

(2001) 01 DEL CK 0071

In the Delhi High Court

Case No : Civil Revision No"s. 799 and 862 of 1997

Kanwal Johar and Others

APPELLANT

Vs

Ramey and Others

RESPONDENT

Date of Decision : 11-01-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9, Order 9 Rule 13, Order 9 Rule 7

Citation : (2001) 4 AD 764 : (2001) 90 DLT 577

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : B.P. Dhalla, for the Appellant; L.K. Singh, for the Respondent

Final Decision : Allowed

Judgement

S.K. Mahajan, J.

Admit.

1. With the consent of the parties, arguments have been heard and these petitions are being disposed of finally.

2. plaintiff filed a suit for injunction against the defendants on the allegations as set out in the plaint. On 24th September, 1990, the suit was dismissed in default. On an application having been made by the plaintiff for restoration of the suit, the suit was restored on 8th March, 1991. Before the restoration of the suit, notice was issued to the defendants including defendant No. 4. Defendant No. 4, it appears, had refused to accept notice and he was, Therefore, proceeded ex-parte.

3. Since he had already been proceeded ex-parte, no further notice was sent to defendant No. 4 after the restoration of the suit. Due to non-appearance of the defendants, ex-parte decree was passed against them on 22nd February, 1992. Defendant No. 4 moved an application for setting aside ex-parte decree passed against him, however, this application was dismissed in default on 26th

September, 1994. An application was filed by defendant No.4 under Order IX Rule 7, CPC (sic.) for restoration of the application under Order IX Rule 13, CPC which was dismissed in default on 26th September, 1994. Before this application could be decided, defendant No.4 expired on 13th December, 1994. No application was filed by any of the parties to bring on record the legal heirs of deceased defendant No. 4. The Court in spite of it being informed that respondent No. 4 had expired, by order dated 27th January,, 1997 dismissed the application after holding that defendant No. 4 was not serious about his case and the Court did not find any merit in the application of the said defendant. legal heirs of defendant No. 4 moved an application on 22nd July, 1997 for review of the order dated 27th January, 1997 on the ground that they were not aware of the pendency of the proceedings in the Court of the Civil Judge and they came to know of the proceedings only in the month of July, 1997. This application was dismissed by the Court by its order dated 25th July, 1997 holding that the Court did not find any error apparent on record so far as order dated 27th January, 1997 was concerned.

4. Being aggrieved by the order dated 25th July, 1997 the petitioners filed an appeal before the Senior Civil Judge. This appeal was dismissed on 1st August, 1997 on the ground that the order dated 25th July, 1997 was not appealable. Thereafter the petitioners filed the present revision petition for setting aside the orders dated 27th January, 1997 and 25th July, 1997.

5. I have heard learned Counsel for the parties and have also gone through the records of the case. It is admitted position that defendant No. 4 had expired on 13th December, 1994 by that time the application under Order IX Rule, 7 CPC filed by the said defendant had not been disposed of. In my opinion, after the death of defendant No. 4 in December, 1994, his application under Order IX Rule 7, CPC for restoration of the application under Order IX Rule 13, CPC could to have been dismissed on merits. The only order the Court could have passed was to dismiss the application on the ground of the same having abated since the legal heirs had not taken steps to get themselves impleaded in the application. The order of learned Trial Court dated 27th January, 1997 dismissing the application on merits, in my view, was without jurisdiction. Once the application had abated, the same could have been revived only after the abatement was set aside under Order XXII Rule 9, CPC. Though, no application was filed by the petitioners for setting aside abatement, however, in my view, their application under Order XXXVII Rule 1, CPC for review of the order dated 27th January, 1997 could be considered as an application under Order XXII Rule 9, CPC for setting aside abatement.

6. Since that application has not been decided on merits, I allow these petitions and set aside the order dated 25th January, 1997 and remand the case back to the Trial Court with a direction that the application of the petitioners under Order XXXVII Rule 1, CPC be treated as an application under Order XXII Rule 9, CPC for setting aside abatement and the application under Order IX Rule 7, CPC filed

by the deceased be deemed to have been dismissed on the ground of same having abated.

7. With these observations, both the petitions stand disposed of with no order as to costs. Parties are directed to appear before the concerned civil Judge on 19th February, 2001.

C.M. Nos. 3014-15/97, 2814/97:

Since the petitions have been disposed of, these application have become infructuous and the same are, accordingly, dismissed.

8. Petitions allowed.