

Smt. Bimla Devi Vs. Aghore Chandra Mallick and ors.

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Court : Kolkata

Decided On : Jul-17-1974

Reported in : AIR1975Cal80,78CWN1045

Judge : Sankar Prasad Mitra, C.J., ;M.M. Dutt and ;A.K. De, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 151 - Order 21, Rule 90 - Order 41, Rule 33 - Order 43, Rule 1

Appeal No. : Full Bench Reference No. 1 of 1972 in Civil Revn. Case No. 2724 of 1966

Appellant : Smt. Bimla Devi

Respondent : Aghore Chandra Mallick and ors.

Advocate for Def. : Satya Charan Pain, Adv.

Advocate for Pet/Ap. : Saktinath Mukherjee, ;Bidyut Kumar Banerjee, ;Satyajit Banerjee and ;Bhaskar Ghose, Adv.

Disposition : Revision dismissed

Judgement :

Sankar Prasad Mitra, C.J.

1. In this reference the facts are that on the 5th January, 1965, Title Suit No. 83 of 1959 in the Subordinate Judge's Court at Alipore for the recovery of money due on a mortgage bond was decreed. The decree-holder thereafter started execution proceedings being Title Execution Case No. 2 of 1965. On August 4, 1965, the petitioner's first bid was not accepted. Two days later the petitioner's bid was accepted and the sale took place. The opposite party No. 1 on the 4th September, 1965, filed an application under Order 21, Rule 90 of the Code of Civil Procedure in the First Court of Subordinate Judge at Alipore which was registered as Miscellaneous Case No. 51 of 1965. This Miscellaneous Case was dismissed for default on the 7th May, 1966 and the sale was confirmed on the 10th May, 1966. The opposite party No. 1 filed an application on May 17, 1966, under Section 151 of the Code of Civil Procedure for reversing the order of dismissal for default made on the 7th May, 1966. Possession was delivered to the petitioner on the 31st May, 1966; but the application under Section 151 was allowed, the order of dismissal was set aside and the Miscellaneous Case No. 51 of 1965 was restored to file by an order of the learned Subordinate Judge dated July 15, 1966. This rule was obtained on the 17th August, 1966, under Section 115 of the Code and it is directed against the order of July 15, 1966.

2. The point that arises for our consideration, is the maintainability of the application under Section 151 on the facts and in the circumstances stated above. As there were differences of opinion on this question between Division Benches of this Court, the entire matter was referred by me and my learned brother Mr. Justice S. K. Dutta, to a Full Bench under Chapter VII of the Appellate Side Rules.

3. Now, Order 21, Rule 90 of the Code provides for an application to set aside a sale in execution of a decree on the ground of material irregularity or fraud in publishing or conducting the sale provided that the applicant has sustained substantial injury by reason thereof.

4. Order 21, Rule 92 of the Code provides, inter alia, that where an application under Order 21, Rule 90 is made and disallowed the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

5. Under Order 43, Rule 1 (i) an appeal lies under the provisions of Section 104 of the Code from an order under Rule 92 of Order 21 setting aside or refusing to set aside a sale.

6. There is a difference of opinion amongst High Courts as to whether an appeal lies under Order 43, Rule 1 (i) from an order dismissing an application under Rule 90 of Order 21 on the ground of default. In *Kali Kanta v. Shyam Lal*, AIR 1917 Cal 815 (2) a Division Bench of this Court held that the language of Order 43, Rule 1 (j) was wide enough to cover a case where an application under Order 21, Rule 90, was dismissed for default. Such a dismissal amounted to an order under Rule 92 of Order 21.

7. In *Basaratulla v. Reazuddin*, AIR 1926 Cal 773 a somewhat different view was taken by another Division Bench consisting of Cuming and Page, JJ. It was held that an order dismissing an application to set aside a sale merely in default of appearance of both the parties would not be regarded as in any way confirming the sale and as such, was not appealable under Order 43, Rule 1 (j). The applicant was not debarred from making a fresh application for the same purpose within the time allowed by the statute of limitation and when the application was otherwise duly made according to the requirements of the law. Two separate judgments were delivered by the learned Judges.

