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Debendra NaraIn Singh Vs. Narendra NaraIn Singh

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Court : Kolkata

Decided On : May-05-1924

Reported in : AIR1925Cal360

Appellant : Debendra NaraIn Singh

Respondent : Narendra NaraIn Singh

Judgement :

1. This is an appeal against the order of the Subordinate Judge of Nadia dismissing for default, an application under Order 21, Rule 90, Civil Procedure Code for setting aside an execution sale.

2. A preliminary objection has been taken on behalf of the respondent that no appeal lies. In support of this contention reference has boon made to Section 141, Civil Procedure Code which lays down that ' the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction.' It is argued that this section applies, that the application must be taken to have been under Order 9 and that being so, no appeal lies.

3. We do not think that there is any substance in this contention. The application purported to be made under Order 21, Rule 90, and in our opinion the appeal is competent. This view moreover is supported by Kali Kanta Chukerbutty v. Shyam Lal Basu (1917) 25 C.L.J. 163.

4. Coming to the merits of the case two main points have been argued. It is argued firstly, that on the facts and circumstances of the case the Court below ought not to have dismissed the miscellaneous case in the absence of both the parties, and secondly, that the Court below should have satisfied itself that the parties had notice of the date fixed for the hearing of the case after the return of the record from the High Court. On referring to the order sheet of the Miscellaneous case it appears that the circumstances are somewhat unusual. The record was received back from the High Court on the 18th April, 1922. There is a note to that effect by the Court and in the margin opposite thereto there is a note by the pleader, who had been acting for the judgment-debtor, to the effect that he was no longer acting for him. Then on the 29th April, the Subordinate Judge recorded an order fixing the case for hearing on the 6th of May on the ground that the petitioner's Pleader had not received intimation of the date fixed for hearing. Thereafter on the 6th May the Order, which forms the subject-matter of the present appeal, was passed stating that both parties were absent and that the case was dismissed for default.

5. The substantial contention urged on behalf of the appellant is that neither of the parties nor their pleaders were aware that the case would be taken up on the 6th of May and that some sort of notice ought to have been given of the date fixed after the return of the record. On the whole we think that this contention is well founded and that having regard to the particular circumstances of the case it would be a hardship on the appellant if the order was allowed to stand. The usual procedure after the record had been recovered back from the High Court would be for the pleaders of both to be informed of the date fixed. In this particular instance as the Pleader for the judgment-debtor has ceased to act for him it would have been more satisfactory if notice had been served on the judgment-debtor of the date fixed for the hearing of the application.

6. Having regard to these considerations, the appeal must be allowed and the case must go back to the lower Court to be disposed of according to law. We make no order as to costs.

7. The Vakil for the appellant undertakes to inform his client of the date when the record is sent back by this Court.

8. The rule (659 M.) is discharged without

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