

(2014) 09 CAL CK 0075
Calcutta High Court
Case No: CO 2507 of 2010

Aparna Ghosh

APPELLANT

Vs

Chitra Hore

RESPONDENT

Date of Decision: Sept. 24, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 57, Order 38 Rule 11, Order 38 Rule 11A, Order 38 Rule 38, Order 9 Rule 8

Citation: (2015) 1 CHN 221 : (2015) 2 WBLR 235

Hon'ble Judges: Subrata Talukdar, J

Bench: Single Bench

Advocate: Tanmoy Roy, Advocate for the Appellant

Judgement

Subrata Talukdar, J.

The only point which arises in this CO 2507 of 2010 for consideration by this Court at this stage is whether on dismissal of the petition and recalling of the order of the dismissal, the interim order granted by this Court stands automatically revived.

2. The short facts of the case are that CO 2507 of 2010 was dismissed for default by an Hon'ble Single Bench of this Court by order dated 18th December, 2013 and the interim order granted on 24th January, 2012 was vacated.

3. For recalling the order of dismissal for default dated 18th December, 2013 the present Petitioners filed an application being CAN 411 of 2014. The said CAN Application No. 411 of 2014 was considered by this Court on 12th March, 2014.

4. This Court upon finding that the cause shown in CAN No. 411 of 2014 is sufficient the order dated 18th December, 2013 was recalled and CO 2507 of 2010 was restored to its original file and No. The interim granted by this Court on 24th January, 2012 was restored for a limited period of two weeks from the date, or until further order whichever is earlier with a further direction on the petitioner to serve

notice afresh on the Ld. Advocate appearing for the Opposite Party (OP).

5. Shri Tanmoy Roy, Ld. Counsel appearing for the petitioners in CO 2507 of 2010 and for the applicants in CAN 411 of 2014 has vigorously submitted that on recall of the order of dismissal for default which simultaneously vacated the interim order granted, the interim order stood restored along with the restoration of CO 2507 of 2010. In support of his submission Shri Roy relies upon the decision of the Delhi High Court Reported in the matter of Radhe Bai Vs. Sabitri Sharma reported in 1957 RLR Page 234. Shri Roy relies upon paragraphs 7, 10 & 11 which read as follows:-

(7) Under Order 9, Rule 8 of the Code where the defendant appears and the plaintiff does not appear (when the suit is called on for hearing), the court is required to make an order that the suit be dismissed. Under Rule 9, where a suit has been so dismissed, plaintiff may apply to have the dismissal set aside and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit. It is, therefore, obvious that on setting the dismissal aside, the court has to appoint a day for proceeding with the suit and not for trying the suit de novo. This indicates that the further proceedings in the suit have to start from the stage and point where they were pending before the suit was dismissed and there is no requirement of law that upon such restoration the entire proceedings must be reached again. Consequently on the restoration of a dismissed suit, all the previous proceedings and the interim orders revive and do not require a fresh order to give them vigour. In this view, I find support from a decision of the High Court of Madras reported as. Vavvalla-Veerawami v. Pulim Ramanna. Air 1935 Madras 365 where it has been observed that where an order dismissing a suit for default was set aside on an application for that purpose, the suit remained as it was on the day when it was dismissed and all proceedings taken up to that date must be deemed to be in force when the dismissal was set aside. High Court of Patna in Bankam Chandra and others V. Chandi Prasad, also lays down that once a suit or appeal dismissed for default was restored by the order of the court, all ancillary orders passed in the suit or appeal before its dismissal also revive and operate since that date with all their legal implications. The High Court of Allahabad in Babu v. Dewan Singh, also supports the same view. It has been observed that the effect of the restoration was the same as if there were no dismissal of the suit and only the order of dismissal is set aside and all pending proceedings and orders were revived including the order that the suit was to proceed ex parte against the applicant and on restoration the parties were in the same position in which it was just before the dismissal. In [Karora Singh and others Vs. Babu Ram](#) the view taken was that all proceedings will be deemed to have been revived and to have remained in force when the dismissal was set aside. It has been brought to my notice that a D.B. of this court (Hardyal Hardy & M.R.A. Ansari JJ) has followed the view of the High Courts of Pepsu and Allahabad in deciding in Welcome India Trading Co. v. Western India Match Co. Fao (OS) 86 of

1970 decided on 6th April, 1971 an appeal from an order of Prithvi Raj J. dated 10th November, 1970 who had taken the same view.

