APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

NARAYANA CHETTIAR AND ANOTHER, FIFTH AND SEVENTH DEFENDANTS, COUNTER-PETITIONERS (APPELLANTS),

1925, March 5.

v.

P. C. MUTHU CHETTIAR AND OTHERS, SECOND PLAINTIFF, PETITIONER, AND DEFENDANTS 8, 9 AND 10, COUNTER-PETITIONERS (RESPONDENTS).*

Civil Procedure Code (Act V of 1908), *sec.* 151, *O. IX, r.* 9, *O. XLVII, r.* 4, (2) *(a)—Application for execution—Dismissal for default of appearance of pleader for decree-holder—Restoration of petition—O. IX, r.* 9, *applicability of, to execution proceedings—Review notice to judgment-debtors, necessity for—Review granted without notice—Validity of order—Irregularity or illegality—Right to set aside order on becoming aware—Inherent power under sec.* 151, *Civil Procedure Code—Jurisdiction under sec.* 151, *when can be invoked—Other remedies—Bar of limitation of another petition, whether a ground for invoking jurisdiction.*

An application for execution of a decree was dismissed owing to the absence of the decree-holder's pleader on the day of the hearing ; on the same day the application was restored on the application of the pleader without notice to the judgment-debtors ; a petition for amendment of the execution application in certain particulars was filed and notice of this petition was issued to the judgment-debtors ; when the petition came on for hearing, the judgment-debtors objected that the order of restoration of the execution application, passed without notice, was illegal and invalid and that it should be set aside :

Held, (1) that Order IX, rule 9, Civil Procedure Code, did not apply to execution proceedings and that the Court had no jurisdiction under Order IX, rule 9 to restore the execution application which had been dismissed for default; *Kaliakkal* v. *Palani Goundan,* 23 L.W., 227, followed ;

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* Appeal against Appellate Order No. 63 of 1924.

(2) that the order of restoration should not be considered as a valid order passed on review under Order XLVII of the Code, as issue of notice to the opposite party was imperative under Order XLVII, rule 4, clause 2 (*a*), and no notice was issued to the judgment-debtors in this case; *Abdul Hakim Chowdhury* v. *Hem Chandra Das*, (1915) I.L.R., 42 Calc., 433, followed;

(3) that the order passed without notice was not merely irregular but illegal, and the judgment-debtors were not bound by it but could object to it when they became aware of it; *Surajpal Pandey* v. *Utim Pandey*, (1921) 63 I.C., 99, referred to;

(4) that the *ex parte* order restoring the application, could not in its nature be considered a final order, and the opposite party, on coming to know of it, could object to it on any ground open to him if he had notice of the application for restoration; see *Krishnaswami Panikondar* v. *Ramaswami Chettiar*, (1918) I.L.R., 41 Mad., 412 (P.C.), relied on;

(5) that the order of restoration was not based on grounds prescribed for review under Order XLVII of the Code; *Chhajju Ram* v. *Neki*, (1922) I.L.R., 3 Lah., 127 (P.C.); and

(6) that the Court had no jurisdiction to act under section 151 of the Act and restore the application for execution to its file, even though the filing of another application for execution would be barred by limitation; *Neelavani* v *Narayana Reddi*, (1920) I.L.R., 43 Mad., 94, applied; and *Bholu* v. *Ram Lal*, (1921) I.L.R., 2 Lah., 66, dissented from.

APPEAL against the order of R. GOPALA RAO, Acting District Judge of Rāmnād, in Appeal Suit No. 153 of 1922 preferred against the order of T. M. FRENCH, Subordinate Judge of Rāmnād, in E.A. No. 396 of 1920 in E.P. No. 36 of 1920 in O.S. No. 14 of 1908.

The decree-holder obtained a decree in O.S. No. 14 of 1908 on the 25th February 1908. He applied for execution in E.P. No. 36 of 1920 on the 23rd February 1920, which came on for hearing on 11th October 1921. It was dismissed on that date, owing to the absence of the decree-holder's pleader, but the Court restored the petition to its file on the application of the decree-holder's

pleader without notice to the judgment-debtors. On the same date the decree-holder put in an application for amendment, of the description of the property to be sold in the original petition for execution. Notice was ordered on the amendment application which came on for hearing on 14th March 1922. On that day the judgment-debtors took the objection that the original E.P. No. 36 of 1920, which had been dismissed for default on 11th October 1921, should not have been restored to file, especially without notice to them. The learned Subordinate Judge held that the order of restoration without notice was illegal and could be objected to when the judgment-debtors became aware of it; that the restored petition, as a new petition, was barred by time and ought to be dismissed, and with it the application for amendment should also be dismissed. The decree-holder appealed to the District Judge, who reversed the order and remanded the case for disposal on the merits. The fifth and seventh defendants (judgment-debtors) preferred this Civil Miscellaneous Second Appeal.

