

Panna Lal Vs. Basdeo

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Court : Allahabad

Decided On : Oct-26-1932

Reported in : AIR1933All118

Appellant : Panna Lal

Respondent : Basdeo

Judgement :

Iqbal Ahmad, J.

1. This is an application in revision by the defendant from an order of an Assistant Collector of the First Class setting aside an order of dismissal of a suit for profits and restoring the suit to its original number. A preliminary objection has been taken to the hearing of this application on the ground that no revision lies to this Court. The suit for profits was filed on 18th July 1931. The suit was adjourned on several occasions to enable the plaintiff to produce the evidence and ultimately on 20th November 1931 the suit was adjourned with a view to enable the plaintiff to produce the patwari along with the khatauni. The next date fixed in the case was 18th January 1932. On that date the plaintiff failed to produce the patwari or the khatauni, and the Court dismissed the suit 'for want of prosecution.' On the same date, viz., 18th January 1932, the plaintiff filed an application for the setting aside of the dismissal of the suit and for its being restored to its original number. It was not stated in the application as to whether the application was an application for

review under Order 47, or an application under Order 9, Rule 9, Civil. P.C. The application was put up before the learned Assistant Collector on the same date and he passed the following order:

The defendants, who are present, shall file objection, if any, by tomorrow.

2. The Assistant Collector proceeded to deal with the application on 19th January 1932. The defendant was not present in Court and then the Assistant Collector recorded the following order:

The defendants have failed to file any objections. They did not even turn up when called today. The case is restored.

3. In the order quoted above the Assistant Collector did not state as to whether he was restoring the suit, under Order 9, Rule 9, Civil P.C, or that he purported to pass the order under Order 47, Rule 4, Civil P.C. The defendant being aggrieved by this order has come in revision to this Court. In support of the preliminary objection Mr. Pathak relies on Sections 248 and 253, Agra Tenancy Act 3 of 1926. Section 253 of the Act provides that the High Court may call for the record of any suit or application which had been decided by any subordinate Revenue Court and in which an appeal lies to the District Judge and in which no appeal lies to the High Court provided the subordinate Revenue Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. It is clear from the provisions of this section that the revisional powers of the High Court under the Agra Tenancy Act are restricted to cases in which the decree or the order sought to be revised is appealable to the District Judge. Section 248(3) of the Act provides for appeals against orders mentioned in Sections 47 and 104 and in Order 43, Rule 1, Civil P.C.; and the appeals against such orders lie to the Court having jurisdiction under Section 242 of the Act to entertain appeals from the decrees in the suit, or in the case of applications for execution having jurisdiction to hear an appeal from the decree which is being executed. By Section 242 the District Judge is empowered to entertain appeals from certain decrees. It is manifest therefore that unless an order comes within Section 47 or Section 104 or Order 43, Rule 1, Civil P.C, no appeal lies to the

District Judge. In the present case it is contended by Mr. Pathak that the order dated 19th January 1932, passed by the Assistant Collector was an order under Order 9, Rule 9, Civil P.C, and as by that order he granted the application for restoration of the suit, no appeal against that order lay under Order 43, Rule 1, Civil P.C. and therefore that order was not appealable to the District Judge, and as such, the provisions of Section 253, Agra Tenancy Act, have no application, and accordingly we cannot revise that order.

4. The learned Counsel for the applicant on the other hand argues that the order dated 18th January 1932, was an order in substance if not in fact under Order 17, Rule 3, Civil P. C., dismissing the suit on the merits and not an order under Order 9, Rule 8 of the Code, and therefore the Assistant Collector could set aside that order only by exercising his powers under Order 47, Rule 4 and not under Order 9, Rule 9, Civil P.C. He maintains that the learned Assistant Collector must be taken to have done that which he was competent by law to do, and as the counsel for the parties were present on 18th January 1932, the Assistant Collector could not dismiss the suit for default and that the only course open to him was to proceed to decide the case on the merits under Order 17, Rule 3, or to adjourn the same in accordance with the provisions of Order 17, Rule 1 of the Code. He therefore maintains that the order dated 19th January 1932, was an order under Order 47, Rule 4, Civil P.C., and therefore appealable under Order 43, Rule 1(w), Civil P.C.; and as the order was passed in a suit for profits valued at more than Rs. 200 the order was appealable to the District Judge and as such is capable of being revised by this Court under Section 253 of the Act.

5. We are unable to agree with the contention of the learned Counsel for the applicant. It is clear that if the order sought to be revised was an order under Order 9, Rule 9, Civil P.C., granting an application for restoration of a suit dismissed for default the order was not appealable to the District Judge and therefore not capable of being revised by this Court. On the contrary, if the order was an order under Order 47, Rule 4, the contention of the learned Counsel for the applicant must prevail.

6. By the order dated 18th January 1932, the Assistant Collector did not decide the suit on the merits. We have quoted above the aforesaid order. The Assistant Collector did not make any reference in that order to the evidence that had already been produced in the case. He did not by that order examine the merits of the plaintiff's claim, nor did he deal with the validity or otherwise of the defence raised by the contesting defendant. He clearly in that order expressed himself as dismissing the suit 'for want of prosecution.' Such a decision cannot be characterized as a decision on the merits. The order professed to be an order dismissing 'the suit for default of the plaintiff. We therefore are unable to hold that the order was either in fact or in form or in substance a decision of the suit on the merits. It follows therefore that the order did not come within the purview of Order 17, Rule 3 of the Code. The only other rule in the Code under which the order could be passed is Rule 8, Order 9, Civil P.C. That rule allows a Court to dismiss a suit for default of appearance by the plaintiff. It is true that the learned Counsel for the plaintiff was present on the date that the order was passed and therefore the order dismissing the suit for default was not in accordance with law, but we are not concerned with the question whether the order dismissing the suit was the proper order to pass. We have to decide the validity or otherwise of the preliminary objection by reference to the order actually passed by the learned Assistant Collector. It may have been a wholly wrong and indefensible order but if the order was one under Order 9, Rule 8, Civil P.C., as we hold it was, it could be set aside by the Assistant Collector under Order 9, Rule 9, Civil P.C, or under the inherent jurisdiction vested in Courts by Section 151, Civil P.C. In either case the order was not appealable to the District Judge and therefore Section 253, Tenancy Act, has no application to the case. It follows therefore that the preliminary objection is well founded and ought to prevail.

7. Apart from this even if the order was revisable by this Court we would be slow to interfere with the order of, the Court below in the exercise of our divisional jurisdiction. The suit was by the plaintiff against the 1am-bardar for his share of the profits of the mahal. The Assistant Collector in dismissing the suit on 18th January 1932, did not bring to bear on the facts of the case a judicial mind. Indeed he never considered the merits of the plaintiff's claim. Even if an order is revisable by this Court, this Court is not bound to interfere with such orders and in the present

case it seems desirable that the case should be tried on the merits. For the reasons given above we dismiss this application. Costs here and hitherto shall be costs in the cause and shall abide the result.

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