

(1942) 02 AHC CK 0018

Allahabad High Court

Case No: Misc. Case No. 664 of 1941, in Ex. F.A. of 39

Ram Lal Sahu

APPELLANT

Vs

Dina Nath

RESPONDENT

Date of Decision: Feb. 6, 1942**Hon'ble Judges:** Verma, J; Allsop, J**Bench:** Division Bench**Advocate:** Lakchmi Saran, for the Appellant;**Final Decision:** Dismissed

Judgement

Allsop and Verma, JJ.

This is an application for the restoration of an execution appeal which was dismissed by a Bench of this Court of which one of us was a member. The appeal was dismissed because Learned Counsel for the Appellant stated that his client had instructed him to withdraw the appeal. It appears that the Applicant was a subsequent mortgagee and Dinanath the opposite party a prior mortgagee of certain property. The Applicant instituted a suit and obtained a decree for the sale of the property which he himself purchased. Thereafter Dinanath instituted a suit on his own mortgage imploding the Applicant as a subsequent mortgagee and he obtained a decree for the sale of the property. The Applicant's defense in that case was that the property in his possession in consequence of the sale of his mortgage was not the same as the property mortgaged to Dinanath. The point was apparently decided against the Applicant and a decree was passed. When proceedings were taken in execution of the decree the Applicant again raised the point that the property mentioned in the decree was not the property in his possession. The decision was against him and it was against that decision that he appealed to this Court. He withdrew the appeal, according to him, because he was advised that his proper remedy was to file a regular suit in order to obtain a declaration that the decree did not involve the property which was in his possession. He filed such a suit but it was dismissed by the trial Court and though an appeal to the first Court was allowed this

Court restored the order of the trial Court. It was when this Court dismissed the regular suit that the Applicant filed the present application for restoration of his appeal against the order of the Court executing the decree.

2. It seems to us that it is quite impossible now to restore an appeal which was dismissed on the application of the Appellant himself that he wished to withdraw it. It may be that the Appellant was acting under a misapprehension but that cannot affect the result. If we were to restore appeals which had been withdrawn in this manner we would create a state of affairs where nobody would ever be certain that litigation in which he was involved was concluded.

3. Learned Counsel has referred us to the case of [Mohammed Shafi and Others Vs. Chedu and Others](#), but the facts of that case were quite different. A suit had been dismissed and some of the Plaintiffs had appealed. Another Plaintiff had made an application to the trial Court to set aside the order dismissing the suit and to restore it to its original number. The trial Court accepted the contention of the Plaintiff and passed an order accordingly. That order was subsisting when the appeal against the decree dismissing the suit came before this Court. It was naturally brought to the notice of the Court that the decree had already been set aside by the action of the trial Court and consequently the appeal was dismissed. At a later stage the order of the trial Court restoring the suit was set aside by this Court and this Court then agreed to restore the appeal against the order dismissing the suit. It seems to us that the circumstances were quite different from those of the case before us. We do not think that we can possibly restore an appeal that was dismissed at the instance of the Appellant himself even if the Appellant was acting under a mistake of law. We consequently dismiss this application.