
(1982) 08 MP CK 0007

In the Madhya Pradesh High Court

Case No : Civil Revision No. 1050 of 1982

Harish Chandra Batra and another

APPELLANT

Vs

Union Bank of India

RESPONDENT

Date of Decision : 02-08-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9(2), 115

Citation : (1983) MPLJ 507

Hon'ble Judges : G.L. Oza, J

Bench : Single Bench

Advocate : A.K. Jain, for the Appellant; Umesh Trivedi, for the Respondent

Final Decision : Allowed

Judgement

G.L. Oza, J.

This revision petition has been filed by the petitioner-defendant against an order passed by II Civil Judge Class I, Jabalpur in Civil Suit No. 79-B of 1979 dated 17-6-1982, restoring the suit of the non-applicant dismissed in default.

The suit was fixed for evidence on 17-6-1982. The order-sheet of that day states that neither the plaintiff nor anyone on behalf of the plaintiff was present. The defendant with Shri A. K. Jain, Advocate was present. It is further observed that the plaintiff or the plaintiff's counsel was not present. The Court waited and called the plaintiff from 10 o'clock till 3.45 P.M. It is further stated that the evidence of the plaintiff is to start but as nobody is present for the plaintiff the suit is dismissed in default and also for want of evidence. It was further directed that the defendant will be entitled to costs of the suit. On the same day, there is another order-sheet at 4 P. M. which states that Shri Trivedi, Advocate appeared and prayed that on account of rains, he was detained in the High Court and could not come to the lower Courts and the learned Judge further observed that this is a sufficient ground for absence at 3.45 P. M. and as it pertains to the personal difficulty of the learned counsel, the order of dismissal is set aside and the case

was fixed for evidence on 28-7-1982.

It was contended by the learned counsel for the applicants that under Order 9, Rule 9, an application for restoration of the suit is contemplated and clause (2) of this rule clearly provides that the restoration could not be done without notice to the defendant. It was, therefore, contended that the Court below committed an error in restoring the suit on an oral application and without notice to the defendant and thereby the learned Court below committed material irregularity in exercise of jurisdiction.

Learned counsel for the non-applicant, on the other hand, contended that immediately after the order of dismissal was passed, the counsel for the plaintiff appeared and brought to the notice of the Court the circumstances under which it became impossible for him to reach the Court and the learned Judge having accepted this came to the conclusion that this was a sufficient cause and restored the suit. Therefore, it could not be said that the Court below committed any error,

It was also contended that to meet the difficulty of restoration without a written application, the non-applicant has filed an application in the Court below, although subsequently, but that application is yet lying without any proceedings as the order of restoration had already been passed. The learned counsel contended that the question of dismissal and restoration is a matter between the plaintiff and the Court and the question of notice is not at all material. The learned counsel placed reliance on a decision reported in Babu Vs. Dewan Singh and Others, and also contended that even if the Court committed an error of law in restoring the suit without notice in spite of Order 9, Rule 9(2), at best, it could be said to be an error of jurisdiction and in support of his contention he placed reliance on a decision reported in Manik Mandal and Others Vs. Bharosi Singh, . Learned counsel for the petitioners, on the other hand, contended that after the amendment of the Code of Civil Procedure in section 115, this contention is without any substance and it was contended that in Raja Ramakaran Vs. B. Ramulu, , their Lordships have considered the impact of the amendment of the Code of Civil Procedure. It was also contended that in Beant Singh v. Nur Mohd. AIR 1967 J&K 11 their Lordships have examined the Patna decision and came to the conclusion that what has been relied on by the learned counsel for the non-applicant in the Patna decision is based on the peculiar circumstances of that case and there was no revision against the order of restoration but that restoration was challenged in subsequent proceedings. The learned counsel also contended that the decision in Ratnakar Ray and Others Vs. Kulamoni Roy and Others, clearly lays down that restoration could not be done without notice and without a written application.

It is not disputed that the dismissal in the present case of the non-applicant's suit was not under rule 2 or rule 3 of Order IX and it is also not disputed that this is not a matter of restoration of a suit under rule 4 of Order IX. Admittedly, the suit was dismissed under Order 9, Rule 8 and, therefore, the Court below could

only exercise jurisdiction for restoration under rule 9 of Order 9.

Order 9, Rule 9 reads :-

9(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to -set the dismissal 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.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party." Clause (1) of this rule talks of "he may apply for an order to set the dismissal aside". Although this phrase does not talk of application in writing but clause (2) which requires that the restoration could not be done without the notice of application having been served on the opposite party, clearly indicates that what is contemplated in the phrase quoted above by the word "apply" is to apply in writing, as clause (2) clearly reads, "unless notice of the application has been served on the opposite party". It is, therefore, clear that notice of application could only be served if this application is in writing.