C. S. Venkatachariar for appellants.

M. Patanjali Sastri for first respondent.

JUDGMENT.

DEVADOSS J.

DEVADOSS, J.—The first respondent herein filed an application on 23rd February 1920 for the execution of the decree in Original Suit No. 14 of 1908. The application after several adjournments came on for hearing on 11th October 1921, when, owing to the absence of the decree-holder's pleader, it was dismissed. The decree-holder's pleader appeared before the Court sometime after and the Court restored the application to file without notice to the opposite party. On the same day, the application was made by the decree-holder for an amendment of the execution application. When the

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amendment application came on for hearing, the judgment-debtors contended that the order restoring the petition to file was illegal and that the amendment petition should not be allowed. The Subordinate Judge of Rāmnād held that Order IX, rule 9, Civil Procedure Code, was not applicable to execution proceedings and that the order restoring the petition to file, if treated as an order under Order XLVII, was illegal, as the other party was not given notice of the application. In the result, he dismissed the petition for execution as well as the application for amendment. On appeal the District Judge held relying on *Janki Nath Hore* v. *Prabhasini Dasee*(1), that the Court had power under Order 47 to restore an application dismissed for default of appearance of the applicant, and that even if it was not an order under Order XLVII, it should be treated as one made under section 151. He set aside the order of the Subordinate Judge and remanded the execution application for disposal according to law. Defendants 5 and 7 have preferred this appeal against the order of the District Judge.

The first contention raised by Mr. C. S. Venkatachariyar for the appellants is that the Court had no power to restore an application to file which was dismissed for default, as Order IX, Civil Procedure Code, did not apply to execution proceedings. We have recently held in *Kaliakkal* v. *Palani Goundan*(2) that Order IX, Civil Procedure Code, did not apply to execution proceedings. Mr. Patanjali Sastri who appears for the first respondent does not challenge the correctness of this decision and concedes that Order IX is not applicable to execution proceedings. The order of the Subordinate Judge was not, therefore, one passed under Order IX, rule 9.

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(1) (1916) I.L.R., 43 Calc., 178. (2) 23 L.W., 227.

It is next contended that the order restoring the execution petition to file should not be treated as an order made in review of the order dismissing the application. The Subordinate Judge, when he restored the execution application to file, did not issue notice to the other side. Under Order XLVII, rule 4, notice to the other side is imperative. Clause 2 (*a*) is as follows:—

"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."

The question is whether an order passed without notice is a nullity or only an irregular order which the Court had jurisdiction to pass. The District Judge has relied upon *Janki Nath Hore* v. *Prabhasini Dassee*(1) as supporting his view that the order of the Subordinate Judge was an order under Order XLVII. In that case it was held

"where an appeal was summarily dismissed by a Division Bench of this Court and such order was ultimately set aside on review by the said Bench on an *ex parte* application without notice to the respondents, that the last order was valid even in the absence of such notice."

The learned Judges held that the respondent was not "the opposite party" within the meaning of rule 4, clause 2 (*a*), interested to appear and support the order of dismissal when the only order sought to be substituted therefor was that the appeal be heard in his presence. With very great respect we are unable to follow the reasoning of the learned Judges. When an appeal is dismissed the decree of the lower Court is left undisturbed and the respondent is entitled to the benefit of such dismissal. They conceded that an order of review cannot be made without previous notice to the person interested in supporting the order sought to be reviewed,

(1) (1916) I.L.R., 43 Calc., 178.

