Before Justice Sir Edward Bennet and Mr. Justice Verma

1939
December, 13

MATHURA DAS (PLAINTIFF) *v.* NARAIN DAS AND OTHERS (DEFENDANTS)*

Civil Procedure Code, order XLI, rules 17, 30—Appellant present but unable to argue appeal—Dismissal whether in default—Duty of court in such case—Whether application for restoration lies.

In the case of an appearance by an appellant who is not prepared to argue the appeal the court disposes of the appeal under rule 30, and not rule 17, of order XLI, and no application for restoration lies in such a case.

In such a case there is no hearing and the appellant does not discharge his burden of showing to the appellate court that the decision appealed against is wrong; there is no point raised for determination and it is not necessary for the court to give a decision on any point or the reasons for the decision; it is sufficient for the court to pass an order of dismissal for default, which in the circumstances means default of proof and not default of appearance. *Mohammadi Husain* v. *Chandra* (1), dissented from.

Mr. *Sri Narain Sahai*, for the appellant.

Dr. *N. P. Asthana* and Messrs. *S. B. L. Gaur* and *K. B. Asthana*, for the respondents.

BENNET and VERMA, JJ.:—This is a first appeal from an order of the learned District Judge of Jhansi rejecting an application for restoration of an appeal. The plaintiff appellant filed the suit which was dismissed and he appealed to the District Judge. Notice was issued on the appeal and 22nd December, 1937, was fixed for hearing the appeal. On the 21st December, 1937, the day before the date fixed, an application was filed by counsel on behalf of the appellant asking for a local inspection. No order was passed on that application, presumably as it was to be heard on the following day. On 22nd of December, 1937, the appeal was called at 2 P.M. and the learned counsel for the respondent was present. Neither the appellant nor any of the three

*First Appeal No. 73 of 1938, from an order of P. C. Plowden, District Judge of Jhansi, dated the 15th of January, 1938.

(1) [1937] A.L.J. 174.

counsel whose vakalatnamas had been filed in the appeal appeared on his behalf at any time on the date fixed. The court waited for one hour until 3 P.M. and at 3 P.M. the appellant appeared in person and put in an application signed apparently by the appellant but without identification by any one and without the signature of any vakil. This application asked for an adjournment on the ground that two of the counsel were busy in other courts and that the third counsel had been engaged the day before and had not prepared his arguments in the appeal. On this the Judge recorded an order refusing adjournment and stated: "This application could have been made yesterday when my reader had to postpone other appeals till next year. It is now made at 3 P.M. after keeping me waiting since 2 P.M. Refused." The Judge then passed an order dismissing the appeal: "I have waited from 2 to 3 P.M. to hear the appellant's pleader. The appeal is not a long one and arguments could have been heard in half an hour. At 3 P.M. I was asked to postpone it although the respondents' pleader has been waiting all this time. I see no reason why postponement should be allowed at such short notice. Yesterday my reader was postponing other appeals till next year. This one could easily have been postponed. The appeal is dismissed with costs in default."

Subsequently an application was made for restoration and there was an objection filed by the pleader for respondent and the Judge dismissed the application for restoration on the grounds given by the objection. These grounds were that on 18th August, 1937, the appellant had got an adjournment, that he had engaged three pleaders and on the date fixed, 22nd December, 1937, none of these three pleaders appeared to argue the appeal and the appellant himself was absent at the hour when the case was called. This first appeal is filed, not against the order dismissing the appeal, but against the order rejecting the application for restoration. At

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the same time, the argument which has been addressed to us and is contained in the second ground of the appeal is that the appeal in the court below could not have been dismissed for default but should have been disposed of on the merits. This argument is based on the fact that the appellant himself appeared before the District Judge had passed the order dismissing the appeal. The argument is therefore that order XLI, rule 17 will not apply as rule 17(1) states: "Where on the date fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed."

Now, if we accept the view that is urged by the appellant, namely that there was appearance and that rule 17 does not apply, it follows that there can be no restoration or re-hearing under rule 19. Rule 19 states: "Where an appeal is dismissed under rule 11(2) or rule 17 or rule 18 the appellant may apply to the appellate court for the readmission of the appeal; and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit."

Now the dismissal could not be under rule 11(2) because notice had issued and it was not under rule 18 because there was no question of failure to deposit costs of notice. If, therefore, rule 17 does not apply, then there cannot be any application for restoration and the present appeal against the order rejecting the application for restoration must fail.