8. In *Ansar Ali v Bhim Sankar*, AIR 1029 Cal 407 (2) a later Division Bench consisting of Mukerji and Mitter, JJ., considered the decision in *Basaratulla's* case, AIR 1926 Cal 773 but declined to follow it. It was held that when no formal order had been recorded confirming the sale and the application under Order 21, Rule 90 had been dismissed for default of non-appearance of both the parties to the proceedings, the order of dismissal was open to appeal. It is pointed out that there is no distinction in principle between an order passed on an application under Order 21, Rule 90 dismissing, it for default either for the non-appearance of one of the parties or for the non-appearance of both the parties. It is the disallowing of the application made under Order 21, Rule 90 which corresponds to an order refusing to set aside a sale within the meaning of Order 43, Rule 1 (j). The fact that a distinct order had not been recorded confirming the sale did not alter the character

of the order disallowing an application under Order 21, Rule 90 which was appealable by reason of the provisions of Order 43. Rule 1 (j). At page 409 of the Report Mukerji, J. observes:

'My learned brother Page, J. was prepared to make a distinction between orders passed for default of appearance on the part of both the parties and orders passed for default of appearance of one of the parties only and I observed that in dismissing an application for default when neither party appears on the case being called on for hearing the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not. With all respect I should say that this distinction, in my judgment, really makes no difference in the result because the statutory consequence of the disallowing of the application is the confirmation of the sale at least to the extent covered by the application..... I am of opinion that there is no distinction in principle between an order passed on an application under Order 21, Rule 90 dismissing it for default either for non-appearance of one or for non-appearance of both the parties, and the principle upon which the other decisions to which I have referred above proceed is in my opinion, equally applicable to a case of the present nature.'

9. We have also to observe the judgment of Page, J. (sitting with Graham, J.) in *Basanta Kumar v. Khirode Chandra*, AIR 1928 Cal 25. His Lordship held that when a person applied under Order 21, Rule 90 but the application was dismissed for his non-appearance, and the opposite party was present and ready to contest the order dismissing the application was an order under Rule 43 (1) (j) and was, therefore, appealable.

10. This Court has, therefore, uniformly held that an appeal lies under Order 43, Rule 1 (j) from an order dismissing an application under Order 21, Rule 90 for default of appearance of one of the parties.

There is a difference of opinion as to what happens when both the parties do not appear; but the judgment of Mukerji, J. in *Ansar Ali's case*, AIR 1929 Cal 407 (2) appears to have correctly decided that the distinction is not sustainable. This Court has also taken the view that under Clause (d) of Rule 1 of Order 43 an appeal is competent against an order of summary dismissal for default of an application

under Rule 13 of Order 9 to set aside an ex parte decree; vide Kumud Kumar v. Hari Mohan, AIR 1916 Cal 391 (1).

11. The High Court of Madhya Pradesh, however, has not accepted the Calcutta High Court's view that an appeal lies under Order 43, Rule 1 (j) from an order dismissing for default an application under Order 21, Rule 90. In : AIR 1968 MP196 (Gopilal v. Sitaram) a Division Bench of the Madhya Pradesh High Court has taken the view that no appeal lies under Order 43, Rule 1 (j) from an order dismissing an application under Order 21, Rule 90 for default. The principal reason for this view is that under Order 43, Rule 1 (j) an appeal lies from an order under Rule 92 of Order 21 'setting aside or refusing to set aside a sale.' When an application under Rule 90 of Order 21 is dismissed for default there is no refusal on the part of the Court to set aside the sale. The word 'refusal' means 'a denial or rejection of something demanded or offered'. There can be no refusal unless there is a request or demand. That is why according to the Madhya Pradesh High Court, when an application under Order 21, Rule 90 is dismissed for default of appearance, there is no refusal to set aside the sale and such an order is not appealable under Order 43, Rule 1 (j).

