(1975) 02 MP CK 0002

Madhya Pradesh High Court

Case No: C. Revision No. 426 of 1973

Nathu Prasad	APPELLANT
Vs	
Singhai Kapurchand	RESPONDENT

Date of Decision: Feb. 6, 1975

Acts Referred:

- Arbitration Act, 1940 - Section 41
- Civil Procedure Code, 1908 (CPC) - Section 100, 104, 141, 151, 2(2)
- Criminal Procedure Code, 1973 (CrPC) - Section 146(1)
- Evidence Act, 1872 - Section 3

Citation: (1976) JLJ 340

Hon'ble Judges: Shiv Dayal Shrivastava, C.J; S.S. Sharma, J; Raj Krishna Tankha, J

Bench: Full Bench

Advocate: Ravish Agrawal, for the Appellant; B.C. Verma, for the Respondent

Judgement

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Shivdayal, C.J.
An apparent conflict between Pooranchand Mulchand Jain Vs. Komalchand Beniprasad Jain, (Dixit, C.J., and Pandey J.) and Komalchand v. Pooranchand 1970 JLJ 11 = 1969 MPLJ 937 (Naik and Singh, J.) has led to this reference. Three questions have been referred to us :-

(1) Whether an appeal lies under Order 43, rule 1 (c), rejecting/dismissing for default an application under Order 17 rule 2, read with Order 9, rule 9, C.P.C. ?

(2) Whether the Division Bench which decided Komalchand v. Pooranchand 1970 JLJ 11 = 1969 MPLJ 937 (Naik and Singh, J.), could take a contrary view to the one taken in Pooranchand Mulchand Jain Vs. Komalchand Beniprasad Jain, (Dixit, C.J., and Pandey J.), which had been decided by a Division Bench ?

(3) Whether the earlier decision in Pooranchand Mulchand Jain Vs. Komalchand Beniprasad Jain, (Dixit, C.J., and Pandey J.), operated as res judicata in the later case (Komalchand v. Pooranchand) 1970 JLJ 11 = 1969 MPLJ 937 (Naik and Singh, J.)?.

2. The first question is of general importance and frequent occurrence on which conflicting views were taken by the two Division Benches, The second and third questions arise because of the two particular decisions mentioned in them.

3. This revision has arisen in the circumstances which may be briefly narrated as follows. A money decree was passed in favour of Nathuprasad (revision-petitioner No. 1) and Dwarkaprasad, whose legal representative is petitioner No. 2, against respondents Nos. 1, 3, and 4, and one Gulabchand, whose legal representative is respondent No. 2. In execution of that decree, a house was attached. Kapurchand (judgment-debtor) filed an objection that it was a self-acquired property. The executing Court rejected that objection, whereupon Kapurchand instituted a suit for setting aside the aforesaid order of the executing Court and for declaration that the house could not be attached or sold in execution of that decree. This was registered in the Court of Civil Judge Class I, Bilaspur, as Civil Suit No. 6-A of 1964. On October, 29, 1968, which was fixed for hearing since the plaintiff did not appear, the suit was dismissed. On November 28, 1968, the plaintiff applied for restoration of the suit on the ground of his witness''s illness, so that he could neither appear himself, nor instruct his counsel. This application (A) was registered as M.J.C. No. 23 of 1968.

4. On April 20, 1971, the aforesaid application for restoration (M.J.C. 23/68) was itself dismissed because when it was called on for hearing, neither of the parties appeared. On December 22, 1971, the plaintiff applied for restoration of M.J.C. No. 23 of 1968 (the aforesaid application for restoration of the suit). It was registered as M.J.C. No. 6 of 1971. It is not necessary to enter into the grounds on which that application (B) was made. However, on December 23, 1971, M.J.C. No. 6 of 1971 was allowed by the trial Court without issuing notice to the other side Now, it is this order dated December 23, 1971, which was passed in MIC. No. 6 of 1971, which is the subject matter of the present dispute.

5. When this matter was placed before the single Bench, the revision-petitioners contended, firstly, that the application (B) for restoration (M.J.C. No. 6 of 1971) was not maintainable; secondly, it having been made after about 8th months was clearly barred by time ; and, thirdly, that application could not be allowed without notice to them (defendants). On the other hand, the plaintiff raised a preliminary objection that the order passed in M.J.C. No. 6 of 1971 was appealable under Order 43, rule 1 (c) of the CPC and since that remedy was not resorted to by the revision-petitioners, this revision cannot be heard.

