

(1958) 08 PAT CK 0022
In the Patna High Court
Case No : Civil Revision No. 1223 of 1955

Manik Mandal and Others

APPELLANT

Vs

Bharosi Singh

RESPONDENT

Date of Decision : 01-08-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9(2), 105(1)

Citation : AIR 1959 Patna 225 : (1958) 6 BLJR 848

Hon'ble Judges : V. Ramaswami, C.J;R.K. Choudhary, J

Bench : Division Bench

Advocate : Kaushal Kishore Sinha, Madhusudan Singh and G.C. Prasad Sharma, for the Appellant; J.C. Sinha and H.K. Banerji, for the Respondent

Final Decision : Allowed

Judgement

R.K. Choudhary, J.—This application is by the plaintiffs and is directed against an order of remand passed by the learned Additional Subordinate Judge of Monghyr on 6-10-1955, in Title Appeal No. 39 of 1955.

2. The events leading to the presentation of the application are these: The petitioners instituted a suit for confirmation of possession, and, in the alternative, for recovery of possession after declaration of their title to the suit land. They also prayed for an adjudication that the defendant was not an under-raiyat in respect of the suit land. It appears that on the date fixed for the hearing of the suit, the defendant was present with his lawyer in court, but the petitioners did not turn up and the suit was dismissed for default on 15-3-1955.

On the same date, the petitioners filed an application for setting aside the order of dismissal, and the learned Munsif, without registering the application as a miscellaneous case, and without giving any notice to the defendant, recalled the order of dismissal then and there, and proceeded to hear the suit. Two formal witnesses were examined and cross-examined on that date, though the defendant with his witnesses had left the court after the dismissal of the suit for

default.

The hearing of the suit thereafter proceeded on several dates and both the parties examined their witnesses though the "defendant in an application made on the next day stated that he was proceeding with the suit without prejudice to his legal rights as regards the recalling of the order of dismissal. Ultimately, the suit was decreed by the learned Munsif, and the defendant preferred an appeal before the District Judge.

The appeal was heard by the second Additional Subordinate Judge of Monghyr, and it was contended before him that the order recalling the order of dismissal without giving notice to the defendant was without jurisdiction and that, therefore, the decree passed in the suit vitiated in law. The learned Additional Subordinate Judge accepted this contention and held that the trial had been without jurisdiction.

He, therefore, set aside the judgment and the decree of the trial Court and remanded the suit to the trial Court with a direction for rehearing the application for setting aside the order of dismissal after registering the same as a miscellaneous case and giving notice thereof to the defendant. Being thus, aggrieved, the plaintiffs have moved this Court in revision.

3. Mr. Kaushal Kishore Sinha, appearing for the petitioners, has contended that the order of remand is bad in law inasmuch as the order setting aside the dismissal of the suit could not be challenged in an appeal from the final decree passed in the suit. In support of this contention he has relied on Section 105(1) of the CPC which states that, save as otherwise expressly provided, no appeal lies from any order made by a Court in the exercise of its original or appellate jurisdiction but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

It has been contended that in order that any error, defect or irregularity in any order may be set forth as a ground of objection in the appeal from the final decree it must be such an error, defect or irregularity which affects the decision or the case on merits. It has been submitted that the order setting aside the order of dismissal has the effect of ensuring the hearing of the suit on merits and it does not affect the decision of the case on merits, and, as such, the order could not be challenged in the appeal.

On the other hand, Mr. J. C. Sinha appearing for the defendant-opposite party, has relied on Section 99 of the CPC which says that no decree shall be reversed or substantially varied nor shall any case be remanded, in appeal on account of any misjoinder of parties and causes of action or any error, defect or irregularity in any proceedings in the suit, nor affecting the merits of the case or the jurisdiction of the court. He has laid stress on the words "the jurisdiction of the court," and has submitted that the order setting aside the dismissal of the suit without giving notice to the defendant was without jurisdiction and, therefore,

the error, defect or irregularity in the proceeding for setting aside the order of dismissal could be challenged in an appeal from the final decree.

