

Sri Krishen And Anr. vs Radha Kishen And Anr. on 15 September, 1950

Equivalent citations: AIR1952ALL652, AIR 1952 ALLAHABAD 652

JUDGMENT

Agarwala, J.

1. This is an application in revision & has arisen under the following circumstances :
2. The applicants made an application for the setting aside of an award under Section 33, Arbitration Act, & the application was allowed 'ex parte' because the opposite-parties were not present. Later on the 'ex parte' order was set aside & a fresh date for final hearing was fixed. Several adjournments of the date fixed for hearing were made at the instance of the applicants & the last date so fixed was 19-5-1947. On this date also, the applicants were absent while the opposite parties were present & the Court passed the following order:

"The plffs. are absent, the defts. are present ready to proceed. This was a date which was fixed for hearing after the plffs. had already sought an adjournment. Hence the suit decided under Order 17, Rule 3, Civil P. C.; Order. The suit be dismissed with costs."

3. The plffs. then applied to the Court for setting aside the 'ex parte' order passed on 19-5-1947. The Court rejected this application on the ground that the order of the 19th May was an order passed under Order 17, Rule 3, Civ. P. C. & could not be set aside by him. The applicants then filed an appeal in the lower appellate Court against the dismissal of their application for restoration. The lower appellate Court considered that though the trial Court's order of 19-5-1947, was a dismissal for default & not a dismissal on merits yet because no appeal is provided against the dismissal of the application for restoration under the provisions of the Arbitration Act the appeal was incompetent. It, therefore, dismissed the appeal. The present application in revision is directed against this order.
4. It has been urged that the view of the lower appellate Court that no appeal lay to that Court against an order dismissing an application for restoration made under Order IX, Rule 9, Civ. P. C. was erroneous. We think that this contention is sound. Section 41 of the Arbitration Act makes the provisions of the Code of Civil Procedure applicable to all proceedings before the Court, but "subject to the provisions of the Act & of Rules made thereunder."
5. Leaving apart the phrase "subject to the provisions of the Act & of Rules made thereunder, for the time being let us consider the effect of the application of the provisions of the Code of Civil

Procedure to all proceedings under the Arbitration Act. The provisions of the Code of Civil Procedure, of course include provisions applicable to suits & to reviews, references, revisions & appeals. Where, therefore, the entire body of the provisions of the Code of Civil Procedure is made applicable to a certain proceedings all such procedure as is provided for in the Code of Civil Procedure whether it is in relation to the first Court trying a suit or it is in respect of appeals, review, or revision, becomes applicable to those proceedings. When the provisions of the Civil Procedure Code are made applicable subject to the provisions of a particular Act all such provisions of the Civil Procedure Code, which are inconsistent with the provisions of the Act, are to be deemed as not having been made applicable to the proceedings under the Act. The only provision of the Arbitration Act which is said to be inconsistent with the right of appeal, as pointed out to us, is contained in Section 39 of the Act which reads as follows:

39 (1) "An appeal shall lie from the following orders passed under this Act (& from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order: An order:

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is arbitration agreement.
- (vi) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court. (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council."

6. It is urged that the words "and from no others" clearly exclude the applicability of the appellate provisions of the Civil Procedure Code except to the extent to which appeals are allowed by Section 39. Section 39 however allows appeals against orders passed under the express provisions of the Act itself & not against any order passed upon the application of the rules of the Civil Procedure Code.

7. In our opinion the phrase "and from no others" refers to orders passed under the Act, i.e., under the express provisions of the Act. It has no reference to appeals which the Code of Civil Procedure provides from orders passed under the provisions of that Act. In one sense, no doubt, when the provisions of the Code of Civil Procedure are made applicable to proceedings under the Arbitration

Act it may be said that those provisions are incorporated in the Arbitration Act itself & as such any order passed under the provisions of the Civil Procedure Code is an order passed under the Act. But this is not the sense in which the words "under the Act" are used in Section 39 "Under the Act" refers to the express provisions of the Act & not to the provisions contained in the Civil Procedure Code.

8. This point came up for consideration before a Full Bench of this Court in 'Ramesh Chand v. Dr. Shyam Lal', A. I. R. (33) 1946 All 34. This was a case under the Encumbered Estates Act. By virtue of rule 6 framed under that Act, the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the Encumbered Estates Act, so far as they are applicable & are not inconsistent with the provisions of the Act. Rule 6 would, therefore, appear to be similar to Section 41, Arbitration Act. Under Section 45, Encumbered Estates Act, an appeal was provided "against any decree or order, finally disposing of the case, of a Special Judge, under this Act." An application for review had been rejected & the question was whether an appeal lay against the order rejecting the review application. Under the Code of Civil Procedure no appeal is provided but it was urged that since the Code of Civil Procedure had been made part of the Encumbered Estates Act the order rejecting the application for review was one passed by the Special Judge "under the Act" & as such an appeal lay under Section 45. The majority of the Judges constituting the Pull Bench rejected this plea & held that an order passed 'under the Act' meant an order passed under the express provisions of the Act, & not one passed under the Code of Civil Procedure. The reasoning adopted by the majority in the Pull Bench equally applies to the present case. Section 39, therefore, does not take away the right of appeal which is given by the Code of Civil Procedure.

9. It should be noted that the whole of the Code of Civil Procedure has been made applicable to proceedings under the Arbitration Act & not merely the proceedings relating to suits as is the case under Section 141 of the Code of Civil Procedure.

10. In our opinion, an appeal lies when an application for restoration of an application made under the Arbitration Act is dismissed for default.

11. It has, however, been urged by Mr. Baleshwari Prasad, on behalf of the respondents, that inasmuch as the order passed by the trial Court on 19-5-1947, was an order on merits under Order 17, Rule 3 no application for restoration of the case was maintainable & as such no appeal against an order dismissing such an application for restoration lay to the lower appellate Court. We think that this contention is well founded.

12. The order of the trial Court has already been quoted. The Court expressly dismissed the suit on merits mentioning that it was passing an order under Order 17, Rule 3, Civil P. C. So far as the Court was concerned, it undoubtedly intended the dismissal to be on the merits.

13. The question whether an application for restoration is maintainable must be decided upon an interpretation of the order which the Court passes. If there is any doubt about the intention of the Court passing the order as to whether it intended to proceed under Order 17, Rule 3 or Order 17, Rule 2, in that case we can say that the order should be construed as one which 'ought' to have been passed. But this cannot be done when the Court expressly passes an order under one of the two

Rules. In that case, the aggrieved party should file an appeal against the order which is in fact a decree, & not apply for restoration.

14. We have examined the record & we are satisfied that the trial Court was justified in dismissing the application under Section 33 of the Arbitration Act on merits. The applicants had taken time on a number of occasions & got the dates for final hearing adjourned. When a party asks for an adjournment of the case which has been fixed for final hearing & the Court fixes another date again for final hearing the implication is that the party who obtains the adjournment obtains it for the purpose of taking steps necessary for the prosecution of the suit, to perform necessary acts for the further progress of the suit, & if he fails to appear on the adjourned date the Court has jurisdiction to pass an order under the provisions off Order 17, Rule 3, dismissing the case on merits on the ground that the claim of the plff. or the applicant has not been proved. This order can be passed even though the plff. or the applicant is absent on the date of hearing. Of course it is open to the Court not to proceed under Rule 3 & to proceed under Rule 2 instead.

15. In our opinion the appeal filed before the lower appellate Court was rightly dismissed though, the reasons for the dismissal given by the lower appellate Court are not correct.

16. There is no force in this revision & we dismiss it with costs.