

RAJASTHAN HIGH COURT

Karni Dan Singh

Vs.

Ram Chandra

Civil Misc. Appeal No. 260 of 1998

(H.R. Panwar, J.)

17.05.2002

JUDGMENT

H.R. Panwar, J.

1. This appeal under Order 43 Rule 1(d) read with Section 9, Rule 9, Civil Procedure Code is directed against the order dated 19.12.1997 passed by Additional District Judge No. 1, Bikaner (hereafter referred to as 'the trial Court') whereby the application filed by the plaintiff-appellant for restoration of the suit was dismissed for want of payment of process fee and filing of notices for service on defendant-respondents. Aggrieved by the order impugned of the trial Court, the plaintiff-appellant has preferred the present appeal.

2. Briefly stated facts to the extent they are relevant and necessary for disposal of this appeal are that on 10.2.1981 the plaintiff-appellant originally filed a suit for declaration and possession with other consequential reliefs in respect of the property in dispute. The original suit was posted for the plaintiffs evidence on 2.3.1994. On this date neither the plaintiff nor his counsel appeared and the trial Court dismissed the suit for default. Against the order dated 2.3.1994, the plaintiff-appellant filed an application on 31.3.1994 seeking restoration of the original suit which was dismissed on account of nonappearance of plaintiff-appellant under Order 9, Rule 8, Civil Procedure Code. By order dated 2.4.1994 notices of restoration application to defendant-respondents were ordered to be issued on payment of process fee and filing of notices. By order dated 18.9.1997 the trial Court directed to issue fresh notices to the defendant-respondents and the plaintiff-appellant was directed to pay process fee and file notices. The trial Court also gave last opportunity to the appellant to file the process fee and notices. However, the order dated 18.9.1997 was not complied by the

plaintiff-appellant which failed to pay process fee and file notices. The matter came up again on 12.12.1997. The trial Court observed that despite the last opportunity to the plaintiff-appellant to pay the process fee and file notices; the appellant has failed to file process fee and notices for defendant-respondents. However, in the interest of justice a further last opportunity was granted to the plaintiff-appellant to pay process fee and file notices. The matter again, came up on 19.12.1997. Despite repeated fast opportunities granted to the plaintiff-appellant, he failed to pay the process fee and file the notices for service on defendant-respondents. The trial Court dismissed the restoration application in consequence of the failure of the plaintiff-appellant to pay process fee and failure to file notices for service on defendant-respondents. As noticed from the order impugned neither party appeared when the said application for restoration was called on. The order of the trial Court dated 19.12.1997 purported to be under Rule 2 of Order 9, Civil Procedure Code, which is challenged in this appeal.

3. I have heard the learned Counsel for the parties. Perused the impugned order.

4. The present appeal has been filed under Order 43, Rule 1(d), Civil Procedure Code, Order 43 deals with appeals from orders. Rule 1 of Order 43, Civil Procedure Code reads as under :-

"1. *Appeals from orders.* - An appeal shall lie from the following orders under the provisions of Section 104, namely -

(a) an order under Rule 10 of Order 7 returning a plaint to be presented to the proper Court except where the procedure specified in Rule 10-A of Order 7 has been followed :

(b) omitted.

(c) an order under Rule 9 of Order 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under Rule 13 of Order 9 rejecting an application, (in a case open to appeal) for an order 'to' set aside a decree passed *ex parte*;

(e) omitted;

(f) an order under Rule 21 of Order 11;

(g) omitted;

(h) omitted;

(i) an order under Rule 34 of Order 21 on an objection to the draft of a document or of an endorsement;

(j) an order under Rule 72 or Rule 92 of Order 21 setting aside or refusing to set

aside a sale;

(j-a) an order rejecting an application made under sub-rule (1) 106 of Order 21, provided that an order on the original application, that is to say; the application referred to in sub-rule (1) of Rule 105 of that order is appealable;

(k) an order under Rule 9 of Order 21 refusing to set aside the abatement or dismissal of a suit;

(l) an order under Rule 10 of Order 22 giving/refusing to give lease;

(m) omitted;

(n) an order under Rule 2 of Order 25 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(n-a) an order under Rule 5 or Rule 7 of Order 33 rejecting an application for permission to use as an indigent person;

(o) omitted;

(p) orders in interpleader suit under Rule 3, Rule 4 or Rule 6 of Order 35;

(q) an order under Rule 2, Rule 4 or Rule 6 of Order 38;

(r) an order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order 39;

(s) an order under Rule 1 or Rule 4 of Order 40;

(t) an order of refusal under Rule 19 of Order 41 to re-admit, or under Rule 21 of Order 41 to rehear, an appeal;

(u) an order under Rule 23 or Rule 23A of Order 41 remanding a case, where an appeal would lie from the decree of the appellate Court;

(v) omitted;

(w) an order under Rule 4 of Order 47 granting an application for review."

