
(1937) 11 PAT CK 0068
In the Patna High Court

Singheshwar Prasad Mahton and Others APPELLANT
Vs
Sakhi Chand and Others RESPONDENT

Date of Decision : 20-11-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 19, 151

Citation : AIR 1938 Patna 111

Hon'ble Judges : James, J

Bench : Division Bench

Judgement

James, J.—This is a reference by the Taxing Officer on the question of whether an application for restoration of an appeal dismissed for non-payment of printing costs should be treated as an application under Order 41, Rule 19 or as an application for review. In this High Court, following the decision of the Full Bench in *Fatimunnissa v. Deoki Pershad* 1897.. 24 Cal. 350 such applications have been treated as applications for review. The learned Taxing Officer, quoting the decision of this Court in *Anant Potdar v. Mangal Potdar* A.I.R.1926. Pat. 27, has remarked that in this High Court there has been conflict of decisions.

2. It is true that the learned Judges observed that in certain cases the view had been taken that the appeal could be restored by an application under Order 41, Rule 19 read with Section 151, Civil P.C.; but on examining the records of those cases, I find that there is actually no conflict of authority. In Review No. 35 of 1923. *Niro Kuer v. Govind Prasad Singh* the application was stamped as an application for review; the Division Bench deciding it casually remarked that the Court had power to restore the appeal under Order 41, Rule 19 read with Section 151, Civil P.C.; but the appeal was not restored in that way but on an application for review. In Re. view No. 30 of 1924. *Debi Lai Sahu v. Gosain Kamleswar Gir* the Registrar as Taxing Officer considered that it could be stamped as an application under Order 41, Rule.19, not quite clearly perceiving the effect of the treatment of Review No. 35 of 1923, which he treated as authority for the view that an application for review of an order dismissing an appeal for nonpayment of

printing costs fell under Order 41, Rule 19.

3. In Misc. Judicial Cases Nos. 24 of 1923 and 35 of 1924. *Mt. Roshan Bibi v. Aziz Fatma and Hira Singh v. Sonalo* the application was in each instance required by the Bench to be stamped as for a review. In Civil Review No. 38 of 1923 the application for restoration was granted, on the petitioner's paying the deficit court fee, which had been required in *M.J.C. No. 24 of 1923*. In *Haridasi Debi v. Sajanimohan Batabyal A.I.R.1932. Cal. 770a* Division Bench of the Calcutta High Court has held that even though Order 41, Rule 19 may not apply in its terms to an application of this nature, that Rule read with Section 151 of the Code would enable such an application to be maintained; and Articles 4 and 5, Court-fees Act do not govern the application. This decision cannot be regarded as overruling the decision of the Full Bench of the Calcutta High Court in *Fatimunnissa v. Deoki Pershad 1897.24 Cal. 350*. The learned Judges when they mention the decision of this High Court in *Anant Potdar v. Mangal Potdar A.I.R.1926. Pat. 27* say that since 1923 the view was taken in several cases in this Court that the appeal could be restored on an application under Order 41, Rule 19; but as I have remarked, none of the cases quoted in *Anant Potdar v. Mangal Potdar A.I.R.1926. Pat. 27* quite justify that observation.

4. With due respect to the learned Judges who decided *Haridasi Debi v. Sajanimohan Batabyal A.I.R.1932. Cal. 770*, I find it difficult to treat that decision as warranting my departure from the rule laid down in *Anant Potdar v. Mangal Potdar A.I.R.1926. Pat. 27*. The learned Judges proceed on two grounds: first, that there was a change in the definition of a decree in the CPC of 1908, and secondly that the decision of the Judicial Committee in *Chhajju Ram v. Neki A.I.R.1932. P.C. 112* would tend to make it difficult to grant these applications if they are regarded as falling under Order 41, Rule 19. The first point was considered in *Anant Potdar v. Mangal Potdar A.I.R.1926. Pat. 27*. The second might justify amendment of Order 47, Rule 1; but I doubt whether it should be regarded as a justification for saying that the Division Bench of this Court was wrong in its view.

5. I consider that until there is an authoritative decision of this Court, overruling the decision in *Anant Potdar v. Mangal Potdar A.I.R.1926.. Pat. 27* we must continue to follow our practice in accordance with the rule therein laid down, and require that these applications should be stamped under Articles 4 and 5 of Schedule 1, Court-fees Act. This order will also govern the other reference. *Mowar Ram Bahadur Singh v. Kumar Kamakshya Narain Singh*.