6. The single Bench referred the above three questions for decision by a larger Bench. It is thus that the matter is before us.

7. After hearing Shri Ravish Agrawal for the revision-petitioners and Shri B.C. Verma for the respondents and after going through the decisions cited by them, we have formed the view that the first question should really be split up into three as follows :-

(i) When an application under Order 9, rule 9, C.P.C., is dismissed for default, whether an application lies for its restoration under Order 9, rule 9 CPC ?

(ii) Whether an order dismissing an application under Order 9, rule 9 C.P.C. is appealable under Order 43, rule 1 (c), C.P.C. ?

(iii) If both the questions are answered in the affirmative, whether both the remedies are concurrent or either of them excludes the other ?

8. To look for an appropriate remedy where an application under Order 9, rule 9, C.P.C. is dismissed for default, the correct approach would be to answer, under what law was the dismissal. There are ''decisions'' in which it has been held that such dismissal does not fall with in the purview of any express provision of the CPC but, at the same time, when nobody appears to prosecute the application, it is either to be decided on merits or to be dismissed for default. That alone will prevent abuse of the process of the Court and that alone will be in the interest of justice. On that basis, it has been held in those cases that the dismissal of an application for default under Order 9, rule 9, is u/s 151 of the Code, which preserves inherent powers of the Court. And, since the dismissal itself is under inherent powers, such dismissal can also be set aside and the proceedings restored, in exercise of the inherent powers of the Court. In our opinion, section 141 of the CPC supplies the correct answer. It enacts thus :-

The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction.

Now, an application under Order 9, rule 9 C.P.C., is a proceeding in a Court of Civil jurisdiction. We see no reason why the procedure provided in regard to suits cannot be made applicable to a proceeding under Order 9, rule 9. There is no justification to read any such restrictive words in section 141. The section is in general terms and the expression "as far as it can be made applicable" provides for the extent to which the section can be applied to a civil proceeding other than a suit. The expression "all proceedings" is of a very wide connotation and to restrict it to a proceeding, which is original in nature and wholly independent of a suit will be doing violence to the language of the section. When a suit, which is dismissed for non-appearance of the plaintiff can be restored on satisfying the Court that the plaintiff was prevented by some sufficient cause from appearing before the Court, there is no reason why, when an application under Order 9, rule 9, is likewise dismissed for nonappearance of the applicant, the latter should be denied an opportunity to satisfy the Court that he was prevented by reason of sufficient cause from appearing before the Court, when his application was called on for hearing. The object and purpose of section

141 is that for economy of words, it was unnecessary to repeat the whole of the procedure in providing for procedure for an application or any other proceeding, original or ancillary. An application under Order 9, rule 9, C.P.C., in not an interlocutory application. It is different from an application made in a pending suit. By its nature, an application under Order 9, rule 9, is an independent application and is registered as an independent Misc. Judicial case. In Munshi Ram Vs. Banwari Lal, , the Supreme Court had to consider a case in which there was a compromise following an award by arbitrator. Hidayatullah, J. (as his Lordship then was) said :-

In such circumstances the new compromise itself may furnish a very good ground for superseding the reference and thus revoking the award as said by Chakravarti J. Where the parties do not throw the award overboard out modify it in its operation the award, in so far as it is not altered, still remains operative and continues to bind the parties and cannot be revoked. In that contingency, the Court may follow one of two modes indicated by the Privy Council in Hemanta Kumar''s case 46 Ind. App. 24. AIR 1919 PC 79. If the whole of the subject-matter of the compromise is within the reference, the Court may include in the operative part of the decree the award as modified. But if it is not so, the Court may confine the operative part of the decree to the award as far as accepted and the other terms of settlement which form a part thereof, if severable and within the original reference in a schedule to the decree. The portion included in the operative part would be executable but the agreement included in the schedule would be enforceable as a contract of which the evidence would be the decree but not enforceable as a decree. The power to record such an agreement and to make it a part of the decree, whether by including it in the operative portion or in schedule to the decree, in our opinion, will follow from the application of the CPC by S. 41 of the Arbitration Act and also S. 141 of the Code.
Thus, section 141, C.P.C., was applied to such a proceeding. Again, in Ramchandra Aggarwal and Another Vs. State of Uttar Pradesh and Another, while dealing with an application u/s 146 (1) of the Code of Criminal Procedure, their Lordships, referring to their earlier decision in Munshiram v. Banwarilal (supra), said :-

Though there is no discussion, this Court has acted upon the view that the expression ''civil proceeding'' in S. 141 is not necessarily confined to an original proceeding like a suit or an application for appointment of a guardian etc. but that it applies also to a proceeding which is not an original proceeding.