5. A plain reading of Clause (d) of Rule 1 of Order 43 makes it clear that the present appeal has not been filed against the order under Rule 13 of Order 9 rejecting the application for an order to set aside the decree passed *ex parte*. Faced with this situation the learned Counsel for the appellant submits that the present appeal though has been filed under Order 43, Rule 1(d), Civil Procedure Code but in fact, it is maintainable under Clause (c) of Rule 1 of Order 43. Clause (c) of Rule 1 of Order 43 provides an appeal from an order under Rule 9 of Order 9 rejecting an application (in a case open to appeal for an order to set aside the dismissal of a suit. In impugned of the trial Court that the dismissal of restoration application by the trial Court was for failure of the plaintiff appellant to pay process fee and file the notices for service on defendant-respondents and, therefore, it cannot be said that the order of the trial Court was under Rule 9 of Order 9, Civil Procedure Code. The impugned order of the trial

Court in clear terms speaks that the restoration application was dismissed in consequence of failure of the plaintiff to pay process fee and also failure to file requisite notices for service on defendant-respondents. On careful reading of Order 43, Rule 1, Clauses (a) to (w), it is clear that under the said provisions, no appeal is provided from an order rejecting an application in exercise of power under Order 2, Rule 9, Civil Procedure Code. Here Rule 3 of Order 9 read with Section 141, Civil Procedure Code is also relevant because on the date of dismissal of the restoration application neither party appeared. The trial Court dismissed the said restoration application on failure of the plaintiff-appellant to pay the process fee and filing of notices for service on defendant-respondents. Such dismissal was purported to be under Order 9, Rule 2 read with Section 141, Civil Procedure Code, Rule 2 of Order 9, Civil Procedure Code provides dismissal of suit where summons are not served in consequence of failure of the plaintiff to pay court-fee or postal charges, if any, chargeable for such service. Section 141, Civil Procedure Code provides the procedure in miscellaneous proceedings which includes any proceeding under Order 9, Rule 2 Rule 3 of Order 9 provides that where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. As against the order made under Rules 2 and 3 of Order 9, the remedy lies under Rule 4 of Order 9 read with Section 141, Civil Procedure Code, which provides that where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in Rule 2, or for his non-appearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit. In this context Rule 5 of Order 9, Civil Procedure Code is also relevant which provides that where, after a summons has been issued to the defendant, or to one of several defendants, and returned unnerved, the plaintiff fails, for a period of one month from the date of other return made to the Court by the officer ordinarily certifying to the Court returns mad by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed, as against such defendant, unless the plaintiff has within the said period satisfied the Court.

- (a) he has failed after using his best endeavors' to discover the residence of the defendant, who has not been served, or
- (b) such defendant is avoiding service of process, or
- (c) there is any other sufficient cause for extending the time in which case the

Court may extend the time for making such application for such period as it thinks fit. In such case the plaintiff may (subject to law of limitation) bring a fresh suit.

6. The learned Counsel appearing for the respondents contended that the present appeal is not maintainable as against the order impugned, no appeal is provided under Order 43, Rule 1, Civil Procedure Code.

7. Learned Counsel for the appellant relied upon a Full Bench decision of the Madhya Pradesh High Court in *Nathu Prasad v. Singhai Kapurchand*,¹ and a Single Bench decision of Allahabad High Court in *M/s. C.P. Properties Ltd. v. M/s. Matadin Bhagwan Dass*,² and a Single Bench decision of the Gauhati High Court in *Haridas Das v. Smt. Santa Rani Das, (Gauhati)*.³ In Nathu Prasad's case (supra), the Full Bench of the Madhya Pradesh High Court held that when an application under Order 9, Rule 9, Civil Procedure Code is dismissed for default, both the remedies are available to the applicant : (i) he can apply for restoration under Order 9, Rule 9, Civil Procedure Code, and (ii) he may appeal under Order 43, Rule 1(c). Thus, side by side, two remedies are open to him. There is no provision in the Code to the effect that either of their will exclude the other. However, if an appeal has been filed and decided, the order of the lower court will merge in the order passed by the appellate Court. There is nothing wrong or unusual that a party should have two alternative and simultaneous remedies against an adverse order.