In support of his contention that the order setting aside the dismissal of the suit was without jurisdiction, he has relied on the provisions of Order 9 Rule 9(2) of the CPC which lays down that no order shall be made under this rule unless notice of the application has been served" on the opposite party. His contention is that admittedly in this case no notice of the application for setting aside the order of dismissal was given to the defendant and, therefore, the court could not pass an order setting aside the dismissal under Sub-rule (1) of Rule 9 or Order 9.

4. It is true that Sub-rule (2) of Rule 9 of Order 9" of the CPC makes it obligatory on a court to have the notice of the applications served on the opposite party before it could set aside the order of dismissal. It is also true that in this case no notice was issued at all in regard to the application made by the plaintiffs for setting aside the order of dismissal. It is, therefore, perfectly clear that the order passed by the trial Court setting aside the dismissal of the suit in this case was in contravention of the provision of law and the Court, in passing such an order, committed an error of law.

That, however, in my opinion, will not make the order without jurisdiction so as to ignore it as being a nullity. No authority has been cited before us in support of the contention that such an order is without jurisdiction. The error in making such an order is an error of law which could be corrected by higher authorities in an appropriate, proceeding taken against that order. But by no stretch of imagination it could be treated as a nullity as being without, jurisdiction. As pointed out in a Full Bench decision of this Court in Ramranbijaya Prasad Singh Vs. Ram Kawal Upadhyaya and Others, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision and objections affecting jurisdiction must relate either to the person, the place or the character of the suit. It was held in that case that if a court has competence in these respects, it may exercise jurisdiction and does exercise it whether correctly or erroneously in dealing judicially with a cause placed before it.

It was also held that a mere violation of an imperative provision of statute cannot affect the jurisdiction of the Court. It was further held that the question that a court in the exercise of the jurisdiction, which it possesses, has not acted according to the mode prescribed by the Statute, relates obviously not to the existence of jurisdiction but to the exercise of it in an irregular or illegal manner and that where there was jurisdiction over the subject matter but non-compliance with the procedure prescribed as essential for the exercise of the jurisdiction, the defect was such as could be waived.

In that case the rent of an occupancy holding was reduced u/s 112A(1)(d) of the Bihar Tenancy Act, and, two years after, the Rent Reduction Officer reduced the rent of the holding over again under the same provision of the Act in ignorance

of the previous reduction of rent. It was contended by the landlord in a suit brought for recovery of rent at the previously reduced rent that the second reduction being in contravention of the mandatory provision of Section 113 of the Act was without jurisdiction. On the principles stated above the Full Bench decided that the second reduction of rent was not without jurisdiction though in making the reduction the revenue officer committed an error of law.

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 notice¹ to the defendant did not, in any way, affect the jurisdiction of the Court, although in doing so it committed an error of law. The contention of Mr. Jagdish Chandra Sinha in this regard, therefore, fails,

5. It has then been contended by learned Counsel for the defendant-opposite party that the order setting aside the dismissal does affect the decision of the case and, in order that such an order could be challenged in an appeal from the final decree, it is not necessary that it should affect the decision of the case on the merits. He has put forward an argument that the words "on the merits" have not been used in Section 105 of the CPC and they cannot be added to the section for the purpose of its interpretation.

He has also submitted that the Court of appeal below was legally entitled to examine the correctness of the order setting aside the dismissal and the order of remand passed by it is perfectly legal and valid. I am unable to agree with this contention. Such an argument appears to have been rejected by almost all the High Courts in India. Section 105, in my opinion, has to be read in the light of the object envisaged in Section 99 of the CPC and the object of both the sections is to cure certain defects or irregularities not affecting the decision of the case on the merits.

The view taken by almost all the High Courts in India is in conformity with the above view. In *Chintamony Dassi v. Raghoonath Sahoo* ILR 22 Cal 981 a suit was brought for money due on a mortgage bond which was decreed ex parte. Long after the expiry of the period of limitation prescribed for making an application to set aside the ex parte decree, an application to that effect was made by the defendant and the ex parte decree was set aside. The suit was then heard on merits and was dismissed.