On that foundation section 24 (1) (b) of the CPC was applied to a proceeding arising out of a reference u/s 146(1), of the Code of Criminal Procedure.

9. The same view was taken by the Andhra Pradesh High Court in Rai Appa Row v. Veera Raghava AIR 1966 AP 263. Likewise, the Gujarat High Court in Kanji Mulji Kanani Vs. Manglaben Parmanand, applied section 441 to grant leave to amend an application to sue in forma pauperis.

10. Before us both sides relied on Madanlal v. T.M. Bank Ltd., AIR 1954 Assam 1.

11. Laxmi Investment Co. Pvt. Ltd. Vs. Tarachand Harbilas and Others, a Division Bench of that High Court held that section 141 would not apply to the dismissal of an application under Order 9, rule. C.P.C., "the reason is that section 141 contemplates proceedings which include original matters in the nature of suits such as proceedings in probates, guardianships and so forth and also applications which are ejasdem generis with such proceeding." With great respect, we would point out that the decision of their Lordships of the Supreme Court in Ramchandra v. State of U.P. (supra) appears to have escaped the attention of that Court. It was held in the Bombay Case that such an application could be made u/s 151 of the Code of Civil Procedure.

12. We are clearly of the view that application (B) lies to restore application A which was dismissed for default which application A had been made for setting aside the dismissal of a suit for default.

13. This brings us to the second part of this question whether an appeal is competent under Order 43, rule 1, from dismissal for default of an application under Order 9, rule 9. Clauses (c) and (d) of rule 1 of Order 43 enact thus:-

An appeal shall lie from the following orders under the Provisions of section 104, namely :-

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit.

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte.

The debate centres round the expression "rejecting an application". One interpretation is that the expression "rejecting an application" is general and comprehensive ; it cannot be confined to rejection on merits: otherwise, some words will have to be added, which are not there in the statute, and it is repugnant to the principle of interpretation of statutes to add words, unless the provision is otherwise rendered absurd or nugatory. The other interpretation is that the expression "rejecting an application", by necessary intendment, refers to rejection on merits and it will be repugnant to the scheme of the CPC to provide an appeal from an order passed in consequence of non-appearance of a party. For instance, when a suit is dismissed for default, no appeal lies and it will not be consonant with the principle of harmonious construction to hold that when an application under Order 9, rule 9 is dismissed for default, the law intended to provide for an appeal from it.

14. The former interpretation was accepted by a Division Bench of this Court in Komalchand v. Pooranchand 1970 JLJ 11 = 1969 MPLJ 937 and the Full Bench of the Patna High Court in Doma Choudhary v. Ram Naresh Lal AIR 1959 Patna 121, where it has been emphatically observed thus:-

There can, therefore, be no distinction in principle between the two clauses. If an appeal lies under rule 1 (d) from an order dismissing an application under rule 13 of Order IX for default, an appeal will also lie under rule 1 (c) from an order dismissing an application under rule 9 of Order IX for default. I have made this clear because some of the decisions which have to be referred to relate to clause (c) and some to clause (d).....There is no reason at all to give a restricted meaning to the word ''rejecting'' in the clauses by saying that it refers only to rejection on merits. If it is argued that there is no specific provision in the clauses regarding dismissal of an application for default that argument can be countered by saying that there is no specific expression in them even relating to rejection on merits. In the definition of ''decree'' in section 2 (2), it has been expressly provided that a decree shall not include any order of dismissal for default.

The latter interpretation finds supported in a Division Bench decision of this Court in Pooranchand Mulchand Jain Vs. Komalchand Beniprasad Jain, Asrab Ali v. Abdul AIR 1966 Tripura 2 & Gaffar Gaja v. Mohd. Farukh AIR 1961 Allahabad 56. The Tripura decision followed the Full Bench decision of the Assam High Court in Madnnlal v. Tripura Modern Bank Ltd., AIR 1954 Assam 1. But we find that the learned Chief Justice and Deka, J. of the Assam High Court, who constituted the majority, as observed by them in paragraph 30 and 41 respectively, favoured the first interpretation.

