(1964) 12 AHC CK 0015

Allahabad High Court

Case No: F.A.F.O. No. 401 of 1961

Prem Prakash Agarwal		APPELLANT
	Vs	
Ram Pratap		RESPONDENT

Date of Decision: Dec. 9, 1964

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11(1), Order 41 Rule 11(2), Order 41 Rule 19

Citation: AIR 1967 All 47

Hon'ble Judges: D.S. Mathur, J

Bench: Single Bench

Advocate: L.M. Pant, for the Appellant; J.N. Pant, for the Respondent

Final Decision: Dismissed

Judgement

D.S. Mathur, J.

This is an appeal by Prem Prakash Agarwal, defendant against the order dated 1-8-1961 of the District Judge of Kumaun. dismissing his application under Order 41, Rule 19, C. P C. for restoration of the appeal which had earlier been dismissed on merits though according to him (appellant), for default under Order 41, Rule 11, C. P. C. The District Judge has not worded his order properly but what he apparently meant was that the appeal had been dismissed on merits under Order 41, Rule 11 (1), C. P. C., and consequently no application under Order 41, Rule 19, C. P. C., for restoration of the appeal was maintainable, and the only remedy available to the party was to challenge the decree passed in the appeal by way of Second Appeal.

2. The material facts of the case are that the suit instituted by Ram Pratap, respondent, was decreed ex parte when the defendant did not put in appearance on the date fixed for hearing. Prem Prakash Agarwal applied for restoration of the suit after setting aside the ex parte decree, but the application was dismissed. He thereafter, preferred an appeal against the order of dismissal, which was ordered to

be listed for admission on 1-7-1961. The notice of the date of hearing was given to the counsel for the defendant appellant, but on the date fixed, that is, 1-7-1961, neither the appellant nor his counsel put in appearance and the District Judge decided to dismiss the appeal on merits. Such an inference can be drawn from the following words used in the order dismissing the appeal.

"The reasons given by the learned Munsif for refusing the application are, in my opinion proper. ""

3. The defendant-appellant treated the order of dismissal to be for default and moved an application under Order 41, Rule 19, C. P. C., for setting aside the order and for re-admission of the appeal for hearing. The application was dismissed under the order under appeal, which runs as below :

"The appeal having been dismissed under Order 41, Rule 11, I do not think I can restore it to its number. The applicant has his remedy by appeal Rejected."

4. The learned Advocate for the plaintiff-respondent has raised a preliminary objection to the maintainability of the appeal. The point raised by him is that the appeal was dismissed on 1-7-1961 under Order 41, Rule 11 (1), C. P. C., and consequently no restoration application under Order 41, Rule 19, C. P. C., was maintainable and the only remedy available to the defendant was to challenge the order dated 1-7-1961 by way of appeal, or revision, as the case may be, and not by challenging the order passed on the application purporting to be under Order 41, Rule 19, C. P. C. The learned Advocate for the plaintiff-respondent has placed reliance upon certain observations made in Chimman Lal and Others Vs. Syed Zahur Uddin, . These observations may be obiter dicta but they lay down the law, I may say with respect correctly

5. An appeal preferred against a decree can be dismissed, without, sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader (counsel), either under Sub-rule (1) or under Sub-rule (2) of Rule 11 of Order 41, C. P. C. Sub-rule (1) provides that the Appellate Court may dismiss the appeal, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day. The appeal is dismissed under Sub-rule (2) if on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing. It shall be found that the dismissal under Sub-rule (2) is invariably in the absence of the appellant or his counsel, and under Sub-rule (1) after hearing the appellant or his pleader if he appears on the day fixed for hearing. The dismissal under Sub-rule (2) is clearly for default of the appellant. Controversy can, however, exist with regard lo the scope of Sub-rule (1) in view of the use of the words "if he appears on that day."

6. Order 41, Rule 19, C. P. C., makes a provision for the readmission of an appeal dismissed for default and a perusal thereof shall make it clear that re-admission of

the appeal is possible only when it is dismissed under Sub-rule (2) of Rule 11 of Order 41, and not under Sub-rule (1) thereof. The dismissal under Sub-rule (1) is thus on merits, and not for default, and an appeal so dismissed cannot be restored though the aggrieved party can challenge the order by way of appeal or revision, if maintainable.

7. The important ingredients of Sub-rule (1), the compliance of which must be made before an order of dismissal under this Sub-rule can be passed, are :

(a) that a day for hearing the appellant or his pleader he fixed; and

(b) that the appellant or his pleader be heard if he appears on that day.