On appeal the plaintiff challenged the legality of the order setting aside the ex parte decree on the ground that the application for setting aside the ex parte decree was made beyond the period of limitation. The lower appellate Court accepted this contention, set aside the order of dismissal and restored the ex parte decree. The defendant then filed a second appeal in the High Court, and it was held that the order setting aside the ex parte decree could not be challenged

in appeal from the final decree. Their Lordships observed as follows:

"We are of opinion that it was not competent for the Subordinate Judge to set aside that order u/s 591. By that section, if any decree be appealed against, any error, defect or irregularity in any such order affecting the decision of the case, may be set forth as a ground of objection in the] memorandum of appeal. Now the error or defect or irregularity which the Subordinate Judge found in the Musif s order was that it was made after time, that is to say, after the thirty days provided by Article 164 of the Limitation Act had elapsed. But then the question is whether the Munsif in making the order that case should be heard upon the merits, made an order "affecting the decision of the case within the meaning of Section 591. We do not think that that section applies to an order setting aside an ex parte dercee u/s 108. The object of Section 108 is to ensure that the defendant shall get a hearing, notwithstanding that he did not appear when the case was called on, if he had not been served with summons, or was prevented by sufficient cause from appearing. The first object and purpose for which courts sit is, of course, that the parties shall be heard; the object of Section 108 is to en-same with reasonable limits as to public convenience that every defendant shall have a hearing. An order u/s 108 is not appealable u/s 588. Unless an order under that section is appealable by reason of its being an order "affecting the decision of the case, it is not appealable u/s 591, Now in one sense it affects the decision of the case, because it ensures a decision upon the merits, and sets aside a decision which has not been obtained upon the merits, but we cannot think that that can be an "affecting" within the meaning of the words "affecting the decision of the case." We think that the words "affecting the decision of the case" must be taken to mean "affecting the decision of the case with reference to the merits of it," and that an order u/s 108, which merely ensures a hearing upon the merits, cannot be considered to be an order "affecting the decision of the case" u/s 591."

In *Sundar Singh v. Nighaiya* ILR 6 Lah 94: AIR 1925 Lah 466 also an ex parte decree was set aside on an application being made for setting aside the same beyond the period of limitation. It was held that the order by the trial Court setting aside the ex parte decree could not be questioned in appeal from the decree as it was not an order affecting the decision of the case on its merits.

6. The earlier view of the Allahabad and the Rangoon High Courts were somewhat conflicting. But the matter has now been set at rest by two Full Bench decisions of these High Courts, namely, *Radha Mohan Datt, Silk Merchant Vs. Abbas Ali Biswas and Others* and *Yeik Lee v. Aihoor Bibi* AIR 1937 Rang 334. In the Allahabad Full Bench case, on the date fixed for final disposal of a suit certain defendants appeared through a pleader who applied for an adjournment and, on the application being refused, withdrew from the proceedings,

The suit was taken up and tried on the merits and a decree was passed against these defendants, Thereafter, they made an application, purporting to be under Order 9, Rule 13, of the Code of Civil Procedure, for setting aside the ex parte

decree though according to the Explanation to Order 17, Rule 2, the decree could not be deemed to be ex parte. The court wrongly granted the application and set aside the decree. The plaintiff filed a civil revision in the High Court against that order.

The application was opposed by some of the defendants on the ground that the revisional jurisdiction of the High Court could not be invoked because the plaintiff could impugn the correctness of the order passed by the Munsif in the appeal which might be preferred from the decree which might be passed in the suit u/s 105 of the Code of Civil Procedure;. Though there was a preponderance of authority that the words "affecting the decision of the case" used in Section 105 meant "affecting the decision of the case on the merits," the authorities on his point were not uniform and, therefore, the question was referred to a Full Bench.

It was held by the Full Bench that the words "affecting the decision of the case" in Section 105(1) of the Civil Procedure, Code are to be construed in the sense of affecting the decision of the case on the merits, and that the words "on the merits" are not to be found in the sub-section, but they must be supplied by necessary implication, being necessarily involved in the connotation of the word "affect" having regard to the context.