15. In our opinion, there is nothing in the wording of Order 43, rule 1 (c) C.P.C. to restrict it to rejection on merits. The words "rejecting an application" are comprehensive enough to include dismissal for default on rejection in any other situation whatever.

16. In Pooranchand v. Komalchand [1], the Division Bench observed thus :-

It seems to us unnecessary to examine some decisions in which it has been held that an appeal lies under Order 43, rule 1 (c) from an order rejecting for default an application under rule 9..... These decisions and others.....overlook the position that when an appeal is preferred against an order rejecting for default an application under rule 9 for the restoration of a suit, the appeal is not against the order to set aside the dismissal of a suit within the meaning of O. 43, R. 1 (c), that section 141 deals with procedure alone and not with any substantive rights, and that the remedy under O. 9, R. 9 C.P.C. is not a matter of procedure but is a substantive right.

with greatest respect, it must be said that the Division Bench was not right when it said : "appeal is not against an order to set aside the dismissal of a suit". Indeed, clause (c) of Rule 1, Order 43, does not make appealable an order to set aside dismissal of a suit. In terms it applies to an order under Order 9, Rule 9 rejecting an application, and the phrase "for an order to set aside the dismissal of a suit," qualifies such "application." To put it differently, when an application is made for an

order to set aside the dismissal of a suit and such an application is rejected by an order under Order 9, Rule 9 C. P. C., in terms, it falls under clause (C). Now, when a suit is dismissed for default and an application is made for an order to set aside the dismissal, it is an application under Order 9, Rule 9, and an order passed on it is also under Order 9, Rule 9. However, there is one argument which we found attractive at first. That argument is this. Rule 9 of Order 9 provides :-

If he satisfies the Court that there was sufficient cause for his non-appearance.....the Court shall make an order setting aside the dismissal.

It is necessarily implicit in this language that if he is unable to satisfy the Court that there was sufficient cause for his non-appearance, the Court shall reject his application. In other words, either there is satisfaction that there was sufficient cause, or there is satisfaction that there was no sufficient cause, and, in either case, satisfaction will be on merits. However, on further reflection, we would not accept this argument in as much as the decision of the application will depend upon the satisfaction or want of satisfaction. Now, want of satisfaction can be either when the fact alleged is ''disproved'' and also when it is ''not proved,'' to employ the language of section 3 of the Evidence Act. Therefore, when an application is dismissed for default, it is also a case where there is want of satisfaction of the existence of the alleged sufficient cause.

17. We have not come across any argument to demonstrate that the provisions of Order 43, Rule 1 (c) led to any absurdity or hardship, if the plain meaning of the clause is accepted. Consequently, it is not permissible to add the words "on merits," or any other words, in the said clause (c). It is the first principle of interpretation of statutes that effect must be given to the intention of the legislature. And, it is equally fundamental that the language of the law itself is the depository of the intention of the legislature. Therefore, where the language is clear, and the meaning plain, effect must be given to it. The Court cannot read a law as if its language is different from what it actually is. Otherwise, it will amount to amending the law, which is not permissible for the Court. See, for instance, Thakur Amar Singhji Vs. State of Rajasthan, and Hansraj Nathu Ram Vs. Lalji Raja and Sons of Bankura, The primary duty of the Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention. See The New Piecegoods Bazar Co. Ltd., Bombay Vs. The Commissioner of Income Tax, Bombay,

18. The result of this discussion is that in our view, an appeal lies from an order dismissing for default or on merits, an application under Order 9, Rule 9, C. P. C.

19. Turning now to the third aspect of the question, it must be said that the field of a provision for restoration is different from that of an appeal. In an application for restoration under Order 9, Rule 9, C. P. C., the applicant will have to show that he was prevented by sufficient cause from appearing before the Court when his

application for restoration (M.J.C.) was called on for hearing. If he is able to satisfy the Court of the existence of such sufficient cause, his application under Order 9, Rule 9 C. P. C., which had been filed earlier, will be restored. If he is not able to so satisfy the Court, his application will be rejected. On the other hand, if the applicant, whose application under Order 9, Rule 9 has been dismissed for default, prefers an appeal from that order, he will have to satisfy the appellate Court that the order of the Court below was erroneous on merits, that is, on the material on record before the lower Court, it could not justifiably pass such order.