12. From a review of all these decisions it appears that the Calcutta High Court's overwhelming view is that an appeal lies under Order 43, Rule 1 (j) from an order dismissing an application under Order 21, Rule 90 for default. It is true that the Madhya Pradesh High Court has taken the view that no appeal lies from an order dismissing an application under Order 21, Rule 90 for default, but in view of the trend of decisions of our Court cited above we are inclined to adhere to the view that an appeal does lie under Order 43, Rule 1 (j) against such an order.

13. The point that next arises for our consideration is the scope of this appeal and the remedy that may be available to a deserving appellant. The Appellate Court has to consider and give its verdict (a) on whether the appellant was prevented by sufficient cause from appearing in Court when his application under Rule 90 of Order 21 was dismissed for default, and (b) whether the sale shall be set aside on the ground of material irregularity or fraud in publishing or conducting it whereby the appellant has sustained substantial injury. The Appellate Court has first to

decide whether the appellant was prevented by sufficient cause from appearing before the Court of first instance. Without coming to a conclusion in favour of the appellant on this point the Appellate Court cannot go into the second point aforesaid if it intends to give its decision thereon without making an order of remand.

14. The decision on the sufficiency of the cause for non-appearance is entirely dependent on the evidence on record. And the Appellate Court would have no evidence at all for the purpose of reaching its conclusions on sufficiency of cause. We may, in this connection, refer to the judgment of Mukerji J. (sitting with Roy, J.) in AIR 1928 Cal 812 (*Jnanendra v. Profullananda*). It was held that in a case in which an ex parte decree had been passed and the aggrieved party had not availed of the remedy by way of an application under Order 9, Rule 13, he was not precluded from raising the question of propriety of refusal to adjourn his case, in an appeal which he preferred from the ex parte decree itself. At page 813 of the Report Mukherji, J. observes :

'Apart from authorities it seems to me to be perfectly clear that when a suit has been decided ex parte the remedy by way of appeal from the ex parte decree as well as the remedy by way of an application under Order 9. Rule 13 are both open to the person against whom the decision was passed. It is true that if he avails of the remedy by way of an application under Order 9. Rule 13 he is in a position of greater advantage than he would be if he preferred an appeal from the ex parte decree itself. This would be by reason of the fact that he would be able to establish by adducing evidence that he was unable to appear owing to circumstances over which he had no control whereas if he prefers an appeal from the ex partedecree itself the Court would have to proceed upon the record as it stands and to determine upon the materials that are on the record whether the application for adjournment was rightly granted or not.'

15. The relevance of the observations of Mukerji, J. quoted above to the instant reference is apparent. When an application under Order 21, Rule 90 has been dismissed for default and an appeal is preferred from the order of dismissal the Appellate Court would have to go by the record as it stands and to determine upon

the materials that are on record whether the appellant was prevented by sufficient cause from appearing before the trial Court. It is obvious that the Appellate Court would have no material on record to render a decision on the sufficiency of the cause and can give no relief to the appellant.

16. Reference may also be made to an unreported judgment in Civil Revn. Case No. 1901 of 1957 (Cal.) (Mohadab Mallick v. Bharat Lines Ltd.) delivered by K. C. Das Gupta, J. (sitting with Guha, J.).

