears in the matter when it is listed. it is no part of his job.' It was then argued by the counsel for the respondent in that appeal that a practice has grown up in the High Court of Allahabad among the lawyers to remain absent when they did not like a particular bench and that the absence of the appellant's advocate in the High Court was in accordance with the said practice, which should not be encouraged. While expressing no opinion upon the existence or justification of such practice, the learned Judge observed that if the dismissal order is not set aside "the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented," and then made the following further observations:
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> "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. May be 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."

The question is whether the principle of the said decision comes to the rescue of the defendant respondent herein. Firstly, in the case before us it was not an appeal preferred by an outstation litigant but a suit which was posted for final hearing seven years after the institution of the suit. The defendant is a private limited company having its registered office at Calcutta itself. The persons incharge of the defendant-company are not rustic villagers nor they are innocent illiterates unaware of Court procedures. Prior to the suit coming up for final hearing on 9th June, 1988 the defendant had filed two applications whereupon the Court ordered that they will be considered at the time of the final hearing of the suit. The plaintiff's case no doubt is that the said applications were part of delaying tactics being adopted by the defendant-tenants with a view to protract the suit. Be that as it may, the defendant thereafter refused to appear before the court. According to the defendant, their advocate advised them that until the interlocutory applications filed by them are disposed of, the defendant need not appear before the Court which means that the defendants need not appear at the final hearing of the suit. It may be remembered that the Court proposed to consider the said interlocutory applications at the final hearing of the suit. It is difficult to believe that the defendants implicitly believed their advocate's advice. Being educated businessmen they would have known that non-participation at the final hearing of the suit would necessarily result in an adverse decision. Indeed. we are not prepared to believe that such an advice was in fact tendered by the advocate. No advocate worth his salt would give such advice to his client. Secondly, the several contradictions in his deposition which are pointed out by the Division Bench in the impugned order go to show that the whole story is a later fabrication. The following are the observations made in the Judgment of the Division Bench with respect to the conduct of the said advocate: "we found that the said learned advocate conducted the proceedings in a most improper manner and that his absence on 10th June, 1988 and on subsequent date was not only discourteous but possibly a dereliction of duty to his client..... the learned advocate had forgotten his professional duty in not making inquiry to the

Court as to what happened on 10th, 11th and 13th June, 1988..... the learned advocate acted in a most perfunctory manner in the matter and the learned advocate dealt with the matter in a most unusual manner. We have also found that the said learned advocate had made serious contradiction in the deposition before the court below. The learned advocate in his deposition stated that he did not file an application for adjournment on 9th June, 1988. But from the record it was evident that it was on the basis of the application filed on 9th June, 1988, the case was adjourned for cross-examination of the witnesses whose examination was called on the next date." The above facts stated in the deposition of the advocate show that he indeed made an application for adjournment on the 9th June, 1988 to enable him to cross examine the witnesses on the next date. Therefore, his present stand that he advised his client not to participate in the trial from and including 9th June, 1988 onwards is evidently untrue. We are, therefore, of the opinion that the story set up by the defendant in his application under Order 9 rule 13 is an after-thought and ought not to have been accepted by the Division Bench in its order dated 3rd March, 1992 more particular when it had rejected the very case in its earlier Judgment dated 8.7.1991.

The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set a side a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is not such abso lute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the Court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head-office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hewing they felt piqued and refused to appear before the court. May be, it was part of their delaying tactics as alleged by the plaintiff. May be not. But one thing is clear they 'chose to non-cooperate with the court. Having adopted such a stand towards the Court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it. out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.

For the above reasons, the appeal is allowed. The order of the Division Bench of the Calcutta_High Court dated 33.1992 is set aside and its order dated 8.7.1991 is restored. The company-defendant shall bear the costs of the appellant in this appeal which are assessed at Rs. 5,000.

N.P.V. Appeal allowed.