

Gopal Dass Vs. Ram Chandra

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Court : Rajasthan

Decided On : Apr-04-1978

Reported in : 1978(11)WLN278

Judge : K.D. Sharma, J.

Appeal No. : S.B. Civil Revision No. 114 of 1977

Appellant : Gopal Dass

Respondent : Ram Chandra

Disposition : Petition dismissed

Judgement :

K.D. Sharma, J.

1. This is a civil revision by Gopal Das, plaintiff, under Section 115 of the Code of Civil Procedure, against an order of the Additional Munsiff, Court No. 2 Jodhpur, restoring on application for setting aside the ex-parte decree, which was dismissed for default of the defendant no-petitioner's appearance on 10th October, 1975.

2. The relevant facts giving rise to this revision-petition may be briefly stated as follows : Gopai Das, petitioner, obtained a money decree on 2-8-1971, against ram Chandra; defendant, in Civil Suit No. 135 of 1971. Ram Caned applied under IX Rule 13, CPC for setting aside the ex-parte decree passed against him by the

Additional Munsiff, Court No. 2, Jodhpur, on the ground that the summons in suit was not served on him by registered post as he, was not present in Gulabpura on 30th July, 1970 and had gone to Khusawal to look after his land & orchard. He came to know about the ex-parte decree on 26 February, 1975 having been passed against him from a piton of the court of the Additional Glenside, No. 2 Jodhpur, on 14th March, 1975 and applied for setting aside the ex-parte decree on 15th March, 1975. The learned Additional Munsiff No. 2, Jodhpur, upon receiving an application for setting aside the ex-parte decree, issued notice thereof to Gopal Dis, decree he Idea, to appear before him on 11th July, 1975 On 11th July, 1975, it appears that notice was not served on Gopal Das, decree-holder. So the case was adjourned to September 6, 1973, with a direction that a fresh notice be issued to Gopal Dass. On 6th September, 1975, notice could not be issued to Gopal Dass because Ram Chancre did not file fresh notice. It was ordered that notice be issued to Gopal Dass as soon as it is filed by Ram Chandra. The case was adjourned to 10th October, 1975. On 10th October, 1975, neither Ram Chandra, nor any counsel on his behalf appeared in the court when the case was taken-up for hearing. Hence, the learned Additional Munsiff No. 12, Jodhpur. dismissed the application for setting aside the ex-parte decree for default of appearance of Ram Chindra. Later on, Ram Chandra applied for restoration of the application for setting aside the ex-parte decree which had been dismissed for default. It was alleged in the application for restoration that on 10th October, 1975, his counsel Shri Sohan Lal could not attend the court when the case was called on for hearing as he had gone to village Sanwaleta Khurd Tehsil Pali, in connection with Navratri Puja Shri Sohan Lal did not inform Ram Chandra that he would not be available in Jodhpur on 10th October, 1975, and so the latter also could not put in his appearance in the court when the application for setting aside the ex-parte decree was taken-up for hearing The Additional Munsiff No. 2, Jodhpur, restored the application for setting aside the ex parte decree on payment of costs of Rs. 50/-, to Gopal Dass, plaintiff. Gopal Dass, has, therefore, challenged the legality of this order in this revision petition.

3. I have carefully gone through the record and heard Mr.B.K. Mohanani, learned Counsel for the petitioner and Mr. Rewa Chand appearing on behalf of Ram chandra, non petitioner. It has been contended on behalf of the petitioner that the

Additional Munsiff No. 2, Jodhpur, committed an error of law in restoring the application for setting aside the ex-parte-decree, which had then been dismissed for default, in exercise of his inherent powers under Section 151, Civil Procedure Code. According to Mr. Mohanani, the Additional Munsiff No. 2, could not exercise his inherent power as the order of rejection of the application for setting aside the ex-parte-decree was appealable under Order 43 Rule 1(d) of the Code of Civil Procedure and Ram chandra did not choose to avail of this right of appeal provided by the statute. In support of his above contention, Mr. B.K. Mohanani relied, upon *Arjun Singh v. Mohindra Kumar* A.I.R. 1964 S.C. 996, *Gopi Chand v. Meena Lal*, *Suranjan v. Malati* : AIR1970 Cal229, *Dawa Choudhary v. Ram Narssh Lal* : AIR1959 Pat121, *Madan Lal v. T.M. Bank Ltd.* A.I.R. 1954 Assam 1 and *Ratindra Nath v. Jyoti Bikash* A.I.R. 1975 Cal 975, Mr. Rewachand appearing on behalf of Ram chand, non-petitioner, on the other hand, contended that there is no express provision in the Code of Civil Procedure for restoration of an application for setting aside an ex-parte decree, which has been dismissed for default, and, so the Additional Munsiff No. 2, Jodhpur, was not wrong in having recourse to his inherent powers in this case for restoring the application for setting aside the ex-parte decree. In support of his above contention he referred me to a Division Bench decision of this Court in *Abbey Singh v. State*.