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but their view was that there was no opposite party when the Court was moved to set aside the order of dismissal for default. This case was followed by another Bench of the Calcutta High Court in *Official Trustee of Bengal* v. *Benodi Behari Ghose Mal*(1). In that case though the learned Judges observed that they prefer to follow *Janki Nath Hore* v. *Prabhasini Dassee* (2) in preference to a previous decision in *Abdul Hakim Chowdury* v. *Hem Chandra Das*(3) they rest their decision upon the practice obtaining in the Calcutta High Court for forty years under which an appeal summarily dismissed under Order XLI, rule 11, is set aside on review by the same Bench. These two cases cannot be authority for the position that no notice is necessary in the case of a review of an order under Order XLVII, for the practice of the Calcutta High Court was rightly or wrongly to set aside a summary order of dismissal on an application made for that purpose. In *Abdul Hakim Chowdury* v. *Hem Chandra Das*(3) it was held that non-compliance with rule 4 of Order XLVII rendered the granting of an *ex parte* application for review a nullity. HOLWOOD, J., observes at page 439:

"It is clear that non-compliance with rule 4 of Order XLVII renders the granting of this application for review, which was prejudicial to the respondent, a nullity and that such an application should not be granted without previous notice."

This judgment was concurred in by CHAPMAN, J.

Where the law requires that a certain formality should be complied with before an order could be made, it is not open to the Court to ignore the clear provision of the law and pass an order without complying with it. The notice to the opposite party is imperative under rule 4, clause 2 (*a*). It is urged by the respondent that, when the Subordinate Judge restored the petition

(1) (1924) I.L.R., 51 Calc., 943. (2) (1916) I.L.R., 43 Calc., 178.
(3) (1915) I.L.R., 42 Calc., 433.

to file, the appellants should have preferred an appeal against that order; when a remedy is open to a party against an irregular order made by a Court it should not be considered to be a nullity; for the Court has power to review its own order and if it reviews it irregularly the party affected by the order should appeal against it and rule 7 (*b*) provides for an appeal if the Court granting the review contravenes the provisions of rule 4. The question is not whether the party to an illegal order has a remedy or not. If a Court does something which it is not authorized by law to do, that order has no legal force. Such an order is illegal and not merely an irregular one and a party is not bound by the illegal order. In *Surajpal Pandey* v. *Utim Pandey*(1), the learned CHIEF JUSTICE and COUTTS TROTTER, J., declined to follow the case in *Janki Nath Hore* v. *Prabhasini Dassee*(2) and held that

> "where an appeal has been dismissed for default it cannot be restored under Order XLI, rule 19, which has no application to such a case; nor can it be restored under Order XLVII, rule 4, clause (2), without notice to the opposite party,"

and

> "If the appeal is restored without such notice and disposed of without the opposite party becoming aware of the order of dismissal or restoration, that party is entitled, as soon as the matter is drawn to its notice even in Second Appeal to a hearing."

The order of the Subordinate Judge restoring the appeal to file cannot be considered to be a final order and the opposite party on coming to know of the order could urge any objection which it was open to him to urge if he had notice of the petition for restoration. This was clearly laid down by the Privy Council in *Krishnasami Panikondar* v. *Ramasami Chettiar*(3). In

(1) (1921) 63 I.C., 99. (2) (1916) I.L.R., 43 Calc., 178.
(3) (1918) I.L.R., 41 Mad., 412.

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that case SANKARAN NAYAR, J., without notice to the respondent, excused the delay in filing the appeal and admitted it. When it came for hearing after notice an objection was taken before the Division Bench which heard it as being out of time. The Division Bench after an examination of the affidavits filed on both sides dismissed the appeal as provided by section 4 of the Limitation Act It was contended before the Privy Council that the order of SANKARAN NAYAR, J., was final and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. Their Lordships observe at page 416:

"This order of admission was made not only in the absence of Ramaswami Chettiyar, 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 tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India."

The order of the Subordinate Judge therefore restoring the petition could not be considered to be a final order and is open to the objection of the other side, on any ground it was open to it if notice had been issued.

There are at least two stages in a review application. When a review application is filed, the Court gives notice to the opposite party and on hearing the opposite party if it considers there are grounds for re-opening the case it grants the application and if after review it sees reason to alter the order already passed, it modifies it. Against the order granting review there is an appeal under rule 7 of Order XLVII and against the final order passed after review there is also an appeal. Why should a party be deprived of the right of appeal by his not being given notice when the Court grants an application

for review? The Lahore High Court in *Firm Gopal Mal Ganda Mal* v. *Hara Chand*(1) holds the view that an order granting an application for review of an order dismissing a suit for default is not illegal merely because notice of the application was not given to the opposite party, if that party has been given every opportunity to raise any objections that he could raise and was therefore in no way prejudiced by the non-issue of notice to him. Though the party against whom an order is made without notice is entitled to object to it afterwards, it is not competent to a Court to omit to give notice to the opposite party when the law requires that notice shall be given of an application before it is granted.