17. An application under Order 21, Rule 90 for setting aside a sale was fixed for hearing on the 22nd December, 1956. No steps were taken on behalf of the applicant on that day. The application was dismissed for default. On the 4th January, 1957, the petitioner made an application purporting to be under provisions of Section 151 of the Code praying that the order for dismissal of the application under Order 21, Rule 90 for default should be vacated and the case should be restored and heard on merits. The opposite party raised a preliminary objection (as in the present case) that the application under Section 151 was not maintainable inasmuch as an appeal lay against the order dismissing an application under Order 21, Rule 90. The Subordinate Judge who heard the matter upheld the preliminary objection and dismissed the application under Section 151. Reversing the decision of the Subordinate Judge, K. C. Das Gupta, J. observed :

'On behalf of the petitioner, it is contended..... that while it may be right to say that ordinarily it would not be open to a Court of law to interfere in the exercise of inherent jurisdiction under Section 151 with an order against which an appeal did lie, the learned Court below was wrong in thinking that this was an inflexible rule which had to be applied without any regard to the circumstances of the case and the nature of the relief asked for. It is argued that in an appeal against the order refusing to set aside the sale on the application under Order 21, Rule 90, the appellant could only urge in support of his appeal such fact and law which would bring him within the protection of the provisions of Order 21, Rule 90. Thus he would have to prove that there had been material irregularity or fraud in publishing and conducting the sale and that in consequence he had suffered substantial injury. These, it is pointed out, would not be proved ordinarily except by adducing

evidence. And when, as in the present case, the applicant has, in fact, adduced no evidence on the question, the appeal under Order 21, Rule 90 would for all practical purposes, be useless. While it is true that in form a remedy was available against the order dismissing the application under Order 21. Rule 90 inasmuch as Order 43, Rule 1 (j) provides for an appeal against such an order, the existence of the remedy, in circumstances, as in this case, where no evidence at all was adduced would be more imaginary than real.'

18. K. C. Das Gupta, J. proceeds to add:

'Mr. Roy has argued that the Court would be really failing to exercise jurisdiction vested in it under Section 151 of the Civil Procedure Code, where, in its anxiety to obey a formula that where another remedy is available in the provisions of the Code itself, the Court ought not to draw upon its power of interference in the exercise of inherent jurisdiction, it loses sight of the real question, namely, whether the remedy is, in fact, available or only merely in form. In my judgment, this argument should prevail. While it is no doubt true that in our attempt to administer justice we cannot go beyond the provisions of law, there is no reason why, specially when the legislature has in this country taken special care to provide for the exercise of special powers to prevent injustice in special circumstances, in the form of Section 151, we should hesitate to exercise these powers because of our fondness for a formula. In my opinion, an appeal against the order made under Order 21, Rule 90 would, where no evidence has been adduced, be ordinarily doomed to failure. To say that this gives adequate remedy would be perverse. In my judgment, the Court ought not to take an attitude which would deny to litigants the assistance of the beneficial provisions of Section 151 of the Civil Procedure Code unless it is compelled to do so by binding authority or principle While a number of cases have been cited before us to show the application of the principle that where an appeal lies, the Court would not interfere under Section 151 an examination of these cases makes it clear that in none of these cases, the position which we have to consider, namely, that the appeal would be only an appeal in name and insubstance no remedy was available arose for consideration. For all these reasons, I have come to the conclusion that the proper view to take is that it is open to a Court in a case like this to set aside the order of dismissal in exercise

of its powers under Section 151 where it is satisfied, on the facts alleged, that such an order should be made.'

A somewhat similar view was also taken by Sarjoo Prasad, C. J. in a Full Bench decision of the Assam High Court in Madanlall v. Tripura Modern Bank Ltd., AIR 1954 Assam 1 at p. 8 paragraph 32.