It was further held that an order setting aside an ex parte decree cannot be held to affect the decision on the merits as it does not determine the merits but merely ensures, or is the condition precedent to, the re-hearing and determination of the suit on the merits and that the propriety of the order cannot, therefore, be questioned, u/s 105(1), in the appeal from the ultimate decree. In coming to the above decision their Lordships made the following observation:

"It has been argued that the words "affecting the decision of the case" cannot be construed to mean affecting the decision of the case on the merits. The legislature did not intend to provide for a rule in S 105 with reference to any error, defect or irregularity at variance with the rule laid down in Section 99 of the Code. In the latter section it has been provided that no decree shall be reversed or substantially varied, etc. in an appeal on account of any error, defect or irregularity in any proceeding in the suit not affecting the merits of the case. In both these sections the legislature appears to have had the same objective in view. In construing a statute it is not permissible to import into the text any words of limitation unless the text requires those words by necessary implication. We are, however, not importing any new words into the text, but we are construing the words "affecting the decision of the case. The word "affect" predicates that the error, defect or irregularity in the order has influenced the conclusion in such a way that an unjust result has been arrived at in the decision of the case on the merits."

Their Lordships further observed:

"Moreover, it is not possible to conceive how the error, irregularity or defect in

the order setting aside the ex parte decree could affect or influence the merits of the case. The trial of the case could not commence till the ex parte decree had been discharged. The setting aside of the ex parte decree was, therefore, a condition precedent to an inquiry or trial into the merits of the claim, and the re-trial may be described as a, second stage in the history of the case, but the two stages are distinct and independent. The second stage does not begin till the first stage has closed."

The same view has been taken in the Rangoon. Full Bench case and the contrary decision in *M.S. Mahomed v. Collector of Toungoo* ILR 5 Ran 60 : AIR 1927 Ran Z50 was overruled.

7. The Bombay High Court also in *Dhondu Narayan Shet Vs. Vaman Govind Patvardhan*, has laid down the same principle of law on the question and has held that where an ex parte decree is set aside by the trial Judge and the suit proceeded with on the merits, the appellate court, on an appeal to it from the final decree, has no power u/s 105(1) to question the propriety of the order of the trial court setting aside its ex parte decree.

The recent view of the Madras High Court is also to the same effect and it has been held by a Bench decision of that court in *Nidamarti Venkata Narasimham Vs. Pogaku Nagojirao*, that where the orders do not affect the decision of the case on merits such orders would not come within the scope of Section 105 and that an order setting aside the dismissal of an application to set aside sale for default cannot be questioned in the appeal against the final order, as it re-open an enquiry and does not affect the decision of the case.

I will have to deal with this case later on while considering some of the cases of the Madras High Court cited by counsel for the opposite party. The view of this court is exactly the same as is to be found in *Baldeo Lall and Others Vs. Mt. Matisara Kuer and Others*, . That was a case in which an ex parte decree was set aside against some only of the defendants and as the decree was set aside only against some of the defendants, it was held that in an appeal from the ex parte decree the propriety of that order could be questioned.

The reason is obvious, for by setting aside the ex parte decree against some only of the defendants and retaining the decree against the others the order affected the decision of the case on the merits. But their Lordships after considering the various decisions on the, point held that Section 105 has no application to a case where the entire ex parte decree has been set aside and a point is raised that a decree should not have been set aside at all.

8. I will now deal with the cases relied upon by the learned Counsel for the opposite party in support of the remand order. Reliance has been placed by him on the cases of *Gopala Chetti v. Subbier* ILR 26 Mad 604 *Athamsa Rowther Vs. Ganesan and Another*, ; *S.N. Mullick Vs. Ganga Gope and Others*, ; and *Ram Lal Gope and Others Vs. Kali Prasad Sahu and Others*, . In ILR 26 Mad 604 the plaintiff sued on a promissory note made by the first defendant alone and joined

his undivided nephew as a second defendant to the suit on the ground that the promissory note was for a debt binding on the family including the second defendant.