20. We have pointed out that when an application under Order 9, Rule 9, is dismissed for default, both the remedies are available to the applicant : (1) he can apply for restoration under Order 9 Rule 9 C. P. C., and (ii) he may appeal under Order 43, Rule 1 (c). Thus, side by side, two remedies are open to him. There is no provision in the Code to the effect that either of them will exclude the other. However if an appeal has been filed and decided, the order of the lower Court will merge in the order passed by the appellate Court. There is nothing wrong or unusual that a party should have two alternative and simultaneous remedies against an adverse order. It is settled and undisputed law that when an exparte decree is passed, the defendant has four courses open to him : (i) to apply under Order 9, Rule 9, C. P. C., to set aside the exparte decree, or (ii) to appeal from the exparte decree, or (iii) to apply for review, or (iv) to institute a suit on the ground of fraud. The first two remedies can be prosecuted concurrently as long as no decision is rendered in either of them. The mere fact that one of the remedies has been resorted to, does not ipso facto bar the other. Filing an application under Order 9, Rule 13 does not affect the maintainability of the appeal u/s 96 or 100. However, where the appellate Court decides the appeal, then the decree of the first Court is superseded and the Court cannot proceed with the application to set aside the ex-parte decree. It must, therefore, be held that both the remedies pointed out above, that is by way of an application for restoration and by way of an appeal, are concurrent ; and, neither excludes the other.

21. This brings us to the second and third questions referred to this Bench. The two reported cases decided by two different Division Benches of this Court were cited and relied on as precedents. The two decisions referred to above can be examined in the present case only for that purpose. We cannot examine the correctness or otherwise of those decisions, as if we were sitting in appeal on them.

22. In Pooranchand Mulchand Jain Vs. Komalchand Beniprasad Jain, Dixit, C.J. for himself and Pandey, J., observed that an appeal does not lie under Order 43, rule 1 (c) from an order rejecting for default an application under Order 9. In the latter Division Bench case, i.e. Komalchand v. Pooranchand 1969 MPLJ 937, Naik, J. for himself and Singh, J., observed that there was an inadvertent omission of certain words when the first Division Bench read Order 43, rule 1 (c). Moreover, the latter Division Bench found it a little difficult to understand how and why the dismissal of

an application under Order 9, rule 9, for default would be under the inherent powers of the Court as held by the first Division Bench, and not under Order 9, rule 9, C.P.C. itself. It was argued before us that the second Division Bench could not hold that the interpretation put by the first Division Bench was wrong. The second Division Bench was bound to follow the first Division Bench ruling and in case it did not agree with the first Division Bench, then the only course open to the second Division Bench was to refer the matter to a larger Bench. In Mahadeolal Kanodia Vs. The Administrator-general of West Bengal, it was observed as follows :-

Before we part with this appeal, however, it is our duty to refer to one incidental matter. We have noticed with some regret that when the earlier decision of two Judges of the same High Court in Deorajin Debi and Another Vs. Satyadhyan Ghosal and Others, was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial decoram no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of Coordinate jurisdiction in a High Court start overruling one another''s decision. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court.
Again in Jaisri Sahu Vs. Rajdewan Dubey and Others, it was said :-

Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happen that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question and a contrary decision is given without reference to the earlier decision.....The better course would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities without taking upon itself whether it should follow the one Bench decision or the other. We have no doubt that when such situations arise, the Bench hearing cases would refer the matter for the decision of a full Court.

23. However, it appears to us that the decision of the latter Division Bench in Komalchand v. Pooranchand 1970 JLJ 11 = 1969 MPLJ 937, was rendered in perculiar circumstances. The revision which came up before the first Division Bench arose

from the same suit from which the subsequent revision which was decided by the second Divisional Bench, arose. The facts of that case may be very briefly stated thus : On August 25, 1958, Pooranchand instituted a suit No. 31-A of 1958 in the Court of the Third Additional District Judge. On April 22, 1959, it was dismissed for default (Order 9, rule 8 CPC). On the same day, i.e. April 22, 1959, an application (A) was made under Order 9, rule 9 which was registered as MJC No. 3 of 1959. On September 3, 1959, that application (''A'') was itself dismissed for default of the plaintiff''s appearance. Then the plaintiff adopted both the remedies : (i) he preferred an appeal, MFA No. 161 of 1959, under Order 43, rule 1 (c); he made an application for restoration under Order 9, rule 9 (read with S. 151, CPC). On January 29, 1960, the appeal was summarily dismissed. Letters Patent Appeal (No. 13 of 1960) was also dismissed by the Division Bench on April 21, 1960. That was the end of it so far as that proceeding (by way of appeal) was concerned.

