

(1976) 05 DEL CK 0016

In the Delhi High Court

Case No : Civil Revision Appeal No. 328 of 1973

Devi Dayal Textile Co. and Another

APPELLANT

Vs

Nandlal

RESPONDENT

Date of Decision : 04-05-1976

Acts Referred:

Citation : AIR 1977 Delhi 7 : (1977) 13 DLT 276 : (1976) 2 ILR Delhi 209

Hon'ble Judges : B.C. Misra, J

Bench : Single Bench

Advocate : V.P. Dewan and M.L. Patney, for the Appellant;

Judgement

B.C. Misra, J.

(1) This revision petition has been filed by the defendants u/s 115 of the Code of Civil Procedure, against" the order of the Sub-Judge, dated 27th January, 1973, setting aside the dismissal of the suit.

(2) The material facts of the case lie in a narrow compass. On 27th January, 1973, none appeared for the plaintiff, while the counsel for the defendants was present, and the court dismissed the suit in default of appearance. On the same date the court suo moto recalled its order on the ground that the case was really fixed for 8th February, 1973 for obtaining the specimen signatures of the defendant and as such it could not be dismissed on 27th January, 1973 and so the order was recalled, and notice was issued to the defendants. The counsel for the defendants has challenged the subsequent order of the court and has contended that the court had no jurisdiction to recall the order u/s 151 of the CPC without an application of the-plaintiff under Order 9 Rule 9 of the Code for setting aside the dismissal.

(3) Mr. Patney, counsel for the respondent has contended that originally 27th January, 1973 was fixed as the date for recording the evidence of the plaintiff but the plaintiff had moved an application for obtaining specimen signatures of the defendant, which had been fixed for 8th February, 1973 and as such the date,

27th January, 1973, stood cancelled and this was the impression gained by the plaintiff respondent as well as the court.

(4) The contention of the counsel for the respondent seems to be correct. The court dismissed the suit on 27th January, 1973 in default of appearance and on the same date, later in the day, it set aside the order of dismissal and restored the suit suo moto without any application of the plaintiff, presumably on the mistake being pointed out by the office of the court. In my opinion, "the impugned order does not suffer from any lack of jurisdiction. It is not only the jurisdiction and power of the court, but it is certainly its duty to recall its order, if it finds that the same were invalid and had been passed by a mistake of the court and would cause injustice to the parties not at fault. Correction of the mistake of the court can be done by the court suo moto without any application by the parties concerned, or even if the court is moved to do so by the parties." There are a number of authorities to show that the court has jurisdiction and power to recall and cancel its invalid order which had been passed by its own mistake. Reference in this connection may be made to *Keshardeo Chamria Vs. Radha Kissen Chamria and Others*, , where the Supreme Court held that the order dismissing the execution on part satisfaction was had and the executing court was justified in correcting the same under its inherent powers, and that the order of restoration of the execution case passed u/s 151 of the Code by the executing court did not come within the purview of section 47 of the Code of Civil Procedure, and as such was not appealable. The Supreme Court also observed that such an order could not be interfered with in exercise of revisional jurisdiction of the High Court. In *B.V. Patankar and Others Vs. C.G. Sastry*, , the court observed that where the executing court ignored the provisions of the law prohibiting eviction of tenants and passed an order of delivery of possession in execution of a decree, the order could be set aside and an order of redelivery to the tenant could be passed on an application u/s 47 read with section 151 of the Code of Civil Procedure. In *L. Janakirama Iyer and Others Vs. P.M. Nilakanta Iyer and Others*, , it was held that where the decretal or do drawn in the High Court as a result of inadvertence and through error introduced the words "Mesne profits" instead of the words "net profits" the error could be corrected by the High Court under sections 151 and 152 even though the appeals from the decree might have been admitted in the Supreme Court before the date of correction.