8. This naturally implies that notice of the day for hearing be served on the appellant or his pleader. Without his being served, he cannot be expected to appear in Court to make his submissions in support of the admission of the appeal. Further, there can be no hearing unless the party to be heard is informed of the day fixed for hearing. In the instant case, the lower appellate Court had fixed a day for hearing and information thereof was given to the counsel for the appellant but he did not put in appearance and in his absence the appeal was dismissed, as appears from that order, on merits. This order would be legal and for that reason cannot be deemed to be under Sub-rule (2) and no application under Order 41, rule 19 C. P. C., shall be maintainable, if an appeal can be dismissed on merits under Sub-rule (1) in the absence of the appellant or his pleader.

9. Two important rules of interpretation of statutes are that an attempt must be made to harmonize the various provisions if they appear to be contradictory. No question of harmonization shall arise if there exists no conflict and the provisions have been worded in clear and unambiguous words. The second rule of interpretation is that all the words used in the enactment must be given their full & proper meaning and no word should be regarded as superfluous unless it be not possible to give a proper interpretation to the enactment or the meaning given is absurd or inequitable. Further, Courts of law cannot omit or add words to an enactment on the supposed intention of the legislature omission or addition of words is an exception and not a rule, to he adopted only when without such a course it is not possible to give effect to the intention of the legislature.

10. In view of Section 121 C. P. C., the rules contained in the First Schedule including Order 41 C. P. C., shall have the effect as if enacted in the body of the CPC until annulled or altered in accordance with the provisions of Part X of the Code. Order 41, Rule 11, C. P. C., has not been amended by the Allahabad High Court and this rule can be treated as a part of the Code and all the rules for interpretation of statutes shall be applicable to the interpretation of the rules contained in tile First Schedule of the Code also.

11. As already mentioned above, the dismissal of the appeal under Sub-rule (2) of Rule 11 of Order 41, C. P. C., is for default of the appellant and after such dismissal, the appeal can, on the Court being satisfied be readmitted under Order 41, rule 19 C. P. C., for a fresh hearing. But after the dismissal of the appeal under Sub-rule (1), after hearing or not hearing the appellant or his pleader, no restoration application under Order 41, Rule 19, C. P. C., is maintainable and the appeal cannot be readmitted for a fresh hearing. Such dismissal is, in the eye of law, on merits. Two sub-rules thus govern different kinds of cases and it cannot be said that there exists any conflict between the two. The dismissal under Sub-rule (1) is, on merits like the decision of a suit under Order 17, Rule 3 C. P. C., or otherwise while under Sub-rule (2), like the decision of a suit under Order 9, C. P. C.

12. If the words " if he appears on that day" were not incorporated in Sub-rule (1), it could be said with considerable force that the dismissal under Sub-rule (1) could be after hearing, and not without hearing the appellant or his pleader. In such a case the material part of Sub-rule (1) would have run as below : " The Appellate Court ..... . .after fixing a day for hearing the appellant or his pleader and hearing him accordingly ..... may dismiss the appeal without sending the notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader. "

13. Where the appellant or his pleader has been informed of the day fixed for hearing, but he does not put in appearance, he is given an opportunity of being heard, but is not actually heard. Consequently, the dismissal under Sub-rule (1) if it was drafted in the above form, would be after hearing the appellant or his pleader, that is, after the appellant has put in appearance, but not when the appellant and also his pleader absent themselves. If the above words had not been incorporated in Sub-rule (1), the dismissal in the absence of the appellant and his pleader would in each and every case be for default under Sub-rule (2) and could never be under Sub-rule (1), with the result that even if the Court expressed an opinion on merits, that part of the order would be ineffective and, one may say, without jurisdiction and the dismissal of the appeal shall continue to be under Sub-rule (2) and not under Sub-rule (1).

14. However, the legislature intentionally incorporated the words "if he appears on that day" in Sub-rule (1), making it clear that the hearing of the appellant or his pleader shall not be a material part of the passing of an order of dismissal under Sub-rule (1). In other words, the Appellate Court shall have jurisdiction to pass an order under Sub-rule (1) after hearing the appellant or his pleader, or without hearing him, for so long as a day for hearing had been fixed and information thereof was communicated to the appellant or his pleader When the legislature intentionally added the above words in Sub-rule (1), the Courts of law shall not be justified in treating them as superfluous or in disregarding their effect. In the circumstances, Sub-rule (1) can be given only one interpretation, namely, that in

case of absence of the appellant or his pleader in spite of communication to him of the day for hearing, the Appellate Court has the discretion either to proceed under Sub-rule (1) by dismissing the appeal on merits or to proceed under Sub-rule (2) by dismissing the appeal for default. Where the Court decides to dismiss the appeal on merits, the only remedy available to the aggrieved party is to challenge the order if it is a decree on merits passed in the appeal. But if the appeal is not dismissed on merits, and instead is dismissed for default under Sub-rule (2), the aggrieved party has the remedy to apply for restoration under Order 41, Rule 19, C. P. C. This is what was observed in the Allahabad case referred to above.

