

(1921) 06 PAT CK 0016

In the Patna High Court

Surajpal Pandey and Others

APPELLANT

Vs

Utim Pandey and Others

RESPONDENT

Date of Decision : 21-06-1921

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 143, 149

Citation : 63 Ind. Cas. 99

Hon'ble Judges : Dawson Miller, C.J.;Coutts, J

Bench : Division Bench

Judgement

Dawson Miller, C.J.—The suit out of which this appeal arises was brought by the plaintiffs as the rest reversionary heirs of the deceased sons of the defendant No. 1, a Hindu widow, claiming a declaration that three sale-deeds executed by the widow were not justified by legal necessity and not binding upon them.

2. At the trial before the Munsif the suit succeeded as to one of the deeds but was dismissed as to the other two. The plaintiffs appealed to the District Judge against that part of the degree which dismissed their claim and were successful. The defendant, therefore, appealed to the High Court. The appeal was heard by a Single Judge of the Court who affirmed the decision of the lower Appellate Court and dismissed the appeal. From that decision the present appeal is brought by the defendants under the Letters Patent.

3. The question for determination in this appeal is whether, in the circumstances which arose, the appeal to the District Judge was regular and whether the appellants can now object that that appeal was improperly restored after it had been dismissed by the learned Judge.

4. The decree of the Trial Court was dated the 6th March 1917. After providing for the days requisite to obtain copies of the decree and judgment, the last day for presenting an appeal to the District Judge was the 14th April. On the 2nd of April the plaintiffs presented a memorandum of appeal for registration in the Court of the District Judge. It was presented, however, on an insufficiently

stamped paper, which fast on being discovered was communicated to the plaintiffs. Pleader. The District Judge thereupon gave time to the 11th of April, which was subsequently extended to the 14th, to make up the deficiency in the stamp. The deficiency was not made good and on the 17th of April, the amount still remaining unpaid, the District Judge passed an order in three terms: "Court-fee not paid, appeal dismissed for default." The correct order to have made would have been an order repeating the memorandum of appeal which had not up to that time been registered nor properly presented. On the 23rd of April the plaintiffs presented a petition praying for restoration of the appeal on payment of the deficit Court-fee. Under what rule of procedure the application was made does not appear from the petition. On the following day, the 24th of April, the District Judge, after hearing the Pleader for the plaintiffs but without any notice having been served upon the defendants, ordered the appeal to be admitted and registered, He did not intimate under what rule of procedure he was acting in making that order, and the rule under which he purported to act can only be conjectured. As far as can be gathered from what happened, the application appears to have been treated as an application under Order XLI, Rule 19. It was clearly not in terms an application for review and was presented on an insufficiently stamped paper for such an application. It seems equally clear that Order XLI, Rule 12, had no application to the circumstances of the case. The procedure there prescribed applies only to cases where an appeal is dismissed under Rules 11(2), 17, or 18 of the same Order. The order of the 17th April dismissing the appeal for default was certainly not made under Order XLI, Rule 11. It is also clear that it could not have been dismissed under Rule 17 or Rule 18 of Order XL, which at that stage could have no application. The memorandum of appeal had never been admitted, no date had been fixed for hearing the appeal as required by Order XLI, Rule 12, nor had any notice been served on the respondents as required by Rule 14. None of the necessary preliminaries contemplated in that Order had been complied with. It was not within the competency of the Court to make any order dismissing the appeal under Rule 17, and it is not suggested that the Court acted under Rule 18. This being so, the order of the 24th of April, ordering the appeal to be admitted and registered after it had been previously dismissed, could not have been an order made under Order XLI, Rule 19. In pursuance of that order, however, the appeal was registered and was in due course heard by the learned District Judge, the defendants remaining in ignorance that the memorandum of appeal, although presented in time, had been rejected for failure to pay the necessary Court fee but had afterwards been admitted and reregistered. Consequently when the appeal was heard, no question was raised as to the propriety of the order of the 24th of April admitting the appeal. When the appeal came on for hearing, the District Judge allowed the appeal on the merits and gave the plaintiffs a decree for the whole relief claimed. From that decision the defendants appealed to the High Court and complained that, in the circumstance above referred to, the learned District Judge was acting irregularly and without jurisdiction in passing the order of the 24th April restoring the appeal for hearing after it had once been

dismissed.

5. It is not stated when the defendants first became aware of the irregularity complained of, but it is not shown that they were aware of it at any time before the appeal was heard and determined by the District Judge.

6. On appeal to the Judge of this Court the matter seems to have been treated as one of limitation and the learned Judge considered that as the memorandum of appeal, although insufficiently stamped, had been presented in time, the District Judge was authorised under Sections 143 and 149 of the CPC in extending the time for payment of the deficit Court-fee even after the appeal had been dismissed for default. He does not, however, appear to have considered how the order of the 17th of April dismissing the appeal may have affected the rights of the defendants to be heard in any subsequent application to restore the appeal. He accordingly dismissed the appeal with costs. It is from that decision that the present appeal is brought.