(5) In *Manoharlal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*, Air 1962 Sc 537, it was observed that the inherent powers had not been conferred upon the court by section 151 of the Code, but it was a power inherent in the court by virtue of its duty to do justice between the parties. In *Mt. Champa Devi v- Mt. Asa Devi*, Air 1938 Allahabad 8 (5), it was observed that the court had inherent jurisdiction to recall and cancel its invalid orders. In *Sita Ram Sahu and Others Vs. Kedarnath Sahu*, , it was observed in paragraph 4 that it could not be said that the court had no jurisdiction to recall an order which it had made earlier in the suit and a court always had power to recall order which had the effect of perpetrating an injustice on a party.

(6) In *Subodh Chandra Mukherjee Vs. Sudhir Kumar Basu and Others*, , it was observed in paragraph 13, that it was not only the right but the duty of the court to try to correct its own mistake; the mistake, in that case, consisted in taking up the case for hearing on a date other than the date fixed and dismissing the case on the mistaken view that the parties had not taken steps which they ought to have taken, and that the only way to correct the mistake was to set aside the order passed under the misapprehension by taking up the case on a wrong date and that was the order which was actually passed..... and this was a proper use of powers u/s 151 of the Code of Civil Procedure. In this case, the court further observed that supposing that an appeal lay against the order of dismissal for default, and this was an unorthodox use of the powers u/s 151 of the Code of Civil Procedure, yet it would be an improper use of discretionary jurisdiction to interfere with the order passed by the trial court restoring the same. With great respect, I entirely agree with the observations made in *Subodh Chandra Mukherjee's* case.

(7) The counsel for the petitioner has relied upon *Arjun Singh Vs. Mohindra Kumar and Others*, , *Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas*, , *Deep Chand v. Addl. Director, Consolidation of Holdings*, Air 1964 Pun 249, *Municipal Corporation of Delhi v. Sunni Majlis Aukaf*, Air 1968 Del 215. The ratio of the aforesaid decisions is that when specific provisions exist in the Code for a particular object the report to section 151 of the CPC is not necessary. There is absolutely no quarrel with the said proposition of law. This rule may have a bearing if the suit had been validly dismissed by the court under Order 9 Rule 8 and the plaintiff was seeking to have the dismissal set aside. Then it is true that he would have to make an application under Order 9 Rule 9 of the Code to show sufficient cause for his non-appearance on the date the suit was called and dismissed. In the instant case, the court below had found that it could not dismiss the suit on 27th January, 1973 as subsequently another date had been fixed in the suit, viz. 8th February, 1973. The plaintiff was, Therefore, not called upon to show sufficient cause for his absence on the date the suit was wrongly dismissed. In *Sheikh Mohammad Vs. Mt. Rukmina Kunwar and Others*, , it was held that where an order of dismissal was not passed under Order 9 Rule 8, then the application under Order 9 Rule 9 was not called for. The case in hand is not governed by the provisions of Order 9 Rule 9 of the Code. In the instant case, "the court below found that the mistake in dismissing the suit was of the court itself and it has sought to correct the same on the same date suo moto. In my opinion, the court had ample jurisdiction to do so and the impugned order is not assailable." The revision has, Therefore, no merit.

(8) However, although the counsel for the petitioners has not argued this point, I find that there is one mistake that the court below has committed. I have held that the court ".was legally empowered and amply justified in setting aside the Order of dismissal, which, it held, had been passed inadvertently. "But the subsequent order ought to have been passed after notice to the defendants, whose counsel was present and who had left the court when the order was

pronounced dismissing the suit. It is only after hearing the defendants and the counsel that the impugned order ought to have been passed. This, however, does not justify my interference with the order, as in my view, the result would be the same and at the most it may have a bearing on the award of some costs to the defendants for the trouble to appear in the case". Mr. Dewan for the petitioners states that he is not interested in costs and that he only wants the question raised by him to be determined. In my opinion, the impugned order has advanced substantial justice and does not call for interference in exercise of discretionary powers of this court u/s 115 of the CPC (see Major S.S. Khanna Vs. Brig. F.J. Dillon,).

(9) As a result, I dismiss the revision. However, the costs of the revision will abide by the result of the suit. The stay granted by this court stands vacated.

(10) The parties appearing before me are directed to appear before the court below on 26th May, 1976 for further proceedings.