(1979) 11 AHC CK 0072

In the Allahabad High Court

Case No : Civil Misc. Writ No. 4900 of 1977

Smt. Ataria APPELLANT

Vs

Board of Revenue and Others RESPONDENT

Date of Decision : 06-11-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17, Order 41 Rule 17(1)

Citation : (1980) AWC 41

Hon'ble Judges : R.S. Singh, J

Bench : Single Bench

Advocate : Sant Prakash, for the Appellant; B.D. Mandhyan and S.P. Singh for, for the Respondent

Final Decision : Allowed

Judgement

R.S. Singh, J.—This petition is directed against the order of the Board of Revenue dated 24-11-1977 dismissing the restoration application and the order dated 13-10-1977 dismissing the second appeal in default.

2. The facts of the case, in brief, are that the second appeal was argued on 6-10-1977. After hearing the learned Counsel for the parties the case was adjourned for 13-10-1977. The second appeal was dismissed in default by the order of the Board of Revenue dated 13-10-1977. An application was filed on behalf of the learned Counsel for the Petitioner on 26-10-1977 before the Board of Revenue with a prayer that the appeal be restored to its original number and be heard on merits. It was alleged in the application that the second appeal was heard on 6-10-1977 and the learned Counsel for the Petitioner got an impression that the judgment would be delivered on 13-10-1977, but it was adjourned for further arguments. The restoration application was also dismissed by the Board of Revenue by order dated 24-11-1977. The contention of the learned Counsel for the Petitioner that he got the impression that the judgment would be delivered on 13-10-1977 was not accepted by the Board of Revenue in view of the fact that the order sheet dated 6-10-1977 showed that the learned Counsel

for the Petitioner himself had prayed for further time to argue the case and the case was then adjourned for this purpose to 13-10-1977 and was noted accordingly in the margin by the parties. It has been further observed in the order of the Board of Revenue that the question of misunderstanding cannot, therefore, be arisen.

3. I have heard the learned Counsel for the parties. There is no dispute about the fact that the second appeal was heard on 6-10-1977 and thereafter it was adjourned for 13-10-1977., The only fact in controversy . is as to whether the next date fixed was for judgment or for further argument. According to the learned Counsel for the "Petitioner it was just a misunderstanding that he noted the next date for orders. But the order sheet shows that it was adjourned for further arguments at the request of the learned Counsel for the Petitioner. The contention of the learned Counsel for the Petitioner is also, borne out by the fact that on the margin" of the order sheet dated 6-10-1977 the word ''judgment'' was noted but it was subsequently scored out and the words ''further arguments'' were written. Without entering into this controversy one thing is apparent in this case that the second appeal was heard by the Board of Revenue on 6-10-1977. Even if it was an adjournment for further arguments and in case no one appeared on behalf of the Petitioner the question is whether the Board of Revenue was justified in dismissing the second appeal in default. The provisions for bearing the appeal is contained in Order XLI of the Code of Civil Procedure. Order XLI, Rule 17 CPC is as follows:

17. Dismissal of appeal for Appellant''s default.

(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the Appellant does not appear when the appeal is called on for bearing, the Court may make an order that the appeal be dismissed.

Explanation: Nothing in this sub-rule shall be construed as empowering the court to dismiss the appeal on the merits.

Hearing appeal ex-parte:(2) Where the Appellant appears and the Respondent does not appear, the appeal shall be heard ex parte.

4. The provision relating to disposal of appeals by dismissal in default is attracted only when the Appellant does not appear on the date of hearing or on any other date to which the hearing has been adjourned. There may be different stages of further hearing. One of the stages of the further hearing may be where the Appellant has commenced the argument in the appeal but before the argument is closed the appeal is adjourned for further hearing. The other stage may be where the Appellant has concluded his arguments and the appeal is adjourned for further hearing of the Respondent. If in a latter case the Appellant absents on the adjourned date for further hearing, can the appeal be dismissed in default of the Appellant on this date of hearing ? On the adjourned date of hearing the Appellant has not to commence his arguments in the appeal but it was for the Respondent to argue the appeal. The Question is as to whether the absence of

the Appellant may entail dismissal of the appeal. In my opinion, in such cases where the court has already heard the Appellant and is required to hear the Respondent, it will not be justified in dismissing the appeal in default of the Appellant. Similarly where before the argument of the Appellant is closed, the appeal is adjourned but the Appellant thinks that there is nothing more to argue in the appeal and be does not appear on the adjourned date, then again the court will be required to hear, the Respondent instead of dismissing the appeal in default- and decide the same on merits. In my opinion, where the appeal is adjourned for further hearing the court will be required to decide the appeal on merits instead of dismissing the appeal in default. The word ''hearing'' used in Order XLI, Rule 17(1) CPC will mean hearing where argument has not commenced but will not include further hearing. Certainly in a case where on the date of hearing the argument has not commenced or the appeal has been adjourned without the commencement of the arguments, this provision will be attracted and it will be open to the court to dismiss the appeal in default. But once the argument has commenced and the case has been adjourned for further hearing, then the aforesaid provision will not be attracted.

5. In the present case the Appellant has argued the appeal and it was adjourned for further hearing or order as the case may be, the court was required to decide the appeal on merits. When the Appellant absents on the adjourned date the court is required to decide the appeal on merits and it has no jurisdiction to dismiss the same in default.

6. In view of what has been discussed above, the order of the Board of Revenue cannot be allowed to stand in law and it deserves to be quashed.

7. In the result, I allow the appeal (petition), set aside the impugned orders of, the Board of Revenue and direct it to decide the appeal in accordance with law. There will, however, be no order as to costs.