None of the defendants appeared at the trial and the suit was decreed ex parte against both the defendants making the first defendant personally liable for the sum sued for and the second defendant liable to the extent of his interest in the joint family property. The second defendant alone made an application for setting aside the ex parte decree and the court set aside the ex parte decree as against both the defendants,

When appealing against the final decree, the plaintiff took the objection that the order setting aside the ex parte decree as against defendant No. 1 was contrary to law, and claimed that the decree should be restored so far as that defendant was concerned. This contention was accepted. As pointed out by their Lordships in the Full Bench decision of the Allahabad High Court in *Radha Mohan Datt, Silk Merchant Vs. Abbas Ali Biswas and Others*, Section 591 of the CPC has not been referred to or discussed in the judgment and ex facie the ruling does not proceed upon a construction of the text and neither any rule of statute nor any authorities have been cited in support of the view, and it is difficult to understand upon what principle the conclusion was arrived at in this case.

Moreover, the judgment itself shows that the contention of the plaintiff was accepted under the circumstances of the case. The circumstances were that there was no contention as to the making of the note and the consideration therefore and that the contention of the second defendant that the debt was one not binding upon him was a defence peculiar to him and not one common to him and the first defendant.

Thus, their Lordships appear to have taken a view that the setting aside of the decree as against defendant No. 1 on whom it was binding in all respects affected the decision of the case on the merits. This case, therefore, is of no assistance to the opposite party. In *Athamsa Rowther Vs. Ganesan and Another*, , the circumstances were peculiar. There was a preliminary ex parte mortgage decree and that decree was made final ex parte. An application was made for setting aside the ex parte final decree only and not the ex parte preliminary decree. The reason appears to be that the application for making the final decree was barred by limitation.

The ex parte final decree was, however, set aside and it was held in that case that such an order affected the decision of the case and the propriety of that order could be challenged in an appeal against the final decree passed in the suit. But their Lordships made it perfectly clear that when the result of the setting aside of the order has been the hearing of the suit de novo on its merits, no injustice would be done to any one by the decision of the case and the final result is not affected. According to their Lordships, however, the result in the case before them was to be very different as will appear from the following

observation:

"The defendant has deliberately, no doubt for good reasons from his own point of view, refrain-"d from opening the whole suit, and only wants the final decree to be reopened because he thinks he has a good point of limitation which will enable him to render the preliminary decree futile. So far from courting a decision on the merits, he is trying to burke such a decision altogether. In such circumstances we cannot but hold that an order setting aside the ex parte final decree while retaining the ex parte preliminary decree is an order "affecting the decision of the case"".

I do not see how this case is of any assistance to the defendant opposite party. This case as well as the case in Paidapati Venkatanarasu Vs. Vikram Kotayya and Others, , were considered in the case of Nidamarti Venkata Narasimham Vs. Pogaku Nagojirao, , referred to above and their Lordships held that:

"The principle that is deducible from the above cases seems to us to be that where the effect of the order is to prevent an enquiry into merits such an order would come within the scope of Section 105, Civil Procedure Code, as affecting the case on merits but where the orders do not affect the decision of the case on merits such orders would not come within the scope of Section 105, Civil Procedure Code."

In S.N. Mullick Vs. Ganga Gope and Others, , their Lordships refrained from deciding this question because in their Lordships" opinion the case could be decided on another point. What happened in that case is that certain cases were fixed for trial on the 3rd of August, 1923. In the meantime, on the 31st of July, they were transferred from the court of the third Munsif where they had been instituted to the court of the Additional Munsif. On the 3rd of August, the defendants applied for time on the ground that they were not aware of the transfer and were not ready to go on with the case.

This application was refused and the cases were heard on the 3rd of August ex parte and decided on the 7th of August. An application under Order 9, Rule 13 of the CPC was filed by the defendants and they also filed an appeal from the ex parte decrees themselves. The application for setting aside the ex parte decree was dismissed but the appeals against the decrees were allowed by the District Judge and the suits were remanded for hearing on the merits.