The order made by the Subordinate Judge restoring the execution application to file cannot be considered on the merits as an order under Order XLVII, Civil Procedure Code. Though the petition mentioned Order XLVII, rule 1, section 151 and Order IX, rule 9, yet the affidavit did not set out any grounds which would justify a review of the order. The absence of a pleader is not a ground for review. The grounds for review are set out in Order XLVII, rule 1, and the Privy Council has ruled that no Court is justified in reviewing an order made by it on any ground other than those mentioned in Order XLVII, or grounds which are similar to the grounds specifically mentioned therein. In *Chhajju Ram* v. *Neki*(2) a Bench of the Lahore High Court reviewed an order made by another Bench. Viscount HALDANE in delivering the judgment of their Lordships observed :

"They think that rule 1 of Order XLVII must be read as in itself definitive of the limits within which review is to-day permitted, and the reference to practice under former and different statutes is misleading. So construing it they interpret

(1) (1923) 75 I.C., 656. (2) (1922) I.L.R., 3 Lah., 127.

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the words 'any other sufficient reason' as meaning a reason sufficient on grounds at least analogous to those specified immediately and previously."

The order of the Subordinate Judge restoring the appeal to file cannot be treated as an order under Order XLVII, rule 1.

It is next contended for the respondent that the Court has power under section 151 to correct its own errors or to pass an order which it thinks proper in the interests of justice. In *Bholu* v. *Ram Lal*(1) it was held that

"In the exercise of its inherent power expressly recognized by section 151 of the Code, a Court can restore an application for execution after it has dismissed it for default and should do so notwithstanding that the applicant has an alternative remedy by making a second application for execution if he satisfies the Court that it should exercise its inherent jurisdiction *ex debito justitiae.*"

In that case reliance was placed upon *Debi Bakhsh Singh* v. *Habib Shah* (2) as supporting the view taken by it. In *Debi Bakhsh Singh* v. *Habib Shah*(2) the plaintiff was dead and the Court not being aware of his death, dismissed the suit for the non-appearance of the plaintiff. The Privy Council held that the dismissal was an abuse of the process of the Court. Their Lordships observe at page 337 :

"Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made."

Where the Court passes an order inadvertently or without being aware of certain facts which should have been brought to its notice it has power to correct an error committed by it, not owing to the negligence of a party, but owing to its not being aware of certain facts. What applied to a person who makes default in appearing before the Court cannot apply to a deceased person,

(1) (1921) I.L.R., 2 Lah., 66. (2) (1913) I.L.R., 35 All., 331 (P.C.)

for he cannot appear before the Court and a Court has no power to dismiss a suit for default when the plaintiff is dead, and if it does without being aware of the fact, it can correct the wrong order made by it.

In this case it cannot be said that the application was dismissed for default of appearance. The decree-holder was asked to furnish certain information to the Court to enable it to proceed with the execution. He having failed to furnish the information or produce the necessary papers for proceeding with the execution, has brought himself within Order XXI, rule 57, and the dismissal of the application cannot therefore be considered to be a dismissal for default of appearance. It is strongly urged by Mr. Patanjali Sastri that the respondent would lose the benefit of his decree, for any subsequent application would be barred by the twelve years' rule and therefore the Court should use its inherent power to restore the application to remedy the wrong. The decree-holder can always file a fresh application for execution if the previous one is dismissed and the fact that a fresh application would be barred by limitation would not give jurisdiction to the Court which it does not otherwise possess. With very great respect, we are unable to agree with the learned Judge who decided *Bholu* v. *Ram Lal*(1) that the inherent power of the Court should be invoked in cases in which the second application may be barred by limitation. In *Babui Ritu Kuer* v. *Alakhdeo Narain Singh*(2) it was held that the Court should not use its inherent powers for the purpose of restoring execution cases. SUHRAWARDY, J., in *Saradindu Mukerjee* v. *Giresh Chandra Tewari*(3) takes the view that

"If an execution case is erroneously dismissed for default and the decree-holder applies for the restoration of the case by

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(1) (1921) I.L.R., 2 Lah., 66. (2) (1919) 4 Pat. L.J., 330.
(3) (1924) 78 I.C., 816.

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way of review, the application for restoration was one under section 151 of the Civil Procedure Code, and the mere fact that it was also described as an application for review did not give the judgment-debtor a right of appeal against the order of restoration."

