APPELLATE CIVIL.

Before Mr. Justice Piggott and Justice Kanhaiya Lal.

1920
May, 18.

SUNDAR AND OTHERS (PLAINTIFFS) *v.* HABIB CHIK AND OTHERS (DEFENDANTS.)*

Civil Procedure Code (1908), *order XLI, rule* 10 (2); *order XXV, rule* 2 (2); *order XLIII, rule* 1 (*w*); *order XLVII, rule 7—Security for costs of appeal—Rejection of appeal on failure to furnish security—Subsequent restoration of appeal—Validity of order—Appeal—Revision.*

A Subordinate Judge sitting as an appellate court directed the appellants to furnish security for costs, but gave them only one week in which to do so. The Judge who passed this order having been transferred, the appellants attempted to show cause against it, but the Court, considering itself bound by the order made by the previous incumbent, rejected the application, and also rejected the appeal under order XLI, rule 10 (2), of the Code of Civil Procedure. The appellants then applied for a review of the order rejecting their appeal and for extension of time to file security for costs. The application was granted; the security was given and the appeal restored to the list of pending appeals.

Held, on this order being attacked both by way of appeal and also by way of revision, that no appeal lay, and as regards revision the lower court could not be said not to have jurisdiction to pass the order complained of. *Balwant Singh* v. *Daulat Singh* (1), *Firozi Begam* v. *Abdul Latif Khan* (2) and *Sankaralinga Chetti* v. *Annamalai Chetti* (3) referred to.

THE facts of this case were as follows :—

The appellants in an appeal pending before a Subordinate Judge were, at the instance of the respondents, called upon to furnish security for the respondents' costs. They were, however, only given one week within which to find the security. After making this order the Subordinate Judge was transferred. On the 8th of February, 1919, the appellants tried to show cause against the order of the first, calling upon them for security, but their application was on the 10th of February, 1919, rejected, and, as a corollary, the appeal also. On the 13th of February the appellants came into court again asking for a reconsideration of the order of the 10th of February. This time their application was granted; the order for security was re-opened, and further time was allowed. The security demanded was furnished,

*First Appeal No. 84 of 1919, from an order of Chaudhri Abdul Hasan, Subordinate Judge of Jaunpur, dated the 12th of April, 1919.

(1) (1886) I. L. R., 8 All., 315. (2) (1908) I. L. R., 30 All., 143.

(3) (1908) 19 M. L. J., 804.

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and the appeal was thereupon restored to the list of pending appeals. Against this order the respondents appealed and also, as an alternative, filed an application for revision.

Dr. *Kailas Nath Katju*, for the appellants.

Maulvi *Mukhtar Ahmad*, for the respondents.

PIGGOTT, J. :—The matter now before us arises out of the following facts. An appeal had been filed in the court below by certain persons who are the respondents in F. A. F. O. No. 84 of 1919 now before us. The opposite party, who are the appellants now in this Court, made an application to the court below asking that the appellants there should be required to furnish security for the costs of the appeal and of the court of first instance. This application came before the court below on the 1st of February, 1919. It is clear that the present respondents were there represented by a pleader who was very imperfectly instructed. He made no attempt to contest the application for security, but stated that his clients would furnish security if suitable time were given. For some reason, not now apparent, the court only gave one week and ordered security to be filed by the 8th of February. By that time the presiding officer of the court who had passed the order of the 1st of February had been transferred, and the matter came before his successor. The appellants in that court now entered an appearance by the same pleader, but some of them, at any rate, also appeared in person, for we find an affidavit put in, sworn to by one of them. In this affidavit, and in the petition which accompanied it, they sought to show cause against the order of the 1st of February, 1919. Facts were stated in the affidavit which, if accepted, would centainly amount to sufficient cause against the order requiring security from those appellants. The court seems to have heard arguments on the 8th of February, but it passed orders on the 10th of February. The order is a very summary one. The learned Subordinate Judge held, in the first place, that he was bound by his predecessor's order of the 1st of February, 1919. Even if this were not so, he said that in his opinion no sufficient cause was shown for his setting aside that order. He then went on to say that the appellants before him neither deposited the costs or security for the same, nor asked for an extension of