4. I have given my anxious consideration to the rival contentions. It is an established principle that where express provisions are made in the Code of Civil Procedure to govern a particular situation, such provision cannot be over-ruled or rendered nugatory by having recourse to the inherent powers given to the court under Section 151, CPC. This principle is recognized by almost all the High Courts in India and by the Supreme Court. In this connection, reference may be made to the authority of the Supreme Court in *Arjun Singh v. Mohindra Kumar* (supra), wherein their Lordships were pleased to make the following observations in this regard in para 19 at page 1003 :

It is common ground that the inherent power of the Court can not override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be

exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates

But, where there is no provision in Code of Civil Procedure for restoration of an application for setting aside an ex-parte decree, which has been dismissed for default, the courts may have recourse to the inherent powers under Section 151, CPC to do substantial justice, provided the other party is well compensated by costs. An application to restore an application for setting aside an ex-parte decree, which has been dismissed for default, is not specifically provided in Order IX or in any other Order of the Code of Civil Procedure. Hence, the contention of Mr. B.K. Mohanani that this matter has been specifically dealt with in the Code of Civil Procedure and that the provisions made in the Code would be completely set at naught or rendered nugatory, if the doctrine of inherent powers is introduced in such cases is wholly untenable. In support of my above view, I may refer to an authority of the Court *Abhey Singh v. State* (supra), wherein it was held that in appropriate cases the court can have recourse to its inherent powers given to it by Section 151, CPC for restoring an application for setting aside an ex-parte decree which has been itself dismissed for default. The view taken in the said authority was approved of and confirmed in another case in *Sohanlal v. Devchand*, wherein Hon'ble I.N. Modi J. who delivered the judgment of the Division Bench, observed as follows in para 12 :-

The first case is *Abhey Singh v. The State*. This was a case for restoration of an application to set aside an ex-parte decree which application was itself dismissed for default. It was held, after reviewing the case law on the point, that such an application was competent not under Order 9 Rule 9, Civil P.C., but under Section 151. No exception can be taken to this decision as there is no provision in the Code for restoration of an application for setting aside an ex parte decree which has been itself dismissed for default.

in *Madanlall v. T.M. Bank Ltd* (supra) also, the Full Bench of the Assam High Court, after taking into account the divergent views on this point observed that in appropriate cases a remedy may be available to the defendant by way of an application under Section 151, CPC to apply for restoration of an application for setting aside an ex-parte decree which has been itself dismissed for default in spite of the fact that an appeal lies against the order of dismissal for default of an application for setting aside the ex-parte decree under Order 43 Rule 1(d) of the Code of Civil Procedure. I have, therefore, no hesitation in holding that the defendant may apply for restoration of his application under Order IX Rule 13, CPC if it is dismissed for default and the court may in appropriate cases restore such application by having recourse to its inherent powers under Section 151, CPC.

5. It was further contended by *v. B.K. Mohanani* that the Additional Munsiff No. 2 Jodhpur, committed an error in restoring the application for setting aside the ex-parte decree on merits. The application has no force. It appears that the Additional Munsiff No. 2 Jodhpur, has relied upon the affidavit of Fateh Mai in accepting the application for restoration. Fateh Mai was the clerk of Shri Ram Chandra, learned Counsel for Ram Chandra. It is stated in the affidavit by Fateh Mai that Shri Rawa Chand had been under-going detention under the Maintenance of Internal Security Act in those days and in his absence Shri Sohan Lal, Advocate, was looking after his cases. On 10th October, 1975, when the application for setting aside the ex-parte decree was called on for hearing Shri Sohan Lal, Advocate, was not present in Jodhpur and had gone to Pali in connection with Navratri Puja and so he could not put in his appearance and the application was dismissed for default. It is further stated in the affidavit of Fateh Mai that no information about the date, i.e., 10th October, 1975, fixed for hearing was given to Ram Chandra by Shri Sohan Lal Gopal Dass and it is put in any counter-affidavit to controvert the facts alleged in. The affidavit of Fateh Mai in my opinion, there was sufficient reason for Ram Chandra's absence at the hearing, the reason was that he had made all reasonable arrangements for his representation in the court but he learned counsel Rawa Chand appearing on his behalf was detained under the Maintenance of Internal Security Act and Shri Sohan Lal, Advocate, who was looking after Rawa Chand's work during his absence went out of Jodhpur to Pali in connection with Navratri Puja without giving any notice of

the next date fixed for hearing of the application to him. Ram Chan are, Therefore, should not be palmists for his own absence in these circumstances,

6. The result is that the order passed by the Additional Munsiff No. 2, Jodhpur, restoring the application for setting aside the ex-parte decree, which had been dismissed for default, does not call for any interference. I accordingly dismiss the revision-petition but without any order as to costs.

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