

## CIVIL RULE.

*Before D. Chatterjee and Newbould JJ.*

1916

June 27.

BIPIN BEHARI SHAHA

v.

ABDUL BARIK.\*

*Small Cause Court Suit—Dismissal for default—Application for restoration of suit—Review—Civil Procedure Code (Act V of 1908) O. IX, rr. 4, 9 ; O. XLVII, r. 1—Provincial Small Cause Courts Act (IX of 1887), s. 17.*

Where a Small Cause Court suit is dismissed for the plaintiff's default in the presence of the defendant, and an application made under O. IX, rr. 4 and 9 for the restoration of that suit is also dismissed for the plaintiff's default in the presence of the defendant's pleader, and where again an application is made under O. IX, r. 9 for the rehearing of the case and another application for treating it as an application for review :—

*Held*, that an application under O. IX, r. 9 lay. O. XLVII, r. 1 applied to all orders of the Court which may be reviewed under certain circumstances.

*Held*, further, that the provisions of s. 17 of the Provincial Small Cause Courts Act did not apply to miscellaneous applications.

*Deljan Nichha Bibee v. Hemant Kumar Ray* (1) followed.

RULE obtained by Bipin Behari Shaha, the plaintiff.

The petitioner, Bipin Behari Shaha, brought a suit in the Small Cause Court for the recovery of a sum of money against Abdul Barik and others. Some of the defendants entered appearance, while others did not. On the 28th August 1915, the suit was dismissed for the plaintiff's default in the presence of the defendant.

\* Civil Rule No. 166 of 1916, against the order of S. C. Ghose, Munsif of Dacca, dated Jan. 15, 1916.

Thereafter the plaintiff applied under O. IX, rr. 4 and 9, for setting aside the order of dismissal. On the 20th November 1915, this application was also dismissed for the plaintiff's default and in the presence of the defendant's pleader. The plaintiff next made another application under O. IX, r. 9 for the rehearing of his application for the restoration of the suit. It appears that subsequently the plaintiff made another application for treating the above application as an application for review under O. XLVII, r. 1. The learned Munsif rejected both the applications on the ground that they did not lie. From this order the plaintiff moved the High Court.

1916  
 BIPIN  
 BEHARI  
 SHAHA  
 v.  
 ABDUL  
 BARIK.

*Babu Jitendra Nath Roy*, for the petitioner, submitted that an application for the restoration of a suit lay under O. IX, r. 9 if it was dismissed for default of the plaintiff only. The procedure under s. 141 of the Civil Procedure Code, 1908, was applicable to all miscellaneous proceedings. Hence an application for the revival of an application for the restoration of the suit lay under O. IX, r. 9: *Sifdar Ali v. Kishun Lal* (1), *Thakur Prasad v. Fakirullah* (2). He also submitted that he was entitled to apply for review for any sufficient reason, and it could not be limited to fraud only: *Raj Narain Purkait v. Ananga Mohan Bhandari* (3), *Lâl Chet Narain v. Rampal Manjhi* (4). The Court ought to have looked into the substance rather than to the form of the application which is the principle enunciated in *Ramu Rai v. Dayal Singh* (5).

*Babu Manmatha Nath Roy*, for the opposite party, contended that the application under O. IX, r. 9 did not lie because s. 141 did not make the procedure

(1) (1910) 12 C. L. J. 6.

(3) (1899) I. L. R. 26 Calc. 598.

(2) (1894) I. L. R. 17 All. 106.

(4) (1911) 16 C. W. N. 643.

(5) (1894) I. L. R. 16 All. 390.

1916  
 BIPIN  
 BEHARI  
 SHAHA  
 v.  
 ABDUL  
 BARIK.

for suits applicable to all proceeding: see *Thakur Prasad v. Fakirullah* (1), *Hari Charan Ghose v. Manmatha Nath Sen* (2). This being a Small Cause Court suit, the application for review of judgment could not lie as there was no deposit or security required by s. 17 of the Provincial Small Cause Courts Act: *Jogir Ahir v. Bishen Dayal Singh* (3). The principle enunciated in *Raj Narain Purkait v. Ananga Mohan Bhandari* (4) and *Lall Chet Narain v. Rumpal Manjhi* (5) was that an application for review of judgment should be allowed only when a partial decree had been passed on the admission of the defendant.