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time. He therefore at once rejected the appeal under the provisions of order XLI, rule 10, clause (2), of the Code of Civil Procedure. On the 13th of February the appellants whose appeal had been thus rejected presented an application to the same court asking for a re-consideration of the order of the 10th of February. They protested that they had never understood that the failure of their application for reconsideration of the order of the 1st of February would involve the rejection of their appeal, and in this connection they invited the attention of the court to the fact that the date fixed for hearing the appeal itself had not yet been reached. They now asked for reasonable extension of time within which to furnish the required security. The court below reviewed its own order of the 10th of February, 1919, and allowed the appellants a short extension of time within which to furnish security. Security was furnished within the prescribed period and the court thereupon ordered the appeal to be re-admitted on to the pending file and to be set down for hearing on the merits. We have before us an appeal from this order re-admitting the appeal, and we also have a petition in revision against the same order, presented by way of an alternative in case this Court should hold that no appeal lies. It has not been contested before us that, so far as the extension of time was concerned within which security was to be furnished in the court below, the court had jurisdiction under section 148 of the present Code of Civil Procedure to enlarge the time even after the period originally fixed had expired. The difficulty raised is as to the setting aside of the order of the 10th of February, 1919. It is contended that the court which passed that order had become *functus officio* so far as this matter was concerned; that no provision is to be found in order XLI, rule 10, or any of the other rules connected therewith, in any way analogous to those of order XXV, rule 2, clause (2), according to which a court of first instance which has dismissed a suit for failure to furnish security for costs has authority to set aside that dismissal. Hence the case for the appellants before us may fairly be stated thus:—that the court below has either misused its power under order XLVII, rule 1, of the Code of Civil Procedure, in which case an appeal lies against its order, vide order XLIII,

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(1) (*w*) of the Code of Civil Procedure, or it has acted wholly without jurisdiction, in which case the interference of this Court is sought under section 115 of the Code of Civil Procedure. A number of matters have been touched upon in argument before us. The case most directly bearing on the point is that of *Balwant Singh* v. *Daulat Singh* (1), decided by their Lordships of the Privy Council. This decision has since been commented upon as having been passed upon a very peculiar state of facts and as not being adequate authority for the propositions of law set forth in the head-note to the report in question. It cannot be denied, however, that in the case in question this Court had refused to entertain an application in substance similar to that made to the court below by the appellants in that court on the 13th of February, 1919, and had refused to do so on the express ground that the order passed by this Court had been one under section 549 of the former Code of Civil Procedure, corresponding with order XLI, rule 10, and that no authority was given to the court by that section to reconsider its own decision upon cause subsequently shown. Their Lordships made it a distinct matter for complaint that this Court should have taken up this attitude and should for this reason have refused to consider whether the appellant to this Court was not entitled under the circumstances to have his appeal restored to the pending file, on his furnishing the security which he had in the first instance failed to furnish. They set aside the order of this Court and replaced it by an order directing his appeal to be restored to the pending file of this Court, subject to reasonable conditions. I find it impossible to say that this is not authority for the proposition that this Court, at any rate, may reconsider, upon cause subsequently shown, an order rejecting an appeal under order XLI, rule 10, clause (2), of the Code of Civil Procedure ; and it does not seem to me that any good reason can be suggested for holding that a power of this nature is inherent in this Court but not in subordinate courts of appeal. This decision of the Privy Council was discussed by a Bench of this Court in the case of *Firozi Begam* v. *Abdul Latif Khan* (2). In that case the court below, which had rejected an appeal under section 549 of the former Code

(1) (1886) I. L. R., 8 All., 315. (2) (1908) I. L. R., 30 All., 143.

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of Civil Procedure, had also rejected an application to re-admit that appeal to its pending file. The one question for decision before this Court was whether an appeal lay against an order rejecting such an application. The learned Judges held, and beyond question they were right in holding, that no appeal lay against such an order. Everything else in the reported judgment is of the nature of *obiter dicta*. The learned Judges did, however, call attention to the fact that there were no provisions in section 549 of the Code of Civil Procedure for the re admission of an appeal which had been rejected under that section, corresponding with those to be found in section 381 of the former Code, and order XXV, rule (2), of the present Code, which governed the action of courts of first instance. They suggested that the matter was one for the attention of the Legislature. We find further that in the case of *Sankaralinga Chetti* v. *Annamalai Chetti* (1) a Bench of the Madras High Court, purporting to found their decision upon the views expressed by this Court in *Firozi Begam* v. *Abdul Latif Khan* (2), held that no application was entertainable for setting aside an order rejecting an appeal under section 549 of the Code of Civil Procedure (Act XIV of 1882).

I feel bound to say that the matter is not to my mind free from difficulty. So far as I am concerned, I am prepared to dispose of the appeal and the application in revision before us on the following very simple grounds. The right of appeal given by order XLIII (1) (*w*) against an order granting an application for review under rule 4 of order XLVII is undoubtedly subject to the conditions laid down by order XLVII, rule 7. In my opinion the appeal before us cannot be read so as to come within the four corners of that rule. The only suggestion possible would be that the appellant desired to plead that the court below had failed to reject the application although there were not before it sufficient grounds for review (*vide* the words of order XLVII, rule 4 (1) of the Code of Civil Procedure). I do not think that this suggestion, however ingenious, is at all entertainable. For one thing, the words of the rule are that "the Court shall reject the application

(1) (1908) 19 M. L. J., 304. (2) (1908) I. L. R., 30 All., 143.