(ii) The application (''B'') for restoration which was registered as MJC No. 31 of 1960, was itself dismissed for default on December 21, 1959. Then the plaintiff made an application (''C) for restoration of application (''B''). This last mentioned application (''C'') was allowed and MJC No. 31 of 1959, i.e. application (''B'') was restored. However, eventually, on October 17, 1960, the application (''B'') was finally dismissed. Aggrieved by that dismissal the plaintiff filed a revision (Civil Revision No. 39 of 1961) in this Court. That revision (Dixit, C.J. and Pandey, J.) was allowed and the case was remanded for inquiry on application (''A''), MJC No. 3 of 1959. When the matter went back to the trial Court, an objection was taken that the matter was res judicata. The learned Additional District Judge rejected that objection in view of the decision of the Division Bench in Civil Revision No. 39 of 1961 abovesaid. Ultimately, on March 31, 1964, the trial Court allowed the plaintiff''s application (''A'') dated April 22, 1959 and restored the suit to file, holding that there was sufficient cause for the plaintiff''s non-appearance in the Court on April 22, 1959, when his suit was dismissed for default. This last-mentioned order of the trial Court was challenged in revision (Civil Revision No. 274 of 1964), which was referred by Dixit, C.J. to a Division Bench. The Division Bench (Naik and Singh, JJ.) allowed the revision for the reasons we have already indicated.

24. The purpose of narrating the facts of that case is that both the conflicting decisions were rendered in two different Civil Revisions arising from two different stages of the same suit. However, both the decision can be used as mere precedents in the present case with which we are dealing.

25. Let it be mentioned for removal of doubt, and for making the picture complete, that when an application (''A'') under Order 9, rule 9 CPC, for restoration of the suit is rejected and an application (''B'') is made for restoration of the application (''A'') although such application (''B'') also falls within the purview of Order 9, rule 9, read with section 141, CPC, yet, the order rejecting the application (''B'') does not fall within Order 43, rule 1 (c) inasmuch as the application (''B'') is not "for an order to

set aside the DISMISSAL OF A SUIT"; it is for an order to set aside dismissal of the application (''A'').

26. We may now sum up the conclusions we have reached on the above discussion :-

(i) When application (''A'') under Order 9, rule 9, CPC is itself dismissed for default of the plaintiff/petitioner''s appearance, an application (''B'') lies under Order 9, rule 9, read with section 141 of the same Code, for restoration of the application (''A''). In order to succeed in this proceeding (''B''), the petitioner has to satisfy the Court that he was prevented by sufficient cause from appearing on the date when the application (''A'') was called on for hearing.

(ii) The order of dismissal for default of the application (''A'') is appealable under clause (c) of rule 1, Order 43, CPC.

(iii) Both the above remedies, i.e., application under Order 9, Rule 9, and appeal under Order 43, Rule 1 (c) are concurrent. They can be resorted to simultaneously. Neither excludes the other. The scope of each of the above proceedings is, however, different.

(iv) When an appeal (second remedy) is decided, one way or the other, the order of dismissal for default appealed from gets merged in the order of the appellate Court, so that thereafter the application (''B'') under Order 9 Rule 9, becomes iufructuous. When it comes to the notice of the appellate Court that an application has also been made under Order 9, Rule 9, for restoration, the appellate Court may do well to postpone the hearing of the appeal until the decision of the application under Order 9, Rule 9, CPC.

(v) No appeal lies from an order rejecting an application (''B'') for restoration of application (''A'') which latter application was for restoration of the suit.

(vi) As observed by their Lordships of the Supreme Court in Mahadeolal Kanodia Vs. The Administrator-general of West Bengal, and Jaisri Sahu Vs. Rajdewan Dubey and Others, , if a Division Bench does not agree with another Division Bench in a decision rendered earlier, the second Division Bench must either follow the earlier decision or place the matter before the Chief Justice for being referred to larger Bench. But the second Division Bench cannot take upon itself the task of holding that the decision of the first Division Bench was wrong.

27. We answer this reference accordingly. The matter shall now be placed before the single Bench.