

(1962) 05 AHC CK 0010

Allahabad High Court

Case No: S.A. No. 2120 of 1953

Ulfat Rai

APPELLANT

Vs

Premwati and Others

RESPONDENT

Date of Decision: May 23, 1962

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 10, Order 9 Rule 9, 2(2), 96

Citation: AIR 1963 All 412

Hon'ble Judges: S.N. Katju, J; A.P. Srivastava, J

Bench: Division Bench

Advocate: Hari Swarup, for the Appellant; K.C. Saksena, for the Respondent

Final Decision: Dismissed

Judgement

Srivastava, J.

This second appeal has been referred to us by Mr. Justice Brijlal Gupta as in the opinion of the learned Judge it raised a question of importance which deserved consideration by a Division Bench.

2. The facts leading up to the appeal are not much in dispute. Five plaintiffs, Chunni Lal, Mitho Lal, Ulfat Rai, Basant and Ajudhya Prasad, filed the suit out of which this appeal has arisen against four defendants, Smt. Prem wati, Sia Ram, Babu Ram and Ram Dulare. The relief claimed was possession over the properties mentioned in the plaint by the cancellation of a deed of compromise dated the 23rd May 1947 filed in a mutation case No. 252 Jai Lal v. Jagannath in respect of village Merapur, Pargana Shamshabad East, tahsil Sadar, district Farrukhabad. Issues were framed in the suit on the 3rd February 1948 and the 21st May 1948 was fixed as the first date for final hearing. On that date two of the plaintiffs, viz. plaintiffs Nos. 1 and 2, and all the four defendants appeared and filed a compromise. The remaining three plaintiffs were not present. The compromise was verified by the persons who were parties to it and the order which the Court passed was:

"The suit is decreed in terms of the compromise between the plaintiffs Nos. 1 and 2 and the defendants. The claim of the plaintiffs Nos. 3 to 5 is dismissed. The compromise shall be incorporated."

3. Ulfat Rai, one of the plaintiffs who had not participated in the compromise, then filed an appeal against the decree. The appeal was filed on the 24th August 1948. As it was prima facie beyond time an application was made for the condonation of the delay u/s 5 of the Limitation Act and the delay was condoned. When the appeal came up for hearing before the learned Additional Civil Judge of Farrukhabad a plea was raised on behalf of the respondents that the appeal was "not maintainable. The contention was that the suit of the appellant had really been dismissed for default and his only remedy lay in applying for restoration. As the order dismissing the suit for default did not amount to a decree no appeal could be filed against it. This contention found favour with the learned Additional Civil Judge and he dismissed the appeal as not maintainable. Against that order Ulfat Rai filed the present second appeal in this Court and the question which was raised for consideration was

"Whether the dismissal of the suit by the trial Court was really a dismissal for default and thus not appealable or whether it was a dismissal on merits and appealable on that account?"

The appellant contended that the dismissal was on merits and the appeal should, therefore, have been entertained by the learned Additional Civil Judge. The respondents on the other hand maintained that the dismissal was for default and the only remedy of the appellant was to apply for restoration and he could not file an appeal. Two cases were cited before Mr. Justice Brijlal Gupta. They were [Kulendra Kishore Roy Vs. Rai Kishori Shaha](#), and Jugeshar Rai v. Railal Bahadur AIR 1918 Pat 376 but the learned Judge thought that they were not very relevant. He felt that there was no authoritative decision on the point which was of some importance and, therefore, referred the appeal to a Division Bench.

4. it cannot be disputed in the circumstances of the present case that 21st May 1948 was the first date or final hearing. When the case was taken up for hearing only two of the plaintiffs were present and the remaining three were absent. The two plaintiffs entered into a compromise with the defendants and that compromise was verified and incorporated in the decree. So far as the other plaintiffs, including the present appellant, were concerned, the suit was dismissed. Was it dismissed for default or was it dismissed on merits?

5. Where there are more plaintiffs than one very often only some appear to conduct the case on behalf of all. The law does not require every one of several plaintiffs to be present on all dates of hearing. Rule 10 Order IX C.P.C. provides:--

"Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had

appeared, or make such order as it thinks fit."

This is a permissive provision and if only some of several plaintiffs appear it is open to the Court to allow them to represent all the plaintiffs and to permit the suit to proceed as if all the plaintiffs were present, it is also open to the Court if the circumstances of the case justify to treat the plaintiffs present as representing only themselves and to treat the absent plaintiffs as not appearing and to proceed with the suit accordingly. Whether the plaintiffs who appear will be permitted to represent all the plaintiffs or will be considered to be representing only themselves will depend on the circumstances of each case and no universal rule can be laid down for deciding that question, in the present case the appellant was himself not present when the case was called on the 21st May 1948. The other two plaintiffs who were present and who had entered into the compromise did not purport to represent the appellant or the other absent plaintiffs. They did not move the Court for permitting them to represent the other absent plaintiffs so that the case could proceed as if all the plaintiffs were present. What they did was that they filed a compromise in which they and the defendants alone were the parties and in which the other absent plaintiffs had not been impleaded.

The Court too did not pass any order under Rule 10 permitting the suit to proceed as if the absent plaintiffs had also appeared. In these circumstances the appearance of the two plaintiffs who had joined the compromise could not, in our opinion, be considered to be appearance for the absent plaintiffs also and the absent plaintiffs including the appellant must be deemed to have been absent on that date. If they were absent the suit could not have been dismissed on merits. It was particularly so because 21st May 1948 was not an adjourned date for which the plaintiffs had undertaken to take any steps. Order XVII Rule 3 of the C.P.C. did not, therefore, apply.

6. As the compromise which was filed did not even purport to be on behalf of all the plaintiffs including the appellant the suit cannot be held to have been decided in accordance with the terms of the compromise so far as the appellant was concerned. The merits of the appellant's claim were not considered. He was not present personally on the date and the first two plaintiffs who were present did not represent him and were not permitted to represent him. The dismissal of the suit so far as the appellant was concerned could, therefore, be interpreted only as a dismissal for default. The definition of the word "decree" given in the C.P.C. shows that a dismissal for default does not amount to a decree and if the suit was dismissed for default the only remedy of the appellant was to apply to; the setting aside of the dismissal so far as he was concerned and to have the suit restored to its original number. The learned Civil Judge was, therefore, correct in his view that the appeal filed by the appellant was not maintainable. His appeal was thus rightly dismissed.

7. The second appeal cannot, therefore, succeed. It is dismissed with costs.