
(1957) 08 AHC CK 0023
In the Allahabad High Court
Case No : Civil Revision No. 1037 of 1954

Ganesh Din

APPELLANT

Vs

Bishwanath

RESPONDENT

Date of Decision : 14-08-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 9 Rule 13, Order 9 Rule 9

Citation : AIR 1958 All 310

Hon'ble Judges : M.C. Desai, J

Bench : Single Bench

Advocate : N.d. Ojha and G.P. Bhargava, for the Appellant; V.K.S. Chaudhary, for the Respondent

Final Decision : Dismissed

Judgement

M.C. Desai, J.—The opposite party filed a suit against Dani Ram, father of the applicant, and obtained an ex parte decree in 1945. No process in execution was issued so long as Dani Ram was alive; after his death a warrant of attachment of his property was issued and the applicant's property was attached. Then the applicant knew that an ex parte decree had been passed against his father and on 5-1-1953 made an application for its being set aside. In the application he stated that Dani Ram had died leaving him as his heir. The application was allowed and the ex parte decree was set aside on 28-3-1953. The opposite party neither applied for substitution of the name of the applicant in place of the name of Dani Ram in the plaint nor was the name of Dani Ram expunged by an order of the court and substituted by that of the applicant and the suit proceeded against Dani Bam as if he were Still alive. On 6-4-1954 it was dismissed in default, but on the same day an application for restoration was made by the opposite party alleging that he had gone to relieve himself when the case was called out and that his absence was for sufficient cause. The court below restored the suit on his paying Rs. 10/- as costs.

2. In this application, which is against the order restoring the suit, it was

contended that the suit had abated long before 6-4-1954 on account of no application having been made by the opposite party under Order XXII, Rule 4, or for substitution and that consequently there was no suit which could be dismissed in default on 6-4-1954. The provisions of Order XXII did not apply in the present case because Dani Ram died not during the pendency of the suit but after it had been decreed; Order XXII deals with the consequence of death of a party during the pendency of a suit. The ex parte decree was set aside at the instance of the applicant himself; this means that he had been treated by the court as an heir of Dani Ram. The ex parte decree could not be set aside at the instance of a stranger. When it was set aside the applicant must be deemed to have become a party in the suit in the absence of an application under Order XXII, Rule 4, or for substitution.

What should have happened in such a case is not laid down anywhere in the C. P. C., but it seems to me that it was the duty of the court itself to get the name of Dani Ram substituted by that of the applicant without any application by the opposite party. After the applicant's application for setting aside the ex parte decree had been allowed there was no need of any application by the opposite party and the court should have itself ordered substitution. No question of abatement arose, because as explained earlier, Order XXII did not apply; moreover if the name of Dani Ram remained in the plaint and was not removed, it was the fault of the court itself for which the opposite party could not be penalised. The opposite party had committed no default. There was, therefore no abatement of the suit at any time before 6-4-1954. It could be dismissed in default, and if dismissed in default, it could be restored by an application under Order IX.

3. Then it was argued that there was no justification for restoring the suit. The court below accepted the allegation of the opposite-party; it committed no illegality in doing so.

4. I dismiss the application with costs.