19. We have already stated that before the Appellate Court there would be no evidence on record relating to the sufficiency of cause for non-appearance. The judgment of K. C. Das Gupta, J. shows that the Appellate Court would also be without evidence on record on material irregularity or fraud. In a case of this nature the Appellate Court can give no relief at all to the appellant and the appeal under Order 43, Rule 1 (j) is wholly meaningless. It cannot be said that such an appeal provides any remedy at all and an application under Section 151 should be maintainable. We may incidentally mention that the Allahabad High Court in two decisions one reported in AIR 1925 All 773 (Ganesh Prasad v. Bhagelu Ram) and the other reported in AIR 1930 All 701 (1) (Kalian v. Nanhe) has expressed the view that the Court can exercise its inherent power in setting aside ex parte decrees and in ordering restoration of applications under Order 9 dismissed for default. We need not discuss the merits or demerits of these decisions owing to the view taken by our Division Bench in the unreported case we have referred to. Our attention has been drawn to several judgments which bar an application under Section 151 when an appeal lies. It has further been argued that considerations like effectiveness of the appeal, the costs involved in the appeal or the inconveniences in preferring an appeal are immaterial in deciding the question of maintainability of an application under Section 151 of the Code. In support of these propositions Mr. Saktinath Mukherjee for the petitioner has first referred to : AIR1959 Cal389 (Tulsiram v. Sitaram). In this case it has been held that the essence of the Code of Civil Procedure is to be exhaustive, so far as it goes. As regards matters for which the Code expressly provides, there is no room for the exercise of any additional jurisdiction under Section 151. It is stated further that it is true that on rare occasions it has been held that the Court can act under Section 151 even when the specific provisions of the Code do not apply. But the better and the preponderating judicial opinion is in favour of limiting parties to the specific

provisions made in the Code. Thus, there is no scope for application of Section 151 where Order 9, Rule 9 applies. Chakravartti, C. J. who delivered the judgment (sitting with Lahiri, J.) has said at page 394 :

'The subject of remedies which a party may have if the decision in a suit goes against him on account of his failure to appear has been specifically dealt with by the Code and, along with other remedies, a remedy of a summary character has been provided. The grounds on which the remedy can be claimed and granted have also been stated in the Code. If in a particular case of non-appearance, those grounds cannot be made out and no case under the specific provisions of the Code can be established, it is quite impossible that the scope of the summary remedy should be extended by invoking the Court's inherent powers under Section 151.'

It is apparent Chakravartti, C. J. was not dealing with a case in which the remedy provided by the Code was wholly ineffective, illusory or meaningless. In fact, the learned Chief Justice has conceded that on rare occasions it is open to the Court to exercise powers under Section 151 when specific provisions of the Code cannot prevent injustice being done. His Lordship relies on *Abdulla Bhai v. Isa Bhai*, AIR 1932 Bom 634. In that case the defendants were present when their case was called on but their counsel was not present as they were engaged in other Courts in the same building. Blackwell, J. of the Bombay High Court held that there was no sufficient cause within the meaning of Order 9, Rule 13; but his Lordship exercised inherent power vested in Court under Section 151 to prevent injustice being done and set aside the decree on payment of costs to the other side. Banerjee, J. (sitting singly on the Original Side of this Court) dissented from this judgment of the Bombay High Court in *Indian Jute & Cotton Association Ltd. v. Nandlal Atal*, reported in (1953) 57 Cal WN 495. The judgment of Banerjee, J. was delivered on the 19th August, 1952, whereas the judgment of Chakravartti, C.J. was a Division Bench Judgment delivered on the 16th September, 1958.

20. The next case relied on by Mr. Mukherjee is a Full Bench decision of the Madras High Court in *Alagasundaram v. Pichuvier*, reported in AIR 1929 Mad 757 (FB). The Madras High Court has held that an order of dismissal for default or an

ex parte order on an application under Order 21, Rules 97 and 100 of the Code cannot be set aside under Section 151. The Madras High Court said that it could not be laid down as a general principle that an ordinary Civil Court had inherent power to set aside its own order and to interfere in any case in which it thought a failure of justice had occurred when the aggrieved party had another remedy by which it could be set aside, even though the remedy was not a cheap or summary remedy. In the instant reference we are not concerned with cheap or summary remedies. We are faced with a case in which the remedy provided is a wholly ineffective remedy.

