
(1991) 02 PAT CK 0011

In the Patna High Court

Case No : Appeal from Appellate Decree No. 53 of 1986 (R)

Smt. Banarsi Debi and Another

APPELLANT

Vs

Tejo Mahto and Others

RESPONDENT

Date of Decision : 12-02-1991

Acts Referred:

Citation : (1991) 02 PAT CK 0011

Judgement

R.N. Sahay, J.—Whether the appellate court can examine the legality and propriety of the order passed by the trial court in a Misc. case arising out of an application filed by the Appellant under Order 9, Rule 9 of the CPC having regard to provisions contained in Order 43 Rule 1A of the Code of Civil Procedure" is the significant question for determination in this appeal filed by the Plaintiff whose suit was decreed by the trial court but reversed by the appellate court.

2. The Plaintiffs-Appellants instituted the suit on 20.9.1978 for a decree of permanent injunction restraining the Defendants-Respondents to interfering in repairing the door and fixing the new door with Chonkhat Kewari and in lifting the bricks etc.

3. The Defendants appeared in pursuance of summons and filed their written statements.

4. On 18.9.1982 the suit was dismissed for default for non-prosecution. The order sheet of the said date shows that the case was fixed for hearing and the parties had also been directed to come ready. The Plaintiffs was doing no pairvi since 21.6.1982. There is no mention whether the Defendants were also present or absent on that date.

5. On 7.3.1983 the Plaintiffs filed an application under Order IX, Rule 9 of the CPC for restoration, of the suit. On 25.6.1983, the application under Order IX, Rule 9 of the CPC was allowed after condoning the delay, No notice was given to the Defendants of the restoration application. On 21.8.1983 notice was issued to the Defendants through registered letter. According to the order sheet dated

8.9.1983, notice was served on the Defendants but they did not appear. Thereafter the suit was heard ex-parte on 26.9.1983 and a decree was passed in favour of the Plaintiffs.

6. The Defendants did not file any Revision application against the order restoring the suit, nor did they prefer any application under Order IX, Rule 13 of the CPC to set-aside the ex-parte decree. They filed an appeal against the ex-parte decree which was heard and disposed of by the Subordinate Judge, Bermo. The learned Subordinate Judge set-aside the ex-parte decree passed against the Defendants. The main ground was that the restoration of the suit under Order IX, Rule 9 CPC was wholly illegal for want of service of notice to the Defendants. The learned Subordinate Judge, however, did not decide the appeal on merit. He merely allowed the appeal without indicating that the suit of being dismissed.

7. Shri N.K. Prasad, the learned Counsel for the Appellants contends that the learned appellate court reversed the decree of the trial court on a totally erroneous interpretation of Order XLIII, Rule 1A of the Code of Civil Procedure. He submits that it was upon the Defendants to challenge the order of restoration before the Revisional Court. They having not challenged the restoration order, the same became final and was not liable to be challenged in an appeal filed against the ex-parte decree.

8. Shri Prasad next contended that since the appellate court has not given any opinion regarding the merits of the case nor he remitted the matter to the trial court for disposal of the suit after notice to the Defendants, the case should be remitted back to the trial court.

9. Shri Prasad also contended that it was not necessary to issue notice to the Defendants because they were absent, when the suit was called for hearing.

10. The learned appellate court has held that the restoration of the suit under Order 9 Rule 9 of the CPC in Miscellaneous Case No. 5 of 1983 was wholly without jurisdiction because no notice of the restoration application was served upon the Defendant and the order was passed ex-parte. The learned appellate court further held that the legality of the order of restoration could be examined by the appellate court in view of the provisions contained under Order XLIII, Rule 1(A) of the CPC which is a new provision inserted in 1976.

11. Order XLIII, Rule 1(A) provides for challenge of non-appealable orders in appeal against decrees which reads as follows:

Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

The object of this new rule was to provide that certain orders which are not appealable may be challenged in an appeal against tiff final decree.

12. The question for consideration is as to whether legality and propriety of order of restoration of a suit dismissed for default which is not appealable as such could be challenged in appeal preferred by the aggrieved party against the decree in suit. No decision regarding interpretation of Order XLIII Rule 1(A) was placed before me and probably this provision has not been construed so far by any High Court.