Some argument was made at this stage as to what the court should have done if it is held that there was an appearance by the appellant before the District Judge and the argument has been made on the strength of a ruling of a learned single Judge of this Court in *Mohammadi Husain* v. *Chandra* (1) that the appellate

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court should have gone into the merits of the appeal and written a judgment in the terms of order XLI, rule 31. In the case of an appearance by an appellant who is not prepared to argue the appeal no doubt the appellate court disposes of the appeal not under rule 17 but under rule 30. But it is difficult to follow the reasoning on which the learned single Judge held in the ruling quoted that it was necessary to write a judgment containing the points for determination, the decision thereon and the reasons for that decision. This ruling states on page 175: "The inability of the pleader to argue did not relieve the court of the necessity of applying its mind to the facts of the case and to decide it on its merits. A court is not entitled to dismiss the appeal for 'want of prosecution' only because the appellant, if he appears personally, or his pleader, who represents him, is, for any reason, unable to argue the appeal. The court should proceed in the manner laid down by order XLI, rules 30 and 31 of the Civil Procedure Code and is bound to pronounce judgment in open court, the judgment to contain the points for determination, its decision thereon and the reasons for that decision." We do not agree with this proposition.

Order XLI, rule 30 begins: "The appellate court after hearing the parties or their pleaders and referring to any part of the proceedings . . . ." Where the appellant and his pleader are not prepared to address the court there is no hearing and therefore nothing is shown to the appellate court as to why it should interfere with the decision of the court below. The burden of proof is on an appellant to show that the decision which he appeals from was wrong and where he does not address the court at all it appears to us that there is no point raised for determination and it is not necessary therefore to give a decision on any point or the reasons for the decision. It is sufficient for the court to pass an order of dismissal for default. Such an order does not necessarily mean that the appeal is dismissed for default

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of appearance. In such circumstances the order means that the appeal is dismissed for default of proof. In the actual order before us dismissing the appeal it is not stated that the appeal is dismissed for default of appearance. It is merely stated that the appeal is dismissed for default, and in a portion of the order already quoted it is stated that there was an application for adjournment. We differ therefore from the learned single Judge in *Mohammadi Husain* v. *Chandra* (1) in holding that it was necessary for the appellate court to write a judgment in the manner which he describes but we agree with him that if there is an appearance for or by the appellant it is not a case of dismissal under order XLI, rule 17.

We now come to another argument which may be advanced by the appellant based on the first ground that the appellant was prevented by sufficient cause from appearing. Apparently this ground is an alternative and implies that there was no appearance and therefore that order XLI, rule 17(1) would apply. In that case it is necessary to see whether the appellant has shown that he was prevented by any sufficient cause from appearing. The grounds given by the appellant are that two of his vakils were engaged in other courts and that the third vakil had only been engaged the previous day and had not made himself sufficiently acquainted with the record. It is to be noted that the appeal had already been once adjourned. It does not appear to us that these are good grounds for allowing a restoration. The respondent had to attend court on the date fixed with his pleader, and the pleader for respondent and the court waited one hour expecting someone to appear on behalf of the appellant. No one did appear to argue the case on behalf of the appellant and only the appellant himself appeared at the late hour of 3 P.M. to ask for an adjournment. If the appellant had communicated to the court the day before that he was not able

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to arrange for counsel to appear, the court has stated in its order that it would have had the case postponed. But the appellant took the course which caused inconvenience to every one concerned.

We do not consider that there is any reason to interfere with the order of the court below refusing to restore the appeal under these circumstances.

We, therefore, dismiss this first appeal from order with costs.

REVISIONAL CIVIL

Before Justice Sir Edward Bennet and Mr. Justice Verma

1939
December, 14

BALLABH DAS (DEFENDANT) *v.* GAUR DAS (PLAINTIFF)*

Specific Relief Act (I of 1877), *section* 9—*Applies to joint possession as well as to exclusive possession.*

The operation of section 9 of the Specific Relief Act is not confined to cases of exclusive possession only, but extends to cases of joint possession as well. A person who was in joint possession with another is entitled, upon dispossession by the other, to bring a suit under the section for restoration of the joint possession.

Dr. *N. P. Asthana* and Mr. *S. C. Das*, for the applicant.

Mr. *Shiv Charan Lal*, for the opposite party.

BENNET and VERMA, JJ.:—These are two cross petitions in revision and arise out of a suit for possession under section 9 of the Specific Relief Act. The plaintiffs in the suit were an idol, who was shown as plaintiff No. 1, and Gaur Das, who appeared as plaintiff No. 2, and purported to be the mahant of the temple. Defendant No. 1, Ballabh Das, on the other hand, claimed to be the mahant. The dispute is with regard to a building which is appurtenant to the temple. Each party denied the possession of the other over that building.

The learned Civil Judge has held that both Gaur Das and Ballabh Das were the managers of the temple and had been in possession of the property in dispute in

*Civil Revision No. 333 of 1937.