8. In the instant case as noticed above, the application filed by the plaintiff-appellants was dismissed in consequence of failure of the plaintiff to pay the process fee and file the notices for service on defendant-respondents. Thus, the trial Court dismissed the application while exercising the powers, under Rule 2 of Order 9, Civil Procedure Code. At any rate the order impugned cannot be under Rule 8 of Order 9, Civil Procedure Code. Even otherwise the order impugned can be said to be under Rules 2 and 3 of Order 9 as neither of the party was present when the restoration application was called for hearing. As against the dismissal of the restoration application under Rules 2 and 3 of Order

9 read with Section 141, Civil Procedure Code, twofold remedy is provided under Rule 4 of Order 9 read with Section 141, Civil Procedure Code wherein it is provided that where the suit is dismissed under Rule 2 or Rule 3, Civil Procedure Code, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for

an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in Rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the, dismissal. Thus, from the plain reading of Rules 2, 3, 4 and 5 read with Section 141, Civil Procedure Code, it is clear that the plaintiff-appellant had two remedies either to bring a fresh suit or may apply for setting aside the dismissal under Rule 4 of Order 9 with the aid of Section 141, Civil Procedure Code or may bring fresh suit (subject to law of limitation) under Rule 5(2) of Order 9, Civil Procedure Code. Both these remedies are simultaneous and would not exclude either of them. However, the orders made under Rules 2, 3 and 4 of Order 9 are not made appealable under Order 43, Rule 1(a) to (w). Thus, the judgments relied upon by the learned Counsel for the appellants have no application to the facts of the present case. In *Arjun Singh v. Mohindra Kumar*,⁴ the Hon'ble Supreme Court observed as under :-

"The inherent power of the Court cannot override the express provisions of the law. If there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."

9. In Haridas Das's case (supra), the Single Bench of the Gauhati High Court held that it is now settled that as per provision of Section 141 of the Civil Procedure Code, an application under the provision of Order 9, Rule 9 for restoration of an earlier application filed for restoration of a suit is maintainable. But, as stated above, any order passed in the second petition is not appealable under the provision of Order 43, Rule 1(c), inasmuch as, the second petition is not for restoration of a suit, but for restoration of an application filed under Order 9, Rule 9 of the Civil Procedure Code.

10. Before the Allahabad High Court in M/s. C.P. Properties Ltd.'s case (supra), the question which came for consideration was as to the limitation applicable to an application for restoration on an application under Order 9, Rule 9, Civil Procedure Code. The only point considered in the above-referred case was as to whether the

limitation as provided under Article 122 of the Limitation Act will be applicable or as provided under Article 37 of the Limitation Act. The Allahabad High Court held that for filing second application for restoration of the application seeking restoration of the suit, the limitation is governed by Article 137 of the Limitation Act. Thus, the said decision cannot be made applicable to the facts of the present case.

11. In *Mst. Nurnahar Bewa v. Rahindra Nath Dev*,⁵ a question came up for consideration whether by invoking the provisions of Section 141, Civil Procedure Code an application under Order 9, Rule 4 or Order 9, Rule 9, Civil Procedure Code can be made for setting aside the order of dismissal for default of an application under Rules 4, 9 or 13 of Order 9, Civil Procedure Code. Three Judges Special Bench answered the question in affirmative and held that whatever may be the nature of the proceedings initiated under Order 9 of Civil Procedure Code, such proceedings are to be treated as miscellaneous proceedings within the meaning of Section 141, Civil Procedure Code as amended. It was further held that the application for restoration of a misc. case arising out of an application under Rules 4, 9 or 13 of Order 9, Civil Procedure Code for restoration of misc. case if such misc. case itself is dismissed for default, is maintainable under Order 9 read with Section 141, Civil Procedure Code.

12. In the instant case, undisputedly the order impugned came to be passed by the trial Court on the application seeking restoration of original suit under Rule 4 of Order 9, Civil Procedure Code, and not under Rule 9 of Order 9 C.P.C. and, therefore, no appeal lies under Order 43 order 43, Civil Procedure Code, but the application under Order 9, Rule 4 read with Section 141, C.P. for restoration of misc. application is maintainable.

13. Right of appeal is the creature of a statute. It is for the Legislative to decide what type of order should be made appealable. Hon'ble Supreme Court in *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad*,⁶ held that if the statute does not create any right of appeal, no appeal can be filed. There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a civil nature, less the suit is barred by statute, however, in regard to an appeal, the position is quite opposite. The right to appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. Having considered the present case in the light of the observations made by the Hon'ble, Supreme Court and the provisions of Order 43, Rule 1 Clauses (a) to (w) noticed above. I am of the considered opinion that against the order impugned, no appeal is

provided under Order 43, Rule 1(a) to (w) and, therefore, present appeal is not maintainable.

14. For the reasons stated above, this appeal is dismissed. No order as to costs.

Appeal dismissed.

Cases Referred.

1. AIR 1976 MP 136
2. 1993 Civil Court Cases 484 (All)
3. 1993(3) L.J.R. 120: 1993 Civil Court Cases 627
4. AIR 1964 SC 993
5. AIR 1988 Cal 358
6. 1999(4) SCC 468: AIR 1999 SC 1818