21. Mr. Mukherjee then relies on the case reported in : AIR1959 Pat121 (Doma Choudhary v. Ram Naresh Lal). Here it was held that in the absence of special circumstances, a Court had no jurisdiction under Section 151, to set aside the dismissal for default of an application under Order 9, Rule 9. And the mere fact that the procedure for following the other remedy is longer or more costly would not entitle the Court to disregard the remedy provided on the ground that its order was necessary for ends of justice or to prevent abuse of the process of the Court. In our case the question of delay or cost does not arise. The question is whether relief can be given at all by the Appellate Court in the absence of materials on record.

22. Mr. Mukherjee drew our attention to the Supreme Court's judgment in Arjun Singh v. Mohindra Kumar, : [1964]5SCR946 . The proposition on which Mr. Mukherjee relies is that if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implications exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the Court's inherent powers cannot be invoked in order to cut across the powers conferred by the Code. In the present reference it does not seem to us that if relief be given under Section 151 of the Code, any specific and at the same time effective provision of the Code exhausting the Court's powers would be avoided or overlooked. The appeal under Order 43, Rule 1 (j) is not a provision which the Supreme Court was thinking of on the facts and in the circumstances of this case which we have already explained. Mr. Mukherjee also relies on the Division Bench judgment of this Court in Shibani v. Balai, (1964) 68 Cal WN 1064. In this case it

was also decided that an order disposing of an application to set aside a sale under Rules 89, 90 or 91 of Order 21 of the Code was appealable even if the application was allowed ex parte or dismissed for default and there was no scope for invoking Section 151 of the Code. In the last but one paragraph of the Judgment D. Basu, J. has observed: 'It has next been contended on behalf of the petitioner that it was not possible for her to urge in an appeal from the ex parte order that her husband was unable to appear on the date of hearing for sufficient cause nor to meet the ex parte evidence of the applicant upon which the ex parte order had been made unless she was allowed to adduce evidence on her behalf. To this the answer is furnished by the Division Bench in Jnanendra v. Profullananda, 32 Cal WN 101 = (AIR 1923 Cal 812), where Mukherji, J. upon a review of the authorities, held that in an appeal from an ex parte decree it was open to the appellant to urge that there was sufficient cause for his non-appearance on the date of hearing.' It appears that the observations of Mukherji, J., in Jnanendra's case that the Appellate Court would be confined to the materials on record only was not considered by Basu, J. There are two Single Bench decisions of our Court one delivered by Gupta, J. in Suranjan v. Malati, : AIR1970 Cal229 and the other by S. K. Chakravarti, J. in Fulzoria v. Tarubala, : AIR1970 Cal240 . Gupta, J. has held that the remedy by way of appeal under Order 43, Rule 1 (d) is not illusory. Chakravarti, J. has followed the decision of the Division Bench in Civil Rule No. 3828 of 1967 (Cal) which we have already referred to. According to Chakravarti, J. the scope of the appeal is limited and the point of absence cannot be usually considered in appeal. In those circumstances an application under Section 151 was competent. The case before Gupta, J. was one under Order 9, Rule 13. The case before Chakravarti, J. was the case of a proceeding under the Calcutta Thilka Tenancy Act, 1949. We are inclined for reasons already stated to agree with the conclusions of Chakravarti, J.

23. In this connection counsel for the petitioner has also referred to the decision of Parthasarathi, J. in Ranganavakamma v. K. V. Mahalakshmi, : AIR 1972 AP117 . The learned Judge has followed the Full Bench decision of the Madras High Court in Sadhu Krishna Aiyar v. Kuppan Iyengar, (1907) ILR 30 Mad 34 (FB) that an Appellate Court has jurisdiction in an appeal against an ex parte decree to revise the decree on the ground that the Court was wrong in proceeding to decide ex

parte. And the consequence of such a reversal is that the Appellate Court may remand the suit for a fresh trial. The Appellate Court's powers enumerated by the Madras High Court are well-settled. The problem arises when the Appellate Court has to take evidence to decide whether the Court of first instance was wrong in proceeding to decide the suit ex parte.

