CIVIL RULE.

Before Mukerji and Guha JJ.

1932

Feb 29 ;
Mar. 8.

HARIDASI DEBI

v.

SAJANIMOHAN BATABYAL.*

Dismissal for Default—Order dismissing appeal for default, if a decree—Application or restoration, if review—Code of Civil Procedure (Act V of 1908), O. XLI, r. 19 ; s. 151—Court-fees Act (VII of 1870), Sch. I, Arts. 4, 5.

An order dismissing an appeal for default of payment of the initial deposit is not a decree, and, as such, an application for restoration of that appeal is not one for review, and can be made on a court-fee of Rs 2.

Fatimunnissa v. *Deoki Pershad* (1) explained and distinguished.

Articles 4 and 5 of Schedule I of the Court-fees Act do not govern such an application.

Chhajju Ram v. *Neki* (2), *Mahadeo Govind Wadkar* v. *Lakshminarayan Ramratan Marwadi* (3) and *Bindubashini Roy Chowdhury* v. *Secretary of State for India* (4) followed.

Sonubai v. *Shivajirao Krishnarao Gopalrao Gaikwad* (5) and *Mt. Dhayani* v. *Ishak* (6) approved.

Anant Potdar v. *Mangal Potdar* (7), *Gopika Raman Ray* v. *Mahar Ali* (8) and *K. K. S. A. R. Firm* v. *Maung Kya Nyun* (9) dissented from.

CIVIL RULE obtained by the plaintiffs appellants.

The material facts and the arguments advanced at the hearing appear in the judgment.

Bankimchandra Ray and *Binaykrishna Mukherji* for the petitioners.

Shambhunath Banerji and *Amiyakumar Shome* for the opposite party.

Nasim Ali, Assistant Government Pleader, for the Secretary of State for India.

*Civil Rule, No. 63F of 1932, relating to Appeal from Original Decree, No. 147 of 1931.

(1) (1896) I. L. R. 24 Calc. 350.
(2) (1922) I. L. R. 3 Lah. 127 ; L. R. 49 I. A. 144.
(3) (1925) I. L. R. 49 Bom. 839.
(4) (1923) I. L. R. 51 Calc. 70.
(5) (1920) I. L. R. 45 Bom. 648.
(6) [1931] A. I. R. (Sindh) 153.
(7) (1925) I. L. R. 4 Pat. 704.
(8) (1923) 39 C. L. J. 247.
(9) (1927) I. L. R. 5 Ran. 675.

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MUKERJI AND GUHA JJ. This Rule has been issued to show cause why an appeal, which was dismissed for default of payment of the initial deposit, should not be restored, the said dismissal being set aside. Illness and poverty have been pleaded as grounds for the default.

The application on which the Rule has been issued was made on a court-fee of Rs. 2. A question, therefore, arose as to whether such an application is competent, or whether, in view of the Full Bench decision of this Court in the case of *Fatimunnissa* v. *Deoki Pershad* (1), the application should not be one for review. In many cases, till recently, the rule laid down by the aforesaid Full Bench decision was held to apply. But in some, of late, applications like the present one have been entertained. And on a Reference made by the Taxing Officer under section 5 of the Court-fees Act, C. C. Ghose, Acting Chief Justice, held that it is sufficient if the application is stamped with a court-fee of Rs. 2 only.

We have heard the learned advocates for the parties as also Mr. Nasim Ali, who, at our request, appeared on behalf of the Government and was good enough to give us his assistance.

The Full Bench decision was passed under the Code of 1882. Under that Code, an order dismissing an appeal for default used to be regarded by this Court as a decree. The Full Bench decision proceeded upon the view that, as there were only two methods prescribed by the Code by which judgments and decrees could be set aside, namely, those described in sections 558 and 623 of the Code, and, inasmuch as the former section related only to default of appearance, a decree dismissing an appeal for default in depositing costs could only be set aside by means of an application for review under section 623 and on an order made under section 626. In the Code of 1908, the definition of decree expressly excludes an order of dismissal for default.

(1) (1896) I. L. R. 24 Calc. 350.

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In the Patna High Court, the rule laid down by the aforesaid Full Bench decision was followed even after the Code of 1908 came into force, but it appears from the case of *Anant Potdar* v. *Mangal Potdar* (1) that, since 1923, a view was taken in several cases that the appeal could, in such circumstances, be restored on an application under Order XLI, rule 19 read with section 151 of the Code. In that case, the learned Judges reverted to the Full Bench rule, observing that the change in the definition of 'decree' as made in the Code of 1908 did not really make any difference.

The Bombay High Court has held that Order XLI, rule 19 does not exhaust the powers of the court in a proper case to readmit an appeal or an application dismissed for default and it is open to the court to deal with these matters on applications made for the exercise of the court's inherent powers under section 151 of the Code. *Sonubai* v. *Shivajirao Krishnarao Gopalrao Gaikwad* (2). The Sindh Court, which usually follows the Bombay decisions, has taken the same view in *Mt. Dhayani* v. *Ishak* (3).

In our opinion, the difficulty of applying the Full Bench decision to cases of this nature has been considerably enhanced by the decision of the Judicial Committee in the case of *Chhajju Ram* v. *Neki* (4), in which it has been said that the expression "any "other sufficient cause" in Order XLVII, rule 1 must be interpreted to mean "a reason sufficient on "grounds at least analogous to those specified "immediately previously". The question whether such decisions as *Gopika Raman Ray* v. *Mahar Ali* (5), *Narain Das* v. *Chiranji Lal* (6), *K. K. S. A. R. Firm* v. *Maung Kya Nyun* (7) can be supported without doing some violence to the decision in *Chhajju Ram's* case (4) need not detain us. It is sufficient to point out that we have, on the other

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(6) (1924) I. L. R. 47 All. 361.
(7) (1927) I. L. R. 5 Ran. 675.

hand, such cases as *Mahadeo Govind Wadkar* v. *Lakshminarayan Ramratan Marwadi* (1), in which it has been held that a plaintiff, whose suit has been dismissed for default, under Order IX, rule 8, Code of Civil Procedure, has no remedy by way of review, and *Bindubashini Roy Chowdhury* v. *Secretary of State for India* (2), in which it has been held that an erroneous impression negligently formed bears no analogy to an excusable failure to bring before the court new and important matter of evidence. It would require no ordinary flight of imagination to treat a failure to deposit initial costs as being an omission of the same kind or description as an omission to produce a matter or evidence subsequently discovered or as being a mistake or error apparent on the face of the record. We are also of opinion that the necessity of applying the Full Bench decision to cases of this description has been altogether obviated by the change in the meaning of the word 'decree' introduced by the Code of 1908. In these circumstances, even though Order XLI, rule 19 may not apply in its terms to such a case, we are inclined to hold that that rule read with section 151 of the Code would enable an application of the present nature to be entertained, and that Articles 4 and 5 of the Court-fees Act do not govern such an application.

On the merits, we are of opinion that the Rule should be made absolute. We order that, if within 7 days from to-day, the initial costs for default of payment, of which the appeal was dismissed, be paid in, the order of dismissal will be vacated and the appeal restored to the file, but if this payment is not made within the time allowed as above, the Rule will stand discharged and, in the latter case only with costs 1 gold mohur to the respondents who have appeared in this Rule.

Rule absolute.

S. D.

(1) (1925) I. L. R. 49 Bom. 839. (2) (1923) I. L. R. 51 Calc. 70.