

(2009) 04 AHC CK 0377
In the Allahabad High Court

V.Kumar	Vs	APPELLANT
R.Kumar		RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Citation : (2009) 04 AHC CK 0377

Hon'ble Judges : Pankaj Mithal, J

Final Decision : Allowed

Judgement

Pankaj Mithal, J.

Service of notice upon the respondents is deemed to be sufficient in view of the office report. Therefore, the appeal has been listed for final hearing.

List has been revised.

Heard Sri V.C. Shukla holding brief of Sri N.C. Rajvanshi learned counsel for the appellants. No one appears for the respondents. In fact there is no appearance from the side of the respondents.

The appellants objections under Order XXI Rule 58 CPC were rejected. Therefore, they have preferred execution appeal which was dismissed in default on 27.7.1984. The appellants applied for recall of the order and restoration of appeal under Order XLI Rule 19 CPC. The application for restoration was rejected by the judgment and order dated 12.10.1984. Accordingly, the appellants have come up in this appeal.

The contention of the learned counsel for the appellants is that they have shown sufficient cause for the absence from the Court on 27.7.1984 which led to the dismissal of appeal in default and therefore the court below was not justified in rejecting the restoration application. I have perused the record. The appellant in support of the restoration application has filed affidavit of one of the appellants Dharmendra Kumar who has stated that he was the only person entrusted and has been doing parivi of the appeal on behalf of the other appellants and on the

relevant date he had fell ill and under the medical advice he was confined to bed till 1.8.1984. Accordingly, he could not attend the court and informed his counsel which led to the dismissal of the appeal. In support he has also filed a medical certificate of a registered medical practitioner who had certified that the Dharmendra Kumar was suffering from high fever and was advised complete rest from 24.4.1984 to 1.8.1984. No counter affidavit disputing the averments made in the aforesaid affidavit of Dharmendra Kumar or disputing the correctness of the medical certificate was filed in rebutted. From the side of the respondents the only thing said was that the story of illness of Dharmendra Kumar is concocted. The court below has rejected the application only on the ground that no reason was assigned as to why the other 3 appellants could not attend the court. In my opinion the approach of the court below in this regard is totally misconceived, in as much as, the appellants have categorically taken a stand that only Dharmendra Kumar was entrusted with the parivi of the case and he alone was doing the parivi of the appeal. The medical certificate produced by said Dharmendra Kumar is neither disputed nor the averments made by him that he was actually ill on 27.7.1984 has been rebutted by any material.

In view of the above, the court below erred in dismissing the restoration application. The cause shown for the absence in view of the above facts and circumstances is sufficient.

Accordingly, the appeal succeeds and is allowed and the judgment and order of the court below dated 12.10.1984 is set aside. The restoration application is allowed and the order dated 27.7.84 dismissing the appeal is directed to be recalled. The appeal is restored to its original number for decision on merits in accordance with law with all expedition.