15. The learned Advocate for the appellant has, however, urged that on the acceptance of the above view, Sub-rule (2) shall become superfluous and as Sub-rule (2) has also to be given its due meaning, Sub-rule (1) must be given the restricted meaning to cover only those cases in which actual hearing has been given to the appellant or his pleader. The second point raised is that the word''s "it he appears on that day" lay stress on the hearing and not on the dismissal of the appeal irrespective of whether the hearing is given or is not given. The third point raised is that on the adoption of the above view the Court shall be debarred from hearing the appellant or his pleader after the dismissal of the appeal on merits under Sub-rule (1), even though it may later be satisfied that there was sufficient cause for the appellant or his pleader not to put in appearance on the day the order of dismissal was passed.

16. I do not see how Sub-rule (2) of Order 41 Rule 11 C.P.C., becomes a surplus age In case if is permissible to dismiss an appeal on merits under Sub-rule (1) in the absence of the appellant or his pleader. As already indicated above, there exist other provisions in the CPC giving discretion to the Court to act in one manner or the other. When the Court proceeds as in the instant case under Sub-rule (1). it cannot be said that Sub-rule (2) will not be applicable to any case. In fact, it is discretionary with the Appellate Court to dismiss the appeal under Order 41 rule 11 C P C either on merits under Sub-rule (1) or for default under Sub rule (2). Sub-rule (2) will thus never become ineffective or a surplus provision.

17. The words "if he appears on that day" are co-related to or connected with the words "hear him accordingly" and have been used to clarify that the order of dismissal under Sub- rule (1) shall be passed after hearing the party only if be puts in appearance in Court. The Court cannot give a hearing to a person in absentia. For hearing the party Ms personal attendance is necessary. Consequently, the words "if he appears on that day" will merely show that the hearing of the appellant or his pleader is necessary only if he appears in Court, and not if he does not put in appearance.

18. The Court is expected to exercise, in fact, exercises discretion Judicially, and not arbitrarily," and consequently if it once decides to proceed under Sub-rule (1), and not Sub-rule (2), of Order 41. Rule II C.P.C. the same Court shall not ordinarily later

change its mind. If the discretion was not exercised properly, the remedy available to the aggrieved party is to challenge the order before a higher Court Farther, if the appellant or his pleader had sufficient cause for not putting in appearance on the day fixed for bearing of the appeal under Order 41, Rule II C. P. C., he can obtain an order for the hearing of the appeal after satisfying the higher Court, and not the same Court Whenever a suit or proceeding is decided on, merits in the absence of a party, no restoration is possible and the higher Court alone can set aside the decree or order on being, satisfied that there was, sufficient cause for non appearance. To clarify this point further, it may be noted that where a suit is decided on merits under Order 17 Rule 3, C. P.C. the Appellate Court is not debarred from remanding the suit for a fresh hearing on being satisfied that there was sufficient cause for the defaulting party not to have appeared in Court or not to have taken steps in time. It may be that a particular Court is unable to help the appellant or his pleader; but if his cause is genuine, he can seek redress before the higher Court.

19. The principles of natural justice merely make it necessary that a reasonable opportunity of hearing be given to a party and not that be given a hearing in the manner he desires When information of the day of hearing of the appeal under Order 41 Rule 11 C. P. C. is given to the appellant or his pleader he is given an opportunity to make his submissions before the Court and if he does not avail of that opportunity, he cannot later say that an order passed on merits in his absence violates the principles of natural justice or that the appeal has been decided without giving him a hearing.

20. To sum up, in the absence of the appellant or his pleader, art appeal can, at the stage of admission under Order 41 rule If C. P. C. be dismissed on merits under Sub-rule (1), though it shall be desirable not to dismiss the appeal on merits except in clear cut cases where there is no possibility of injustice being done to the appellant, considering that the jurisdiction of the High Court entertaining Second Appeal or revision is a limited one and the possibility of the appellant suffering an irreparable injury cannot be completely excluded. But where the Appellate Court decides to dismiss the appeal on merits, all the more in a petty case of the present nature, it cannot be said that the order is without jurisdiction or that the order of dismissal be deemed to be for default under Sub-rule (2). The order dated 1-7-1961 makes it clear that the appeal preferred by the appellant was dismissed on merits. The matter was also not such that the District Judge should not have dismissed the appeal under Sub-rule (1). Consequently, the order dated 1-7-1961 was and must be deemed to be under Sub-rule (1) of rule 11 of Order 41, C. P. C. and, as such, no application under Order 41 rule 19 C. P. C. was maintainable, and the impugned order cannot be treated as an order under O. 41 rule 19 C. P. C. In such circumstances, the F. A. F. 0. is not maintainable.

21. The F. A. F. O. is hereby dismissed, though it shall be open to the appellant to seek such other remedy as he may be advised Costs on parties. The stay order is

vacated.