Radha Ballabh vs Jawahar Lal on 14 October, 1955

Equivalent citations: AIR1956ALL216, AIR 1956 ALLAHABAD 216

JUDGMENT

Roy, J.

1. This is a defendant's second appeal prising out of a suit 'for profits under Section 230, U. P. Tenancy Act, No. 17 of 1939. The suit had been instituted by Jawahar Lal, the plaintiff-respondent. During the pendency of the suit he became insane and his son was appointed his next friend. On. 27-7-1948, the suit was dismissed in default.

An application for restoration of the suit was made on 25-8-1948, which was described as "an application by Prem Chand, the pairokar of the plaintiff, through his Vakil Sri Jamuna Prasad". In that application it was contended that the plaintiff had been ill on 27-7-1948, when the case was fixed for hearing.

The application in restoration was allowed and the suit was restored to file on its original number of re-hearing by an order dated 4-11-1948. The defendant had made an application for the review of the order of restoration but that application was rejected.

Ultimately the suit was decreed by the learned Assistant Collector, first class, on 30-3-1950, in the sum of Rs. 80/12/9 with proportionate costs and interest. Prom that decision an appeal was taken before the Civil Judge of Mathura, being Revenue Appeal No. 33 of 1950, and the appeal was dismissed on 29-7-1953. The defendant has, therefore, come up in second appeal.

2. The point which has been urged by learned counsel for the appellant is that the application in restoration was not made by or on behalf of the plaintiff and consequently the Court wrongly assumed jurisdiction in entertaining it and in restoring the suit to file on its original number.

Ordinarily an order passed by a Court restoring a suit to file on. its original number under the provisions of Order 9, Rule 9 Civil, P. C., would be a revisable order under the provisions of Section 115 of the Code. 'Habib Shah v. Debi Bax Singh', 14 Ind Cas 221 (Oudh) (A), 'Manickam Filial v. Mahudam Bathummal', AIR 1925 Mad 209 (B) and 'Raghunath Das v. Sri Kishan', AIR 1950 All 248 (C) may be cited as cases in support of this pro position.

A Full Bench of this Court in -- 'Ram Sarup v. Gaya Prasad', AIR 1925 All 610 (D) held that the High Court can interfere in revision with an appellate order directing the setting aside of a decree 'ex parte'.

3. The matter, in the present case, will however, be governed by the provisions of the U. P. Tenancy Act of 1939. Under that Act the Second Schedule lays down that Section 115, Civil P. C. will not apply to suits or proceedings under the Act.

It has, therefore, to be seen whether the order of restoration passed under Order 9, Rule 9, Civil P. C., which was not revisable under Section 115 of the Code, can be brought into question in this appeal. Learned counsel for the appellant relies upon Section 105, Civil P. C., in support of his submission that it can be so brought into question. That section provides:

> "Save as otherwise expressly provided no appeal shall He from any order made by a Court in the exercise of its original or appellate jurisdiction, but where a decree is appealed from, any error, defect or irregularity in the order 'affecting the decision of the case' may be set forth as a ground of objection in the memorandum of appeal".

The words "affecting the decision of the case" in this section are important. It has to be seen whether the order which has been passed by the trial court under Order 9, Rule 9 of the Code can be construed as an order affecting the decision of the case.

4. In -- 'Gulab Kunwar v. Thakur Das', 24 All 464 (E), it was held by a Division Bench of this Court under analogous provisions of the Code of Civil Procedure which was then in force that an order readmitting an appeal which had been dismissed for default is not appealable; neither is it an order "affecting the decision of the case" which "may be set forth as a ground of objection in the memorandum of appeal" from the decree in the suit within the meaning of Section 591 of the Code.

A contrary view was taken in another Division Bench ruling of this Court in -- 'Nand Ram v. Bhopal Singh', 34 All 592 (P) where it was observed that the words "affecting the decision of the case" cannot be interpreted as meaning affecting the decision of the case with reference to. its merits and that in the absence of any such limitation as may be imposed by introducing the words "with reference to its merits" a Court has no power to read such limitation into the section.

The question again came up for consideration by a Full Bench of this Court in AIR 1925 All 610 (D), There the point that was referred to the Full Bench was whether the High Court can interfere in revision with an appellate order directing the setting aside of an ex parte decree when the appellate court had no power, under the provisions of Order 9, Rule 13 to give such a direction.

The Full Bench answered that question in the affirmative and held that the High Court can interfere in revision. Three separate but concurring judgments had been pronounced by the Judges constituting the Full Bench on that question. In the report of the Judgment of Lindsay, J., it appears that the question was raised as to whether the word "decision' in Section 105 means decision upon the merits.

Lindsay, J. accepted the view in 'Chintamony Dassi v. Raghoonath Sahu',. 22 Cal 981 CG) which was followed by this Court in 24 All 464 (E) and. also in 'Tasadduq Husain v. Hayat-un-Nissa, 25 All 280 (H) and he expressly dissented from the contrary view expressed in 34 All 592 (F) referred to above.

In view of these decisions, I am of the opinion that the word "decision" in Section 105 of the Code of Civil Procedure means decision upon the merits. An order passed under Order 9, Rule 9 of the Code cannot be construed to be a decision upon merits so as to come within the purview of Section 105 of the Code. Consequently the order of restoration cannot be brought into question in this second appeal.

5. Apart from that aspect of the matter, it has been found by the lower appellate court that the plaintiff regained sanity long before the application in restoration had been made. If that was so, the plaintiff could make the- application in restoration by himself without bringing into aid the hand of his next friend. If on the other hand he was insane on that date, his next friend could make the application.

It has been contended on behalf of the appellant that there was no evidence whatsoever .to justify the presumption of the lower appellate Court that the plaintiff regained sanity long before his application in restoration had been made. The question whether the plaintiff had regained sanity or not before the application in restoration had been made was a question of fact, and that cannot now be gone into again in second appeal. So also the question whether the application in restoration was made by proper person.

6. In my opinion this second appeal is concluded, by findings of fact and it is, therefore, dismissed under Order 41, Rule 11, Civil P. C.

7. Leave to appeal is refused.