13. If we closely examine Order XLIII, Rule 1(A); it clearly provides if judgment is pronounced on the basis of any order is made under the Code and a decree is drawn up the party, against whom such decree is passed is entitled to canvass before the appellate court that such order should not have been made and judgment should not have been pronounced. Now it cannot be contended that on the basis of the order of restoration, the judgment was pronounced against the Defendant. After restoration the suit was heard ex-parte and then judgment was pronounced. On a plain interpretation of Order XLIII, Rule 1(A) there can be no doubt Order IX Rule 9 CPC restoring the suit cannot be challenged in an appeal against the final decree because the judgment was not pronounced on the basis, of the restoration order. In my Opinion, the interpretation of the Appellate holding that the order of restoration in Miscellaneous Case No. 5 of 1983 was without jurisdiction is erroneous and the appellate had no jurisdiction to examine the legality propriety of the restoration order. This new order under consideration postulates those categories of cases where judgment is pronounced the decree was drawn up on the basis of any order, for instance decree passed on the basis of compromise, divorce decree passed with mutual consent or judgment on admission as provide under Order XII, Rule 5 Code of Civil Procedure.

14. Now the next question for consideration is as to whether the legality of order of restoration could be examined having regard to the provision of Section 105(1) of the CPC which provides as follows:

Save as otherwise expressly provided, no appeal shall lie 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 any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

15. This question was considered in Manik Mandal and Others Vs. Bharosi Singh,

In the aforesaid case, the suit was dismissed for default because the Plaintiff was absent and the Defendant was present. The Plaintiff filed an application for setting-aside the order of dismissal and the trial court without registering the application as a Miscellaneous case, and without giving any notice to the Defendant, restored the order of dismissal and proceeded to hear the suit. The suit was taken up for hearing. The Defendant also appeared but filed an application that he was proceeding with the suit without prejudice to his rights as regards recalling of the order of dismissal. Ultimately, the suit was decreed by the trial court and the Defendant preferred an appeal before the District Judge.

The order of the trial court recalling the order of dismissal without giving notice to the Defendant, was challenged as without jurisdiction and therefore, the decree passed in a suit vitiated in law. This contention was accepted by the appellate court and the decree was set-aside. This order was challenged in Civil Revision before the High Court.

16. The High Court held that though "Order 9 Rule 9(2) CPC provides that no order shall be made under this rule unless notice of the application had been served on the Opposite Party and no notice was served and thus the error of procedure had been committed by the trial court still the order was not without jurisdiction. The following passage from the judgment (supra) may usefully be quoted:

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 would 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 those 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 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 under Section 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 Civil Procedure Code,) in setting aside the order of dismissal without giving notice 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.

17. It was contended before the High Court that the order setting-aside dismissal of the suit affected the decision of the case and such an order could be challenged in appeal from final decree. It is not necessary that it should affect the decision on merits because 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. Repelling this contention, it was held that such an argument appears to have been rejected by all the High Courts of India Section 105 has to be read in the light of Section 99 CPC and the objects of both the sections communicate to cure certain defects or its irregularities, not affecting the decision of case on merits. The view take by almost all the High Courts in India is in conformity with the above view." Their Lordships of the High Court placed reliance on the following passage of the decision of the Calcutta High Court in *Chintamony Dassi v. Raghoonath Sahoo* ILR Cal 981:

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 Munsif'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 section applies to an order setting aside an ex-parte decree u/s 108. The object of Section 108 is to ensure sure that the Defendant shall get a hearing notwithstanding that he did not appeal 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 ensure 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. How 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 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.

18. In AIR 1927 Bom 495 Dhondu Narayan v. Waman Govind it was laid down:

Where an ex-parte decree is set-aside by the trial court 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.

19. Thus, there is overwhelming authority for proposition that the order recalling the dismissal of a suit for default cannot be questioned in appeared from the final decree.

20. The learned appellate court has passed rather curious order. The court after holding that the judgment of the trial court is illegal and without jurisdiction, set-aside the decree in appeal but passed no order for the remand of case to the trial court for reheating. The learned appellate court has not decided the suit on merits, although he has made sonic, stray observations here and there regarding the merits of the case.

21. I have already held that the appellate court had no jurisdiction to decide about the legality of the restoration order and the ex-parte hearing of the suit. The judgment and decree of the appellate court for the reasons stated above, is set-aside and the case is remanded to the appellate court for decision on merits in accordance with law. There shall be no order as to costs.