The Bombay High Court in *Sonubai* v. *Shivaji Rao*(1) held that

"Where an application is made to readmit an appeal dismissed for default, it was open to the Court to exercise its inherent powers to deal with the application under section 151 of the Civil Procedure Code and make an order to the effect for the ends of justice or to prevent abuse of the process of the Court, without any reference to the period of limitation fixed for application to readmit appeals or to restore any other proceeding dismissed for default."

When an application is granted under section 151 of the Civil Procedure Code, the party affected by the order has no right of appeal, as observed by SUHRAWARDY, J., in *Saradindu Mukerjee* v. *Giresh Chandra Tewari*(2). Should the Court use such powers in such a way as to give an unfair advantage to one party over the other because it thinks that the ends of justice do require it? Justice should be administered according to law and procedure. It may be that in administering the law the Court may feel that one party gains an unfair advantage over the other. But it is not open to a Court to ignore the procedure laid down for its guidance and grant reliefs when it thinks such a relief should be granted without following the procedure laid down for its conduct. If the provisions of section 151 are given the extended interpretation which some Courts are prepared to give them, the Courts may overlook the rest of the Procedure Code whenever it considers that the ends of justice do require that a certain order should be passed. Section 151 enables a Court to make such orders as may be necessary for the ends of justice and to prevent the abuse of the process

(1) (1921) I.L.R., 45 Bom., 648. (2) (1924) 78 I.C., 816.

of the Court. The law of limitation works hardship upon persons who have legitimate claims against their opponents, but the legislature has enacted the law of limitation; and it would not be right for the Court to overlook the law of limitation on the ground that the claim is a *bona fide* one and the defence on the ground of limitation is immoral. When the law lays down certain procedure for parties who are affected by any order, the mere fact that the law of limitation steps in and prevents the party from claiming relief under the procedure, is not sufficient justification for the Court to grant a relief under section 151. In this connexion reference may be made to *Neelaveni* v. *Narayana Reddi* (1). There OLDFIELD, J., observed at page 151:

> "That our Courts possess inherent power is recognized in section 151 of the Civil Procedure Code. But the exercise of the power in a particular form in which it is invoked must be justified in each case in the manner authorized by authority . . . . And generally the legitimacy of its exercise must be tested with reference to the principles which authority has prescribed."

In that case it was held

> "that a Court has no power, apart from the provision of Order IX, rule 13 of the Civil Procedure Code, to set aside an *ex parte* decree passed by itself."

Though a Court may feel that an *ex parte* decree was improperly passed, it cannot get it aside by invoking its power under section 151. The application to set aside an *ex parte* decree can only be granted if the conditions laid down in Order IX, rule 13, are satisfied. In *Somayya* v. *Subbamma*(2), it was held that if the Court sees sufficient reason to grant the application it could do so, but that decision was overruled by the decision in *Neelaveni* v. *Narayana Reddi*(1). We hold that the order restoring the execution application to file cannot be said

(1) (1920) I.L.R., 43 Mad., 94. (2) (1903) I.L.R., 26 Mad., 599.

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to be an order passed under section 151. The first respondent could have presented a fresh application for execution, but owing to the law of limitation he is precluded from doing so and that would not give jurisdiction to a Court to invoke the aid of section 151. Mr. Patanjali Sastri very strongly urged that his client would lose about Rs. 5,000. However dishonest the conduct of the appellants might have been, they are entitled to the relief which the law gives them. We therefore, with much regret, allow the appeal, but in the circumstances disallow the costs of the appeal.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

1926, March 2.

BATHINA SUBBARAMI REDDI (PETITIONER), PETITIONER,

v.

GANESAM PATTABHIRAMI REDDI (RESPONDENT), RESPONDENT.*

Guardians and Wards Act (IX of 1890), *ss.* 41 (3), (4)—*Minor attaining majority—Discharge of guardian by Court—Accounts, filed by guardian—Application to Court by quondam minor to enquire into the correctness of accounts filed by guardian—Court, whether competent to inquire in proceedings under the Act—Remedy by suit—Scheme of the Act—Court, not bound to declare guardian discharged from liability to minor—Disputes between minor and guardian to be determined only by suit and not by proceedings under the Act.*

Where a minor, to whom a guardian had been appointed under the Guardians and Wards Act, 1890, attained majority

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* Civil Revision Petition No. 400 of 1925.