
(1981) 06 GAU CK 0004
In the Gauhati High Court
Case No : Civil Revision No. 35 of 1980

Sri Gunabhi Ram Baisya

APPELLANT

Vs

Sri Sachindra Nath Baisya and Others

RESPONDENT

Date of Decision : 15-06-1981

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 141

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 9 Rule 13, Order 9 Rule 9, 115, 151

Citation : (1981) 1 GLR 148

Hon'ble Judges : T.C. Das, J

Bench : Single Bench

Advocate : D.N. Barua and C. Barua, for the Appellant; B.C. Sarma, for the Respondent

Final Decision : Allowed

Judgement

T.C. Das, J.—This application u/s 115 of the CPC is directed against the judgment and order dated 9.11.79 passed by the learned Assistant District Judge No. 1, Gauhati in dismissing the Miscellaneous Appeal No. 23 of 1977 and affirming the order passed by the learned Munsiff, Nalbari in Misc. (J). No. 15/77.

2. The opposite party as Plaintiff, instituted T.S. No. 37/76 in the Court of Munsiff at Nalbari for declaration of his right, title and interest over an area of land against the Petitioner who was the main Defendant in the said suit. The Petitioner appeared in the suit and prayed for time to file his written statement. On the prayer of the Defendant, the learned Munsiff granted time for filing written-statement and finally 19.3.77 was fixed for the same. As 19.3.77 was declared a holiday, the case was put up on 21.3.77 for orders. The learned Munsiff granted further time to the Petitioner upto 11.4.77, on which date the Petitioner neither appeared nor took any steps in the case for filing written statement. As the Petitioner-Defendant was absent, the case was taken up for ex-parte hearing and on the said date the suit was decreed ex-parte against the

Petitioner.

3. Thereafter, a petition under Order 9 Rule 13 of the CPC was filed by the Petitioner on 16.4.77 and the same was registered and numbered as Misc. (J) case No. 15 of 1977 in the Court of learned Munsiff at Nalbari. The hearing of the Misc. Case was fixed on 23.6.77 but the Petitioner again remained absent and the learned trial Court dismissed the aforesaid Misc. Case for default of the Petitioner with cost. Thereupon the Petitioner preferred an appeal in the court of learned Assistant District Judge No. 1 at Gauhati which was numbered as Miscellaneous Appeal No. 23 of 1977. The learned appellate Court on hearing both the parties, dismissed the appeal on the ground that the appeal was not maintainable in view of the provision of Section 141 of the Code as amended in 1976. According to the learned Appellate Court, the scope of Section 141 has been enlarged by the amendment of 1976 and the remedy of the Petitioner against such an order was in the trial Court and not by way of an appeal.

4. The short point that falls for determination in this revision is whether an appeal against an order of dismissal of a petition under Order 9, Rule 13 is maintainable under Order 43, Rule 1(d) of the Code of Civil Procedure, or not.

5. Mr. D.N. Barua learned Advocate for the Petitioner has submitted that: (a) there has been an illegal exercise of jurisdiction by the appellate Court in dismissing the appeal on the ground that the remedy of the Petitioner was not by way of an appeal but in the original Court (b) the appellate Court has refused to exercise jurisdiction vested in him to decide the appeal; (c) the appeal was competent in view of the provision of Order 43, Rule 1(d) of the Code and the provision of Section 141, as amended, does not in any way debar the Petitioner to prefer an appeal against the impugned order. He further submitted that Order 43, Rule 1(d) gives a substantive right to the Petitioner to prefer an appeal against the impugned order passed by the learned Munsiff even if the petition was dismissed for default. The learned Counsel has referred to me two decisions of this Court reported in Madanlall Agarwalla Vs. Tripura Modern Bank Ltd. and AIR 1974 Gau 54 (Shyamsundar Agarwal and Co. v. State of Assam) and had further submitted that this Court in interpreting the provisions of Order 43, Rule 1(e) and (d) categorically held that when an application under Order 9, Rule 13 for setting aside ex-parte decree is dismissed for default, ordinarily an appeal would lie under Order 43, Rule 1(d) and if no appeal is filed, the remedy u/s 151 of the Code cannot be availed of. Placing reliance on a decision of this Court in Civil Revn. No. 44/71 (Jami Ram Medhi v. Ramjan Ali) decided on 7.2.1974 (Gauhati) this Court held that an appeal under order 43, Rule 1(d) of CPC is competent against the order of dismissal of a petition under Order 9 Rule 13 of CPC either on merit or for default and the provision of Section 151 of the Code is not attracted. Learned Counsel for the Petitioner has submitted that the judgment of the learned Appellate Court in holding that the appeal is not maintainable, cannot be sustained in view of the re-mentioned decisions of this Court. The contention of the learned Counsel has sufficient force.

6. Mr. B.C. Sarma, learned Counsel appearing on behalf of the Respondent has submitted that as the scope of Section 141 has been enlarged, the Petitioner has his remedy available in the trial Court itself even without taking resort to the provisions of Order 43, Rule 1(d) of the Code of Civil Procedure. According to Mr. Sarma, the effect of dismissal of the petition under Order 9, Rule 9 or Order 9 Rule 13 of the CPC would be like that of a suit dismissed for default and as such the procedure to be adopted for revival of the suit would be the same procedure to be followed in respect of a petition under Order 9, Rule 9, or Rule 13 in case the petition is dismissed for default. His further submission is that though the provision of order 43, Rule 1(d) prescribes the right of appeal, the Petitioner could have sought for the remedy in the original Court by virtue of the extended scope of Section 141 of the Code of Civil Procedure.

7. The provision of order 43, Rule 1(d) of the Code provides a right of appeal against an order rejecting an application to set aside a decree passed ex-parte, and such right of appeal cannot be taken away as contended by the learned Counsel for the opposite party. Moreover, the provision of Section 141, Code of Civil Procedure, as amended in 1976 cannot be interpreted in a manner so as to make the provision of Order 43, Rule 1(d) nugatory. Therefore, in my opinion, the learned appellate Court is not correct in holding that the dismissal of the petition under Order 9, Rule 13 of the CPC cannot be open to appeal.

8. In the result, the petition is allowed. The judgment and order of the learned appellate Court are set aside. The appeal is remanded to the learned appellate Court below for disposal on merits. The Rule is made absolute. But on the facts and circumstances of the case, I make no order as to costs.