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where *it appears to it* that there is no sufficient ground for a review;" for another thing, it was obviously not intended that the words of this clause should be used so as virtually to nullify the whole of order XLVII, rule 7, by letting in an appeal upon the mere ground that the discretion conferred upon the court by order XLVII, rule 1, had been wrongly exercised. I am, therefore, clearly of opinion that the First Appeal from Order No. 84 of 1919, now before us, is not entertainable as an appeal and should be dismissed on that ground alone. There remains the petition of revision, and I am not prepared to say that I have not felt the force of the arguments by which the learned counsel for the petitioners in revision, the respondents in the court below, has sought to show that the order complained of was wholly without jurisdiction. My own impression is that the Legislature has assumed that an appellate court, by reason of its jurisdiction is to entertain appeal even beyond the prescribed period of limitation, supposing that in its opinion sufficient cause were shown under section 5 of the Indian Limitation Act, could not be prevented by reason of a mere order rejecting a petition of appeal under order XLI, rule 10 (2), of the Code of Civil Procedure, from taking up another appeal on the same pleas and against the same decision, if upon full consideration it saw sufficient grounds for doing so. In any case what we are asked to do is to hold that the learned Judge of the court below was not entitled to assume a jurisdiction which, according to their Lordships of the Privy Council, was certainly exercisable by this Court, which they directed this Court to exercise in their decision in the case of *Balwant Singh* v. *Daulat Singh* (1). It may be that the provisions of order XLVII, rule 1, are wide enough to cover the order complained of, or, as I have suggested, that the court below may be regarded as simply having re-admitted a petition of appeal by reason of the jurisdiction it would have had to entertain a fresh petition of appeal if presented on the date of its order of re-admission. In any case I am not prepared to say under the circumstances that the order complained of was wholly without jurisdiction, or that this Court is bound to interfere with it in revision, more

(1) 1886) I. L. R., 8 All., 315.

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particularly when I am of opinion that it was a very proper and necessary order in the interests of justice. I think the appellants in the court below had been treated, up to the 10th of February, 1919, in the most summary fashion imaginable. They had been given a week, within which to furnish certain security. When they appeared on the last possible date they submitted to the court substantial reasons why they should not have been required to furnish security at all, and, incidentally, complained that they had had no such reasonable notice as would have enabled them to instruct counsel properly on any previous date. The court brushed aside all their objections, upon the assumption that the presiding Judge was bound to stand by his predecessor's order of the 1st of February, 1919. It is quite clear also that the court below did not at the time make any attempt to explain to the appellants before it what their position would be if it merely rejected their petition of the 1st of February, or to ascertain from them definitely whether, in the event of that application being rejected, they would not be prepared to furnish the required security within reasonable time. It is obvious now that those appellants were so prepared, and the learned Subordinate Judge himself was clearly impressed with the belief that he had acted hastily and without reasonable consideration in rejecting the appeal in the manner in which he did on the 10th of February. For these reasons I do not think that this Court is either obliged in law, or called upon in the interests of justice, to interfere in revision, and on this ground I would also reject the application for revision.

KANHAIYA LAL, J. :—In this case an appeal was rejected for failure of the appellants to file security for the costs incurred by the respondents in the trial court and for the costs to be incurred by them in the appeal. Subsequently an application was made to set aside that order. The court below granted that application and allowed the appellants a week's further time to file the security required. It was open to the court under order XLVII, rule 1, of the Code of Civil Procedure to review or set aside its previous order if it considered that there was sufficient reason for doing so. Order XLI, rule 10, does not contain any specific provision laying

down the method in which an order rejecting an appeal for default of filing the security can be set aside. But the absence of such a provision does not necessarily suggest that a court is not competent to review its order or to modify it, if it thinks that the ends of justice require it or that sufficient reasons exist for its doing so. If the appeal had not been rejected, the court could have extended the time under section 148 of the Code of Civil Procedure. The appeal having been rejected, the court could still act in the absence of a specific provision similar to that contained in order XXV, rule 2, of the Code, in review, and I do not think that the court exceeded its jurisdiction by discharging its previous order and granting an extension of time. In *Balwant Singh* v. *Daulat Singh* (1) an order rejecting an appeal for default was set aside by their Lordships of the Privy Council in somewhat similar circumstances and an extension of time was granted. In *Firozi Begam* v. *Abdul Latif Khan* (2), it was held that no appeal would lie from an order refusing to re-admit an appeal which had been rejected for failure to furnish the required security for costs. Such an appeal would have been clearly inadmissible under order XLVII, rule 7, even if the application rejected had been treated as an application for review. An order granting a review is, however, appealable. In *Sankaralinga Chatti* v. *Annamalai Chatti* (3), it was held that no application to set aside an order rejecting an appeal under section 547 of the old Code of Civil Procedure (XIV of 1882) was entertainable, but the question of the applicability of the provisions relating to review does not appear to have been there considered. Here the time originally granted to the appellants was clearly insufficient, and the order of the court below setting aside its previous order is not in the circumstances unjustifiable. I see no reason, therefore, to interfere with it and agree in dismissing the appeal and the application for revision with costs.

Appeal dismissed.

(1) (1886) I. L. R., 8 All., 315. (2) (1908) I. L. R., 30 All., 143.

(3) (1908) 19 M. L. J., 304.