

Suranjan Kanjilal Vs. Malati Dutt

Suranjan Kanjilal Vs. Malati Dutt

SooperKanoon Citation : sooperkanoon.com/856419

Court : Kolkata

Decided On : Oct-03-1969

Reported in : AIR1970Cal229

Judge : A.C. Gupta, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 151 - Order 9, Rule 13 - Order 43, Rule 1

Appeal No. : C.R. No. 2593 of 1969

Appellant : Suranjan Kanjilal

Respondent : Malati Dutt

Advocate for Def. : Manan Kumar Ghosh, Adv.

Advocate for Pet/Ap. : A.K. Motilal and ;Satyanarayan Roy, Adv.

Judgement :

ORDER

A.C. Gupta, J.

1. An application under Order 9, Rule 13 of the Code of Civil Procedure made by the petitioner to set aside an ex parte decree for eviction passed against him was itself dismissed for default. The petitioner then applied under Section 151 of the

Code to set aside the order of dismissal stating reasons for his non-appearance when the application under Order 9, Rule 13 was called on for hearing. The Court below dismissed the application under Section 151 on the ground that as the Code provides an appeal from an order dismissing an application under Order 9, Rule 13. the application under Section 151 was not maintainable. The legality of this last order is in question in this Rule.

2. Mr. A. K. Motilal learned Advocate for the petitioner, raised two contentions to show that the order passed by the learned Munsif was wrong. Mr. Motilal submitted, first, that the order dismissing for default the application under Order 9, Rule 13 was not appealable and, secondly, even if the order was appealable this did not preclude the Court from setting aside the order of dismissal in exercise of its inherent power, if on the facts of the case the Court thought that it was necessary to do so for the ends of justice.

3. As regards the first contention, the point is covered so far as this Court is concerned by a decision of a Division Bench reported in 21 Cal LJ 628 = (AIR 1916 Cal 391), Kumud Kumar Bose v. Hari Mohan Samaddar, where it has been held that an order dismissing an application to set aside an ex parte decree, whether on the merits or for default is appealable under Order 43, Rule 1 (d) of the Code. The first submission of Mr. Motilal, therefore, fails.

4. Mr. Motilal next contended that even if an appeal lay from an Order dismissing for default an application under Order 9, Rule 13, the relief is illusory because in such an appeal the appellant cannot canvass the ground that there was sufficient cause for his non-appearance when the application under Order 9, Rule 13 was taken up for hearing. Mr. Motilal submitted that it was, therefore, not only desirable but also proper for the Court to invoke its inherent power under Section 151 of the Code to do justice in such a case. In support of his contention Mr. Motilal referred to a number of decisions of different High Courts including two Bench decisions of this Court namely : AIR1927 Cal534 , Sarat Kumar Bose v. Bisweswar Mitra and : AIR1929 Cal17 , Sourendra Nath Mitter v. Jatindra Nath Bose. The two Calcutta cases contain certain observations which indeed support the view that 'where the dismissal for default is not due to laches on the part- of the applicant, the Court

can allow an application under Section 151 to set aside an order dismissing for default an application under Order 9, Rule 13. But these observations made in said two cases appear to have proceeded on the view that the Code of Civil Procedure does not contain any express provision for setting aside an order of dismissal for default in such case. I have already referred to the decision in 21 Cal LJ 628 = (AIR 1916 Cal 391) which holds that an order of dismissal for default is also appealable. Further, it has been held by another Division Bench of this Court, Jnanendra v. Profullananda, 32 Cal W N 101 = (AIR 1928 Cal 812) that in an appeal from an ex parte decree the appellant can urge that there was sufficient cause for his non-appearance at the hearing of the application under Order 9, R, 13. This decision answers the contention that an appeal provided from an ex parte order of dismissal is an illusory right. A later decision of this Court, also of a Division Bench, holds that if a litigant does not choose to avail of a right of appeal provided by the Statute, the Court could not exercise its inherent power to give him relief; Abdul Jabbar v. Azizar Rahaman : AIR1937 Cal425 .

5. More recently another Division Bench of this Court on a consideration of the authorities states the following proposition among others as having been settled by consensus of judicial opinion:--

'Where the Code itself makes an express provision for a particular remedy, the party, who does not avail of such remedy, cannot as a Rule, be allowed to resort to Section 151, for, to do so would be to defeat the object and utility of the Code itself.'

This decision, however, points out that 'there may, of course, be extraordinary cases, where the application of Section 151 may be justified even though there may be an alternative remedy. One of such exceptional cases may be where the Court itself had committed such mistake or such omission as may itself be termed as abuse of the processes of the Court. In such cases the Court is bound to rectify its mistake according to the maxim--'actus curiae neminem gravabit' (an act of Court shall prejudice no man)'. It is not claimed that the instant case is of the exceptional kind.

6. It thus appears that the questions raised by Mr. Motilal are no longer live issues so far as this Court is concerned; it is not necessary, therefore, to refer to the decisions of the other High Courts relied on by him.

7. This Rule is discharged, but without any order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com