24. Mr. Mukherjee, has urged that the Appellate Court has power under Order 41. Rule 33 read with Section 151 of the Code to take evidence with regard to the reasons for default. Reliance is placed on the Supreme Court's judgment in *Nair Service Society Ltd. v. K. C. Alexandar*, : [1968]3SCR163 . In paragraph 29 the Supreme Court observes :

'Now it is a fixed principle of law that a suit must be tried on the original cause of action and this principle governs not only the trial of suits but also appeals. Indeed the appeal being a continuation of the suit new pleas are not considered. If circumstances changed they can form the subject of some other proceedings but need not ordinarily be considered in the appeal. To this proposition there are a few exceptions. Sometimes it happens that the original relief claimed becomes inappropriate, or the law changes affecting the rights of the parties. In such cases Courts may allow an amendment pleading the changed circumstances. Sometimes also the changed circumstances shorten litigation and then to avoid circuitry of action the Courts allow an amendment. The practice of the Courts is very adequately summarised in *Ram Ratan Sahu v. Mohan Sahu*, (1907) 6 Cal LJ 74. *Mookerjee and Holmwood. JJ.* have given the kind of changed circumstances which the Courts usually take notice, with illustrations from decided cases. The judgment in that case has been consistently followed in India.....'

25. In *Ram Ratan Sahu's* case it has been held that a Court of Appeal in exceptional circumstances has the power, in fact, the duty to take notice of events which have happened during the pendency of the appeal, and such events when not appearing on the record may be proved by extrinsic evidence.

26. Mr. Mukherjee's point is that just as a Court of Appeal can take notice of subsequent events and the evidence in support of those events, it can also take evidence when necessary on the sufficiency of the grounds which prevented the

appellant from appearing before the Court of first instance when his application under Order 21, Rule 90 was called on for hearing. We are unable to uphold these submissions of Mr. Mukherjee. Order 41, Rule 33 reads:

'Power of Court of Appeal.-- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:

.....'

27. It is undisputed that under Order 41, Rule 33 the Appellate Court can in appropriate cases take note of subsequent events to give appropriate relief to the parties; but in the instant case we are not concerned with subsequent events. Assuming that the Appellate Court can take evidence under this Rule which was not adduced before the Court of first instance it has been pointed out that the power conferred by this Rule should be used sparingly in exceptional circumstances. In *Shib Chandra Kar v. A. C. Duleken*, 28 Cal LJ 123 at p. 132 = (AIR 1918 Cal 13 at pp. 14, 15) (SB), Mookerjee. J. said :

'..... Order 41, Rule 33 must be cautiously applied, for instance, applied generally in cases where but for recourse to it the ends of justice would be defeated.....'

28. The Rule was interpreted by the Supreme Court in *Rameshwar Prasad v. Shambhari Lal*, : [1964]3SCR549 , Raghubar Dayal, J. says:

'Rule 33 really provides as to what the Appellate Court can find the appellant entitled to. It empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus would have reference only to the nature of the decree or order in so far as it affects the rights of the appellant. It further empowers the Appellate Court to pass or make further or other decree or order as the case may require. The Court is

thus given wide discretion to pass such decree and orders as the Interests of justice demands such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of the rights of various parties.'

29. It is clear, therefore, that the Court's power under Rule 33 of Order 41 is an extremely limited one and it cannot be used in ordinary circumstances or as a matter of course. Only when the Court is satisfied that but for the use of this power a gross injustice would be done that the Court can take recourse to it. A power to be exercised in extraordinary or exceptional circumstances cannot in our opinion, be described to be a remedy available to a litigant before the Appellate Court.

30. For all the reasons aforesaid, we are of the view that when an application under Order 21, Rule 90 is dismissed on the ground of default, it is open to the applicant to move the Court which passed the order for dismissal under Section 151 of the Code of Civil Procedure to have the order for dismissal set aside.

31. In the result, this Rule is discharged. There would be no order as to costs. Let the records be sent back to the trial Court expeditiously.

M.M. Dutt, J.

I agree.

A.K. De, J.

I agree.