7. I have already indicated that, in my opinion, the order restoring the appeal was not and could not have been made under the provisions of Order XLI, Rule 19. It is contended, however, that the petition asking for restoration should be treated as an application in review under Order XLVII of the Civil Procedure Code, and in fact the plaintiffs have since paid the deficiency between the fee paid with their application for restoration and the amount necessary for an application in review and have asked the Court to treat that application as if it had been an application in review, s The defendant", however, raised the objection that even if the application can be treated as one presented under Order XLVII the provisions of Rule 4(2), proviso (a) of that Order, have not been complied with. That rule provides that no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order a review of which is applied for. They contend that as no notice of the application was served upon them, they had no opportunity of appearing or being heard when the order restoring the appeal was made, and that, therefore, the order was bad in law. In any case they contend that they are entitled, as soon as the matter has been drawn to their notice, even in second appeal to a hearing. In my opinion the defendants' contention must prevail. If it could be shown that the defendants were aware of the order complained of when the appeal was being heard before the District Judge and raised no objection on that point, different considerations might arise. But in the present case there was nothing to show that the defendants had any notice of that order until after the appeal had been determined by the District Judge. The order of the 17th of April, in terms dismissing the appeal for default, was in effect an order rejecting the memorandum of appeal. There is no good authority to show that such an order is tantamount to a decree within the meaning of the Civil Procedure Code. See *Ayyanna v. Nagabhooshanam* 16 M. 285 : 5 Ind. Dec. and *Rup Singh v. Mukhraj Singh* 7 A. 887 : A.W.N. (1885) 260 : 4 Ind. Dec. 969. The defendant, therefore, had at that time not only a decree of the Trial Court

but also a decree of the Appellate Court in their favour, and except as provided by the rules, the Court had no power to deprive them of the right vested in them under those decrees. It is contended, however, that assuming the application for restoration could have been an application in review under Order XLVII, no notice was necessary to the defendants and that as order to review setting aside the previous order and restoring the appeal for hearing could be made ex parte, on the ground that there was no opposite party upon whom service of notice was necessary under the proviso of Sub-rule (2) of Rule 4 of Order XLVII. In support of this contention the decision in *Janaki Nath Hore v. Prabhasini Dasi* 30 Ind. Cas. 898 : 43 C. 178 : 22 C.L.J. 99 : 19 C.W.N. 1077 is relied on. In that case it was held, dissenting from a previous decision of the same Court, that where an appeal had been summarily dismissed under Order XLI, Rule 11, an application in review by the plaintiffs must be heard ex parte and the appeal restored for hearing without notice to the defendants. The ground for this decision appears to have been that there was no opposite party within the meaning of the proviso to Rule 4 of Order XLVII at that stage of the proceedings. There does not appear to have been any settled practice of the Calcutta High Court at that time, and from the judgment it appears that in certain cases the contrary view has been expressed, notably in the case of *Abdul Hakim v. Hem Chendra Das* 30 Ind. Cas. 165 : 42 C. 433. In my opinion, the expression opposite party in the proviso to Order XLVII, Rule 4, means the party interested to support the order or decree sought to be set aside or modified in the application for review. In the present case the defendants were the opposite party, and I can see no reason why the expression there used should be limited to cases in which such party has actually appeared in the appeal. I think the proper principle to apply is that laid down by their Lordships of the Privy Council in *Krishnasami Pandikondar v. Ramasami Chettiar* 43 Ind. Cas. 493 : 45 I.A. 25 : 34 M.L.J. 63 : 4 P.L.W. 54 : 16 A.L.J. 57 : 7 L.W. 156 : 23 M.L.T. 101 : 27 C.L.J. 253 : 2 P.L.R. 1918 : 22 C.W.N. 481 : 41 M. 21 Bom. L.R. 541 : 11 Bur. L.T. 121 : (1918) M.W.N. 906 (P.C.). In that case an appeal had been presented after the period allowed by Limitation Act, 1908, and had been admitted u/s 5 of that Act by an order ex parte by a Single Judge, no notice having been served upon the respondents. It was held that the respondents were entitled on the appeal to question the propriety of the order and to show that no sufficient cause for granting the extension had been shown. It was argued that the admission of the appeal by the Judge was final and that the Division Bench could not reconsider the question whether the delay was excusable. In dealing with this argument their Lordships said: But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tainted term of an order like the present that, though unqualified in expression, it should be open to re-consideration at the instance of the party prejudicially affected." In the result their Lordships declined to interfere with the decision of

the Division Bench, which had held that sufficient cause had not been shown for extending the time u/s 5 of the Limitation Act and had set aside the order of Sankaran Nair, J., admitting the appeal.

8. It seems to me that the defendants, who had had no opportunity of appearing to oppose the application, are at least entitled to a hearing as soon as the matter is drawn to their attention. The learned District Judge gave no reasons for admitting the appeal and, as already stated, he appears to have dealt with it as an application under Order XLI, Rule 19, which had no application in the circumstance; and I think we are entitled to go into the grounds alleged in the petition to determine for ourselves whether any sufficient cause is shown, treating it as an application for review. All that the petition states is that the petitioner's Pleader informed him by letter, which was delivered at a later date, that the Court fee paid was deficient and that when he came here (that is apparently to the place where the District Judge's Court was held), he learnt that the appeal had been dismissed for default. No reason is given why the proper fee was not paid in the first instance; it is not stated when he was informed by his Pleader that there was a deficit, nor is it stated when he arrived on the spot or provided the funds. In the ordinary course if the Pleader informed him by letter on the 2nd of April when the deficit was pointed out, he would receive the letter in plenty of time to make up the deficiency before the 17th of April, when the appeal was dismissed for default. But nothing was done until the 23rd April when the petition was filed, and no sort of explanation is given why the money was not provided in time and no sort of cause is shown upon which the Court exercising a reasonable discretion could act in granting an extension. If, therefore, the defendants are entitled, as I think they are, to be heard upon the propriety of the order made, they have sufficiently shown that no cause for extending the time has been made out.

9. Apart from this, however, treating the matter as an application in review, it seems to me that the provisions of Rule 4 of Order XLVII, which require notice to be served upon the opposite party, were not complied with and that the order of the 24th of April restoring the appeal was made without jurisdiction and should be set aside.

10. I would, therefore, allow this appeal and set aside the judgment and decrees of the lower Appellate Courts and order the decree of the Munsif to be restored. The appellants are entitled to their costs here and in each of the lower Appellate Courts.

Coutts, J.

11. I agree.