It is not disputed that in the present case neither there was any application on behalf of the non-applicant in writing nor notice of such application was served on the opposite party and, therefore, it is clear that the Court while exercising jurisdiction under Order 9, Rule 9 omitted to notice this provision and failed to comply with it. On the contrary, in spite of the clear and unambiguous provision like clause (2) of Rule 9, the learned Court below restored the suit without notice and without an application for restoration. It could not be disputed that when the Court exercises jurisdiction under Order 9, Rule 9 and omits to notice the contents contained therein and passes an order directly in contravention of the provisions contained in Order 9, Rule 9, the Court below has committed material irregularity in exercise of jurisdiction.

The learned counsel placed reliance on a decision reported in *Manik Mandal v. Bharosi Singh*. In this case it was observed: -

The ratio of this Full Bench case applies on all fours to the present case. The trial Court had jurisdiction to entertain and decide the question raised in the application for setting aside the dismissal of the suit. There was no lack of inherent jurisdiction in it. The failure to comply with the provision of Order 9, Rule 9 (2), of the CPC in setting aside the order of dismissal without giving notice to the defendant did not, in any way, affect the jurisdiction of the Court, although in doing so it committed an error of law.

It was on the basis of this observation that it was contended that, at best, it could be said to be an error of law and not an error of jurisdiction. In *Beant Singh v. Nur Mohd.* an identical question was considered and considering the

Patna case quoted above, it was observed :-

The Patna authority *Manik Mandal v. Bharosi Singh* (supra) can be easily distinguished because even their Lordships in that case have said that "a restoration ordered without notice as required by Order 9, Rule 9 (2) would not affect the jurisdiction of the Court." But their Lordships at the same time said "the error in making such an order is an error of law which could be corrected in an appropriate proceeding taken against that order." This means that if the aggrieved party had taken recourse to a proper revision petition against the order of restoration, it must have been set right. But in that case the order of restoration was not challenged at all, but on a decree in the main suit this ground was pressed as a ground affecting the merits of the decision. Their Lordships rejected the contention that such an order of restoration would affect the merits of the decision in the original suit. Therefore, that authority also does not help the respondent's learned counsel.

The above observations clearly indicate that what has been laid down in the Patna decision did not pertain to the question about revisional jurisdiction but the observations were made as the restoration was not challenged but the decree itself was challenged in the subsequent proceedings.

Section 115 of the CPC reads : -

(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where-

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation.-In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

Clause (c) of sub-section (1) clearly provides that where the Court can interfere with the decision. In the language of sub-section (1), the phrase "any case which has been decided" has been explained in the explanation of this section which has not been introduced by amendment, in which it has been said that "any case which has been decided" includes any order made and it is, therefore, dear that when the Court below exercises jurisdiction illegally that is not in accordance with Order 9, Rule 9 (2), the matter will clearly fall within the ambit of section 115.

In *Raja Ramakaran v. Ramulu*, the scope of the amendment has been considered and it has been observed :

In support of his contention the learned counsel for the respondent relied upon the decision of the Allahabad High Court in *Mahendra Pratap Kapur Vs. Burmah Shell Oil Storage and Distributing Co. Ltd. and Another*, wherein it was held that the ex-parte interim order will not amount to a case decided, as no final order is passed and it can be said that a case has been decided only when a final order is passed, but not at the stage when an interim order is passed which did not attain finality. The learned counsel for the petitioner relied upon the decision in *Tata Iron and Steel Co. Ltd. Vs. Rajarishi Exports (P) Ltd.*, wherein the Orissa High Court held that the ambit and scope of revision u/s 115, CPC has been widened by inserting the Explanation and by virtue of this Explanation the order passed at any stage is amenable to the jurisdiction of the High Court under section 115, Civil Procedure Code. In *Food Corporation of India Vs. Birendra Nath Dhar*, the Calcutta High Court held that the Explanation to the amended section 115, CPC takes in any order made in the course of the suit or proceeding and as such there is absolutely no limitation as to the powers of interference u/s 115, CPC and any order passed without any distinction whatsoever is amenable to the jurisdiction u/s 115, Civil Procedure Code. In *Sobha and Others Vs. Behari Lal and Others*, the Himachal Pradesh High Court held that the Explanation has widened scope of the revision and the High Court is competent to interfere in any matter in order to secure the ends of justice.

It is, therefore, dear that in view of section 115, as it stands now, it could not be contended that the order passed by the Court below in total disregard of Order 9, Rule 9, could not be interfered with in revision when the Court below was exercising jurisdiction under Order 9, Rule 9 itself and passed the impugned order without complying with the provisions contained in the rule. It, therefore, is a case clearly falling under clause (c) of sub-section (1) of section 115 and the order cannot be maintained.

It was contended by the learned counsel for the non-applicant that they have also submitted an application in the Court below for restoration of the suit and this application has been made in writing. It is apparent that if this order of restoration could not be maintained and is being set aside in this revision petition, the Court below will be free to consider the application for restoration made by the non-applicant and proceed to decide this application in accordance

with law.

The revision petition is, therefore, allowed. The order passed by the learned Court below dated 17-6-1982 restoring the suit of the non-applicant plaintiff is set aside. The petitioners shall also be entitled to costs of this revision petition. Counsel's fee as per schedule, if certified.