

(1991) 04 AHC CK 0090

In the Allahabad High Court

Case No : First Appeal From Order No. 110 of 1991

Atar Singh and others

APPELLANT

Vs

Lotan Singh and others

RESPONDENT

Date of Decision : 11-04-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 19

Citation : AIR 1992 All 59

Hon'ble Judges : R.R. Mishra, J

Bench : Single Bench

Advocate : Sri S. Harkauli, for the Appellant; Sri Prakash Chandra, for the Respondent

Final Decision : Allowed

Judgement

1. The plaintiff-respondent had filed a suit for injunction with the prayer to restrain the defendant-appellants from alienating the land in dispute. The trial Court had granted an injunction. Against the same the defendants had preferred an appeal before the lower appellate Court. On the particular day when the appeal was called out for hearing, the appellants were not present and accordingly the appeal was dismissed for non-prosecution. Thereafter a restoration application was filed by the defendant-appellants, which has been dismissed by the lower appellate Court by the impugned order dated 17th November, 1990. Aggrieved, the defendant-appellants have preferred this First Appeal From Order in this Court.

2. I have heard learned Counsel for the parties and have gone through the impugned order passed by the court below. By the said order the lower appellate Court has dismissed the restoration application both on the grounds that the affidavit which was filed by the father of the appellants as pairokar was not tenable in law in the absence of power of attorney and that the appellants had personally signed the restoration application. On merits, the lower appellate Court also found that since the appeal was dismissed at about 12.15p.m. and the

grounds taken in the restoration application that when the case was called out at about 12.30 p.m., Sri Lok-man Singh, the said pairokar had gone to fetch the counsel, was not acceptable to the lower appellate Court on the ground that at the exact time when the case was called out, according to the lower appellate Court, the said pairokar was not even present in the court. The learned Counsel appearing for the plaintiff-respondent, submitted that the restoration application filed by the defendant-appellants was not maintainable inasmuch as the law contemplates the presence of the appellant and not the pairokar, therefore, there was no sufficient cause for restoring the appeal.

3. The second submission made by the learned Counsel for the plaintiff-respondent was that the presence of the father will not in law amount to the presence of the appellants, even if the father might be the pairokar of the case.

4. The third objection taken by the plaintiff-respondent is that a review petition against the order dated 17th November, 1990 filed by the defendant-appellants is admittedly pending before the lower appellate Court. Sri S. Harkauli, learned Counsel appearing for the defendant-appellants states that he will not press the said review application.

5. Having given an anxious consideration to the aforesaid facts, the arguments advanced by the parties and the grounds taken in the impugned order, on the facts of this case I find that there is no finding recorded by the lower appellate Court that the said absence on behalf of the defendant-appellants was either deliberate or negligent. It has also not been found that the appeal in question was dismissed for default even earlier. Bearing in mind that this was the sole occasion, on which for the reasons stated in the restoration application accompanied with affidavit, there was a default on behalf of the defendant-appellants and also taking into consideration that interest of justice requires that the parties should be heard instead of shutting them on technical ground, I consider it expedient and necessary in the interest of justice to allow the present appeal.

6. Accordingly the appeal is allowed. There will be no order as to costs. The impugned order dated 17th November, 1990 passed by the lower appellate Court is set aside. The appeal stands restored. The lower appellate Court is directed to proceed to hear the appeal on merits in accordance with law.

7. Appeal allowed.