*Babu Jitendra Nath Roy* was not called upon to reply.

D. CHATTERJEE AND NEWBOULD JJ. The plaintiff brought a suit in the Small Cause Court. The suit was dismissed for the plaintiff's default in the presence of the defendant. The plaintiff then made an application under Order IX, rules 4 and 9 for restoration and rehearing of the case. On this occasion also, there was a default and then the order dismissing this case was made in the presence of the defendant's pleader. There was again an application made under Order IX, rule 9 for the rehearing of the case. The learned Munsif held that Order IX, rule 9 did not apply and, therefore, dismissed the application.

It appears that the plaintiff made an application also for treating it as an application for review. On that application also, the learned Judge said "Such application does not lie." We are unable to see the justification of such orders.

(1) (1894) I. L. R. 17 All. 106.

(3) (1890) I. L. R. 18 Calc. 83.

(2) (1913) I. L. R. 41 Calc. 1.

(4) (1899) I. L. R. 26 Calc. 598.

(5) (1911) 16 C. W. N. 643.

In the first place, we do not think that Order IX, rule 9 does not apply; and in arriving at this conclusion, we follow the case of *Deljan Nichha Bibee v. Hemant Kumar Ray* (1). There it was held that Order IX, rule 9 was applicable to a case in which an application for setting aside a sale had been dismissed. The application for setting aside the sale was treated there as an original proceeding. In this case also, in a similar way, the application for the restoration of the case under Order IX, rules 4 and 9 may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case and decided upon evidence.

In this view of the case, we think that the learned Munsif ought to have considered the application on the merits.

Then as regards the alternative prayer for treating the application as an application for review, we do not understand why the learned Munsif says that Order XLVII, rule I, has no application. That rule seems to apply to all orders of the Court which may be reviewed under certain circumstances.

The objection taken by the opposite party was that there was no deposit under section 17 of the Small Cause Courts Act. Section 17 of the Small Cause Courts Act, however, speaks of deposits where there has been an application for review of judgment in cases where an *ex parte* decree has been passed, or a review of judgment evidently in cases where there has been a judgment deciding the case. We do not think that the provisions of section 17 with regard to deposit of security have any application to a miscellaneous application of this kind. If they had any application,

(1) (1915) 19 C. W. N. 758.

1916  
 BIPIN  
 BEHARI  
 SHAHA  
 v.  
 ABDUL  
 BARIK.

the learned Judge might have asked the petitioner to give security or to deposit the amount instead of saying that the application does not lie.

In this view of the case, we make the Rule absolute and direct that the application should be decided on the merits.

We make no order as to costs.

L.R.

*Rule absolute.*

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### CIVIL RULE.

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*Before Mookerjee and Cuming J.*

SHYAM MANDAL

v

SATINATH BANERJEE.\*

1916  
 Aug 3.

*Decree—Appeal—Dismissal for default—Merger—Civil Procedure Code (Act V of 1908), s. 2 (2) ; O. XXI, r. 22—Omission to give notice under O XXI, r. 22, effect of—Bengal Tenancy Act (VIII of 1885) s. 155 (3)—Extension of time under s. 155 (3).*

The original decree is merged in the appellate decree whether the latter confirms, amends, or reverses the original decree, and it is the appellate decree alone which can be executed.

*Abdul Rahiman v. Maidin Saiba* (1), *Chandrakant v. Lakshman* (2) referred to.

But this doctrine cannot be applied where the appeal is dismissed for default. In such a case the appeal fails for non-prosecution, and it cannot be said that the Court of Appeal adopts the decree of the Primary Court. The judgment of the lower Court therefore, is the judgment to be enforced.

*Bipro Das v. Chunder Seekur* (3) referred to.

Section 2 (2) of the Code of Civil Procedure, 1908, expressly provides that any order of dismissal for default is not a decree.

\* Civil Rule No. 493 of 1916, against the Order of Dwijendra Nath Pal, Munsif of Baruipore, dated April 18, 1916.

(1) (1896) I. L. R. 22 Bom. 500, 506. (2) (1916) 24 C. L. J. 517.

(3) (1867) 7 W. R. 521.