

(1953) 11 GAU CK 0004

In the Gauhati High Court

Case No : Misc. Appeal No. (F) 2 of 1952

Rahimuddin Sheikh and Others

APPELLANT

Vs

Sarifan Nesa and Others

RESPONDENT

Date of Decision : 09-11-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 8, Order 9 Rule 9, 115, 151
Land Acquisition Act, 1894 — Section 54
Limitation Act, 1963 — Article 163, 181

Citation : (1953) 11 GAU CK 0004

Hon'ble Judges : Ram Labhaya, J;Deka, J

Bench : Division Bench

Advocate : P.N. Roy, for the Appellant; S.C. Das, for the Respondent

Judgement

Ram Labhaya, J.—This First Miscellaneous Appeal is directed against an order of the Additional Subordinate Judge, Lower Assam Districts dated 29-9-1951 by which Appellants, application under Order 9, Rule 9 read with Section 151, CPC for revival of the proceeding initiated by a reference under the Land Acquisition Act was dismissed on Appellants' default.

2. On the objection of the Appellants to an award made under the Land Acquisition Act the case was referred to the Subordinate Judge who received the reference on 2-1-1948. On that date he observed in his order that the reference of the Land Acquisition Case No. 1/1945-46 had been received from the Sub-divisional Officer, Goalpara. After several adjournments of the case on 15-6-1948 it was ordered by the learned Subordinate Judge that the case was contested and that it should be referred to the Judge for transfer. On 22-6-1948 it was transferred to the file of the Special Subordinate Judge, Assam Valley Districts. The order of this date does not show that any of the parties was present in Court on that date. No date was fixed for attendance on the parties before the Special Subordinate Judge.

On 17-3-1950 the reference was transferred to the file of the Additional

Subordinate Judge. L.A.D. by Memo dated 8-3-1950. The order does not show that any of the parties attended the Court even on that date. There was no direction for the parties to attend on any specified date. On 24-6-1950 the Additional Subordinate Judge, L.A.D. passed the following order:

To my file. Fix 7-7-1950 for steps. Inform pleaders accordingly.

It is obvious that the parties were not in attendance on that date and the direction was that the pleaders of the parties should be informed for appearance on 7th July for steps. On 7-7-1950 no steps were taken by either party. The case was adjourned to 5th August for hearing. On 5th August the learned Additional Sub-Judge dismissed the proceeding on the ground that Applicants were absent and that they had not taken any steps.

The petition under Order 9, Rule 9 read with Section 151, Code of Civil Procedure, which was put in by the Applicants was directed against this order of 5th August. In the application it was averred that the reference in Miscellaneous Case No. 1/1948 was made on their objections to the award made under the Land Acquisition Act. On 5th "August the proceeding was dismissed in default. They had no knowledge that the case was fixed for hearing on 5th August and learnt about the order only about 15 or 20 days before the application for restoration of the proceeding was put in.

Mr. J.N. Chatterjee, pleader for the Applicant, appeared as a witness on their behalf and deposed that when the case was transferred to the Subordinate Judge, he did not get any notice or information about the date of hearing of the case. The proceeding also does not show that any such notice was served on him. The statement of Mr. Chatterjee remains unrebutted. Notwithstanding this the learned Additional Subordinate Judge dismissed the application for restoration. In dismissing it he was influenced to a considerable extent by his view that the application was time barred.

3. A preliminary objection has been raised by the learned Counsel for the Respondents. He urges that the appeal is not competent as the order appealed from is not within the ambit of Section 54, Land Acquisition Act which provides that subject to the provisions of the Code of Civil Procedure, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of one award, of the Court, and from any decree or the High Court passed on such appeal. He argues that the order appealed from not being an award, no appeal lies. He has in support of his contention relied on *Bansidhur Marwari and Others Vs. Secretary of State for India*,

In this case a Division Bench of the Calcutta High Court held that an order of the Land Acquisition judge dismissing Petitioner's application for restoration of his previous application dismissed for default was not covered by Section 54, notwithstanding the addition of the words "in any proceeding" in Section 54. The

learned Judges followed an earlier decision of the Calcutta High Court reported in--"Hasun Molia v. Tasiruddin" 39 Cal 393 (B).

