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Abheysingh Vs. the State

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Court : Rajasthan

Decided On : Jan-17-1951

Reported in : AIR1951Raj81

Judge : Wanchoo, C.J. and; Bharadwaj, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 151 - Order 9, Rule 9

Appeal No. : Civil Revn. No. 116 of 1950

Appellant : Abheysingh

Respondent : The State

Advocate for Def. : Mansharam, Govt. Adv.

Advocate for Pet/Ap. : Ratanlal Purohit, Adv.

Disposition : Revision dismissed

Judgement :

1. This is a revision by Abhey Singh against the order of the Munsif of Jabazpur in a civil matter. The facts giving rise to this revision are these : Abheysingh had filed a suit against Kesrimal, Bakhtawar and Uda for a declaration that 'the lands in suit were not liable to be attached and sold in execution of a decree passed against Bakhtawar and Uda and in favour of Kesrimal. At a later stage, the State Council of the former State of Mewar was also impleaded as a defendant. On 1-12-1948,

an ex parte decree was passed in favour of the present petitioner. Thereupon, on 12-12. 1948, an application was made on behalf of the State Council for setting aside the ex parte decree. This application was, however, dismissed for default on 14-2 1949. Then on 12-3-1949, the Government Pleader made an application for restoration of the application of 12-12-1948. This application was allowed and the application for restoration dated 12-12-1948 was restored. Abheysingh came up in revision against the order restoring the application of 12-12-1948. The case was heard by a learned Single Judge of this Court and he considered that the matter was of sufficient importance to merit decision by a larger Bench. That is how the case has come before us.

2. The main question for decision is whether the Munsif had jurisdiction to restore the application of 12-12-1948, and if so, under what provision of the law. There has been a good deal of difference of opinion between various High Courts on this point. Some of the High Courts have held that the Court has power under Order 9, Rule 9, Civil P. C. itself by virtue of Section 141, Civil P. C, to restore an application for restoration which has been dismissed for default. In support of this view, we may refer to the following cases: Loknath v. Mt. Sattan Bai, A. I. R. (10) 1923 Lah. 302 : (73 I. C. 821), Mt. Jamna v. Mt. Ram Raji, A. I. R. (10) 1923 Oudh 146 : (74 I. C. 380) and Chinnappa Naidu. v. Deenadayalu Naidu, A. I. R. (35) 1948 Mad. 480 : (1948-1 M. L. J. 411). As against this view, the High Courts of Patna, Bombay, Calcutta, Allahabad and Nagpur have held that the Court has no jurisdiction under Order 9, Rule 9 to restore an application for restoration which is once dismissed for default. The following cases support this view, namely, Ramgulamsingh v. Sheodeonarain Singh, A. I. R. (9) 1922 Pat. 121: (4 pat. L. J. 287), Manke v. B. Walwekar, A. I. R. (10) 1923 Bom. 386: (80 I. C. 182), Pitambarlal v. Dodeesingh, A. I. R. (11) 1924 ALL. 503 : (46 ALL. 319), Surendranath v. Jatindranath, A. I. R. (16) 1929 Cal. 17 : (115 I. C. 367) and Brijmohan v. Baghoba, A. I. R. (19) 1932 Nag. 101 : (28 N. L. R. 83).

3. But even though these five High Courts have held that an application for restoration once dismissed for default cannot be restored under order 9, Rule 9, it is remarkable that they have also held that the Court has jurisdiction under its inherent power under Section 151, Civil P. C. to restore such an application for

restoration, if it is in the interest of justice to do so. We may in this connection refer to the case of Harbans Singh v. Suresh Dutt, A. I. R. (16) 1929 ALL. 624 : (118 I. C. 669) where a Division Bench of that Court held that the Court could under Section 151, Civil P. C. restore an application made for the restoration of the suit. The Calcutta High Court in the case of Surendra Nath v. Jatindra Nath, A. I. R. (16) 1929 cal. 17 : (115 I. C. 357) already cited while holding that such an application for restoration could not be restored under Order 9, Rule 9, went on to say that in order to do that real and substantial justice for the administration for which the Courts exist, the Courts can use Section 151, C. P. C. in order to restore such an application for restoration. The Nagpur High Court also in the case of Brijmohan v. Raghoba, A. I. R. (19) 1932 Nag. 101 : (28 N. L. R. 83) already referred to held that an order restoring an application for restoration dismissed for default can only be passed under Section 151, C. P. C. in order to do real and substantial justice.

4. The better view seems to be that no application under Order 9, Rule 9, will lie for restoration of an application for restoration or setting aside an ex parte decree which has been dismissed for default and we respectfully agree with the High Courts which have taken this view We are, further of opinion, that the Court should have power in appropriate cases for good reasons to restore applications for restoration or setting aside ex parte decrees which have been dismissed for default under its inherent power given to it by Section 161, C. P. C. This view, as we have already shown, has been taken by three of the High Courts, namely, Allahabad, Calcutta and Nagpur and we are in respectful agreement with them. We, therefore, hold that the Court has power under Section 161, C. P. C. but not under Order 9, Rule 9, C. P. C. to restore an application for restoration or setting aside an ex parts decree which has been dismissed for default. The Munsif of Jahazpur, therefore, did not act in excess of jurisdiction when he restored the application of 12-12.1948.

5. It has been urged on behalf of the appellant that in this case, the Munsif did not even call for an affidavit and that, in any ease, there was no good reason for restoring the application for setting aside the ex parte decree as the State was really not interested in this litigation and was merely a pro forma defendant. We

would like to point out to the Munsif concerned that he must always insist upon an affidavit in cases of this kind even though the application is made by the Government pleader. That gentle. man does not stand in any better position than any other lawyer and an application made by him in a civil matter is to be supported by an affidavit in the game way as an application by any other lawyer on behalf of any other party. As this is, however, She first case of this kind where no affidavit has been taken from the Government Pleader, we will overlook it this ones.

6. As to the other contention that there was no good reason for the Munsif to restore the suit as the State was not really interested in this litigation, we feel that we are not in a position to express any opinion at this stage. The suit has not yet been restored and the application for setting aside the ex parte decree dated 12-12-1948 will, in due course, come up before the Munsif. He should then consider whether the State has any real interest in this mattes: and whether it is worthwhile setting aside the ex parte decree, in case the State has no real interest in this litigation between private parties. We, therefore, dismiss the revision. Considering the circumstances of the case, we made no order as to costs.

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