(10) In my opinion, a consideration of the aforesaid authorities leaves no room for doubt that the principle of Rule 9 contained in Order 38 which has been held as applicable to attachments before judgment does not apply to other orders, where no such specific provision exists. As a result, the interlocutory orders which terminate on the decision of the suit on its dismissal in default will revive on the setting aside of the dismissal either by the same court or by a superior court, since the legal effect of setting aside is to restore the proceedings to the same stage and point at which they were pending immediately before they were interrupted by the dismissal. Any other construction would reduce the proceedings of the court to a mockery, because if the submission of the appellant were correct, it would logically follow that every time the suit is dismissed in default and restored and for that matter an ex parte decree or order passed and set aside, the fresh proceeding must start ever again including the passing of orders for issue of notice to the non-applicant defendants who had been proceeded ex parte, or orders closing the evidence or disallowing or allowing a commission or any question in examination of a witness. Such a result is surely not intended by the provisions and principles of law.

(11) My conclusion, therefore, is that on the restoration of a petition for eviction (which has been dismissed in default) either by the Controller or by the appellate Tribunal, the interlocutory orders passed before the dismissal of the petition u/s 15(2) of the Act would revive and the proceedings would commence from the stage at which they were pending before the dismissal. Consequently, the tenants are bound to comply with the said order and cannot contend that it had lapsed and needed to be passed again. It may, however be clarified that during the period the eviction petition remained dismissed until it was restored, the operation of the interlocutory order would remain suspended and any default alleged to have been committed by the tenants during the said period will not render them liable to any penalties attaching to non-compliance with the said order. Nevertheless no sooner than the petition is restored, the interim order revives and the tenant must deposit all arrears of rent then due and refrain from committing any further default in compliance with the order except at his peril. The Rent Control Tribunal in the impugned order has taken good care of this point and the appellants had not been penalised for any default committed by them during the period occurring between the dismissal of the petition and its restoration under the orders of the appellate Tribunal. The defaults with which the appellants have been charged were those which had been committed by them long after the main petition for eviction had been restored. The appellants have, therefore, clearly violated the terms of the order passed u/s 15(2) of the Act.

6. Shri Roy also relies upon the judgment of the Hon"ble Apex Court in matter of [Vareed Jacob Vs. Sosamma Geevarghese and Others](#), He places reliance on Paragraphs 20 and 21 of the Majority view in Vareed Jacob (supra) which read as follows:-

20. "In the case of Nandipati Rami Reddi v. Nandipati Padma Reddy (supra), it has been held by the Division Bench of the Andhra Pradesh High Court that when the suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration shall stand revived. That once the dismissal is set aside, the plaintiff must be restored to the position in which he was situated, when the Court dismissed the suit for default. Therefore, it follows that interlocutory orders which have been passed before the dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored unless the Court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration.

21. In the case of [Nancy John Lyndon Vs. Prabhati Lal Chowdhury and Others](#), it has been held that in view of Order 21, Rule 57, CPC it is clear that with the dismissal of the title execution suit for default, the attachment levied earlier ceased. However, it has been further held that when the dismissal was set aside and the suit was restored, the effect of restoring the suit was to restore the position prevalent till the dismissal of the suit or before dismissal of the title execution suit. We repeat that this judgment was under Order 21, Rule 57 whose scheme is similar to Order 38, Rule 11 and Rule 11-A, CPC and therefore, we cannot put all interlocutory orders on the same basis."

7. Shri Roy also places reliance on Paragraph 67 of the minority view in Vareed Jacob (supra). Paragraph 67 reads as follows:-

"I am, therefore, of the opinion that the interim order of injunction did not revive on restoration of the suit. The courts, however, would be well-advised keeping in view the controversy to specifically pass an order when the suit is dismissed for default stating when interlocutory orders are vacated and on restoration of the suit, if the court intends to revive such interlocutory orders. An express order to that effect should be passed."

8. Following the ratio of the Hon"ble Apex Court in Vareed Jacob (supra) this Court notices that both the majority and minority views speak of revival of the interim order upon restoration of the suit, petition or proceeding as the case may be. However, the minority view further makes it incumbent upon the restoring court to expressly record that on restoration of the suit, petition or proceeding the interim order stands revived or not.

9. This Court notices that in CAN 411 of 2014 the petitioners/applicants made a specific prayer "to continue the interim order passed earlier on 24th January, 2012 until further order" on setting aside of the order of dismissal for default dated 18th

December, 2013. This Court further notices that by order dated 24th January, 2012 an Hon"ble Single Bench on prima facie satisfaction of the merits of the case admitted the application and stayed further proceedings in Title Suit No. 1330 of 2000 until further orders.

10. The Hon"ble Single Bench noticed that Title Suit No. 1330 of 2000 ought not to have been restored to its original file and No. by allowing an application Order 9 Rule 9 CPC without putting the petitioners/defendants on notice.

11. Therefore, this Court is of the considered view that an arguable case on merits having been made out by the petitioners in CO 2507 of 2010, on recall of the order of the order of dismissal for default dated 18th December, 2013, the interim order dated 24th January, 2012 also stands revived.

12. The interim order will now continue until disposal of CO 2507 of 2010. Let CO 2507 of 2010 appear under the heading "Contested Application" of the year 2010 in the combined monthly list of November, 2014.

13. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.