4. The learned Counsel for the Appellants has not disputed the correctness of the view taken in the two Calcutta cases referred to above. He has on the other hand requested that the appeal be treated as a petition of revision contending that a petition for revision is competent by reason of the fact that the Court to which a dispute is referred under the Land Acquisition Act being subordinate to the High Court by reason of the provisions contained in Section 54, was subject to its revisional jurisdiction.

He has relied on--"Laxmanrao v. Collector of Kagpur" AIR 1945 Nag 146 (C) and-- Makhan Lal and Others Vs. Secy. of State in support of his contention. The Full Bench decision of the Allahabad High Court was followed in--" AIR 1945 Nag 146 (C)". The authorities support the contention put forward by the learned Counsel for the Appellants. Mr. Das, the learned Counsel for the Respondents, had no answer to this contention. He did not dispute the contention that a Court constituted under the Land Acquisition Act is Subject to the revisional jurisdiction of the High Court. In these circumstances following the view taken in the two cases referred to above we treat this appeal as a petition of revision.

5. It is clear that the Appellants who may now be described as Petitioners had no information that the case had been fixed for hearing on 5-8-1950. The case could not have been dismissed for default. As they had no knowledge of the date of hearing, it could not be said that they were guilty of default. They could not possibly attend without any information of the date when the case was to come up for consideration; nor could the case be regarded as having been fixed for hearing; for such a thing cannot happen without intimation to the parties. Order 9, Rules 8 and 9, therefore, would not apply to the case. The application for restoration could be made only u/s 151 CPC. It was actually made u/s 151 read with Order 9, Rule 9. The inherent powers of the Court u/s 151 were thus expressly invoked. The application for restoration was virtually an application u/s 151.

Article 163, Limitation Act also would not apply to such an application. The application of Article 181 is attracted by the peculiar circumstances of the case. Where a date for hearing is not fixed or is not notified to the Plaintiff or the Petitioner, Order 9, Rule 8 has no application and the period of limitation for restoration of the application would be three years under Article 181, the residuary Article." This view receives support from--"Mt, Zainab Bibi v. Bihari Lal" AIR 1935 Pesh 186 (E) and we are in full agreement with it.

6. On the merits there can be no doubt that the Petitioners at whose instance the reference was made to the Court were not informed that the case was fixed for 5th August. There can be no manner of doubt about it. The Petitioners' evidence on the point has not been rebutted. The learned Judge in dismissing the application was influenced by the fact that the petition was barred by time under

Article 163 and in any case Petitioners had not established that they learnt about the dismissal of the proceeding in default within a month before the filing of the petition for restoration. Article 163 did not apply and as the case is covered by Article 181 it was not necessary for the Petitioners to establish that they had got knowledge of the dismissal within a month immediately preceding the filing of the petition.

The order is vitiated by the failure on the part of the learned Judge to exercise jurisdiction which was vested in him inasmuch as it was not realized that the application for revival was u/s 151, CPC. The Petitioners were entitled to succeed on showing that they had no knowledge of the date on which the proceeding was dismissed for default. This they had succeeded in doing. We, therefore, set aside the order of the learned Additional Sub-Judge, L.A.D. in the exercise of our revisional jurisdiction. The proceeding initiated on a reference to the Court shall be restored and the reference shall be disposed of on the merits and in accordance with law. We make no order as to costs.

Deka, J.

7. I am in agreement with my learned brother as to the proposed order and accept the reasonings as given in--"Mt. Zainab Bibi v. Bihari Lal" AIR 1935 Pesh 186 (E). The learned Subordinate Judge in passing the order of 29-9-51 failed to look into the correctness or otherwise of the order of dismissal passed on 5-8-50, which was definitely a bad order, the dates of hearing not being notified to the parties to the proceeding. He would have been acting completely within his jurisdiction in restoring the proceeding u/s 151, CPC but he misdirected himself in looking into other details which were of consequence only under different circumstances.

If we take it that the learned Subordinate Judge committed an error only as to point of limitation in refusing to set aside that order, there may be some difficulty in our interfering with the order moved against u/s 115, CPC. The learned Subordinate Judge in my mind misconceived his jurisdiction as to the application for restoring the proceeding and in, treating the same as one under Order 9, Rule 9, CPC alone, and in this view, I hold that the order moved against comes within the scope of Section 115, CPC and is liable to be interfered with.