It was contended in the High Court on behalf of the plaintiff that it was not competent to the lower appellate court to enter into the question of the propriety of the order refusing to set aside the ex parte decrees. As already observed, their Lordships did not decide this question because in their Lordships" opinion the application for adjournment made on the 3rd of August should have been allowed.

In this case it is manifest that by refusing to allow an adjournment the defendants were deprived of examining their witnesses in support of their case

and such an order, therefore, clearly affected the decision of the case on the merits. In *Ram Lal Gope and Others Vs. Kali Prasad Sahu and Others*, , there was a mortgage suit in which there was a reference to arbitration, but it was returned unexecuted by the arbitrators. Then there was another reference to arbitration, but as the Vakalatnama did not empower the pleaders to make a reference to arbitration, the parties had to file a fresh Vakalatnama.

On the 19th of August, the defendants applied for time to file Vakalatnama, but the court did not grant time and rejected the petition filed by the parties for referring the suit to arbitration and adjourned the suit to the 21st of September 1926 for disposal. That was, however, a holiday and the suit was taken up on the 22nd when the defendants 1st party applied for time on the ground that his witnesses who had come on the preceding day had gone to Baidyanath Dham,

The Court rejected the petition and decreed the suit *ex parte* after the defendants' pleaders retired from the suit stating that they had no instructions. An appeal preferred before the District Judge was dismissed as against some of the respondents for failure to prove service of notice on them, though actually one of them had appeared in the appeal and it could not have been dismissed as against him. As the appeal stood dismissed against some of the respondents, the lower appellate court took the view that it could not be heard against any of the respondents. The appeal was accordingly dismissed.

On appeal to this Court, their Lordships, after considering the various provisions of law and the facts and circumstances of the case came to the conclusion that the lower appellate court was not justified in dismissing the appeal as against some of the respondents for failure to prove service of notice and consequently the appellate court was in error in holding that the appeal was incompetent. Then their Lordships considered the refusal to adjourn the case by the trial court and held that the prayer was wrongly refused.

Accordingly, the suit was remanded to the trial court for fresh decision in accordance with law. The facts of this case have no bearing to the facts of the present case. Moreover, in view of the, fact that the defendants could not adduce evidence at the trial because of the wrong refusal of adjournment application and in view of the fact that the appeal in the lower appellate court was held to be incompetent because of the wrongful dismissal of the appeal as against some of the respondents, the orders affected the decision of the case on the merits as will appear from the following observations made by their Lordships:

"This error or irregularity has affected the decision of the case, because, the lower appellate court has dismissed the appeal in its entirety on the ground that it had already been dismissed against some of the respondents. The High Court is competent in second appeal to enter into the Question of a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon its merits, It is apparent from what has been said above that this matter can be considered in an appeal against the final decree of

the appellate court."

In my opinion, this case, instead of helping the opposite party, supports the contention raised on behalf of the petitioners.

9. On consideration of the authorities discussed above, my concluded opinion is that where an order of dismissal of a suit for default has been set aside under Order 9, Rule 9 of the Code of Civil Procedure, the propriety of that order cannot be challenged in appeal from the final decree passed in the suit u/s 105 of the Code of Civil Procedure.

10. On the facts of the present case as stated above, it is manifest that the interference by the lower appellate court with the order of the trial court setting aside the order of dismissal of the suit for default was uncalled for as it was beyond its competence to challenge the propriety of that order in an appeal preferred against the final decree passed in the suit. The lower appellate court has thus acted with material irregularity and illegality in the exercise of its jurisdiction in making an order of remand.

11. In the result, the application succeeds and is allowed with costs. The judgment and the order of the lower appellate court setting aside the judgment and the decree of the trial court and remanding the case to the trial court for fresh decision are set aside and the case is sent back to the lower appellate court for a decision of the appeal on merits. Hearing fee: Rs. 100/-.

V. Ramaswami, C.J.

12. I agree.