

MISCELLANEOUS CIVIL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice
E. M. Nanavutty

RAGHUBAR DAYAL (APPLICANT-APPELLANT) *v.* SANKATHA
BAKSHI AND ANOTHER (OPPOSITE PARTY-RESPONDENTS)*

1935
April, 17

*Civil Procedure Code (Act V of 1908), section 148 and Order
XLI, rule 19—Default—Appeal dismissed in default—Restora-
tion application—Court restoring appeal conditionally on
payment of certain sum by specified date—Failure to deposit
amount in time—Court's power to extend time for payment
and restore the appeal.*

Where an appeal is dismissed in default and the order allow-
ing the application for restoration of the appeal states that if
the applicant deposits a certain sum on or before a specified
date the appeal shall be restored *otherwise it shall stand dis-
missed* and the applicant fails to deposit that sum on the due
date, the Court has no power to restore the application or to
set aside the order of dismissal, because the Court had already
by its previous order made it clear that if the sum specified was
not paid on or before the due date the application for restora-
tion of the appeal would stand dismissed and the order on the
restoration application merely declared the effect of the previous
order. The fact that the appellant is willing to pay the full
costs to the opposite party would not give jurisdiction to the
appellate Court to extend the time prescribed by him for pay-
ment of that sum. *Jagannath Saha v. Kampta Prasad Upadhya*
(1), and *Mohammad Sharif v. Din Mohammad* (2), distinguished.
Jagannath v. Bishwanath Ratan (3), *Hamidur Rahman v. Shaha-
nand Das* (4), *Sajjadi Begam v. Dilawar Husain* (5), *Kshetra
Mohon Ghose v. Gour Mohon Kapali* (6), and *Shyam Lal v.
Moti Ram* (7), referred to. *Bansi Diwan v. Majahar Uddin* (8),
relied on.

Messrs. K. N. Tandon and Saiyed Mohammad, for the
appellant.

Messrs. Radha Krishna Srivastava and Sheo Mangal,
for the respondents.

*Miscellaneous Appeal No. 65 of 1933, against the order of Pandit Tika
Ram Misra, District Judge of Unao, dated the 3rd of October, 1933.

(1) (1918) I.L.R., 36 All., 77.	(2) (1927) A.I.R., Lah., 365.
(3) (1933) I.L.R., 8 Luck., 502.	(4) (1925) A.I.R., Pat., 153.
(5) (1918) I.L.R., 40 All., 579.	(6) (1933) 37 C.W.N., 878.
(7) (1929) A.L.J., 968.	(8) (1932) 36 C.W.N., 693.

1935

RAGHUBAR
DAYAL
v.
SANKATHA
BAKHSI

KING, C.J. and NANAVUTTY, J.:—This is an appeal under order XLI, rule 1, clause (t) of the Code of Civil Procedure against an order of the learned District Judge of Unao, dated the 3rd of October, 1932, dismissing the appellant's application for restoration of his appeal under order XLI, rule 19 of the Code of Civil Procedure.

The facts out of which this appeal arises are briefly as follows:

A suit on the basis of a mortgage, dated the 25th of June, 1923, was filed by the appellant Raghubar Dayal against Sankatha Bakhsh Singh and his minor nephew Rajendra Shankar Singh for Rs.3,214-2-6. On the 17th of October, 1931, this suit was decreed by the trial Court in favour of the plaintiff against Sankatha Bakhsh alone, and the minor defendant was discharged. The plaintiff appealed to the District Judge against the order of the trial Court discharging the minor defendant. The 15th of December, 1932, was the date fixed for hearing of the appeal. On that date there was some talk of a compromise and the hearing was adjourned to the following day, the 16th of December, 1932, but no compromise was arrived at. The case was called out but no one appeared, and the appeal was dismissed in the absence of the appellant. That same day an application for restoration of the appeal was filed by the appellant. This application came up for hearing on the 6th of September, 1933, and the application for restoration was allowed provided the applicant-appellant paid Rs.50 to the opposite party by the 2nd of October, 1933. The actual words of that order are as follows:

"If the applicant deposits or pays Rs.50 to the counsel of the opposite party on or before the 2nd of October, 1933, the appeal shall be restored, *otherwise it shall stand dismissed.* Put up on 3rd October, 1933."

The applicant failed to deposit the sum of Rs.50 on the due date, the 2nd of October, 1933, but he deposited it on the 3rd of October, 1933. The opposite-party

refused to take it, and the learned District Judge accordingly dismissed the application for restoration of the appeal, holding that in these circumstances he had no power to restore the application and to set aside the order of dismissal. Dissatisfied with this order of the lower appellate Court, the plaintiff has filed the present appeal.

It has been strenuously contended on behalf of the appellant that the ruling reported in *Surajpal Singh v. Deokali* (1), is not applicable to the facts of the present case, and even if it was applicable, then it was contended by the learned counsel for the appellant that it laid down bad law. In that case a conditional order had been passed on an application to set aside an *ex parte* decree, namely, that if a certain amount was paid within a certain time, the decree would be set aside, and if not the application would stand automatically dismissed. No payment was made within the prescribed time and an order was passed dismissing the application. In these circumstances it was held that the order dismissing the application was not a fresh order, but that it merely gave effect to the previous conditional order, and that if the defendant died in the meantime it was not an injurious order passed against a dead man. We have carefully examined this ruling and we see no reason to dissent from it, nor can we hold that the *ratio decidendi* laid down in it is not applicable to the facts of the present case.

The learned counsel for the appellant has laid great stress upon a ruling of the Allahabad High Court reported in *Jagannath Saha v. Kampta Prasad Upadhyaya* (2). The facts in that case were that on an application to set aside an *ex parte* decree the Court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages. This condition was not fulfilled, and the Court disallowed the defendants' application to set aside

1935

 RAGHUBAR
DAYAL
v.
SANKATHA
BAKSH

 King, C.J.
and Nana-
vutty, J.

(1) (1926) A.I.R., Oudh, 481.

(2) (1918) I.L.R., 35 All., 77.

1935

RAGHUBAR
DAYAL
v.
SANKATHA
BAIKSHI

King, C.J.
and Nana-
vally, J.

the decree. It was held that an appeal lay from the order, and that the Court below had jurisdiction to extend the time allowed for payment of the damages, or to pass a fresh conditional order setting aside the decree upon terms, as the original order had become inoperative. In our opinion the principle of this decision is not applicable to the present case. In the first place there was no order passed laying down the consequences that would ensue if the condition as to payment of the money by way of damages was not fulfilled. In the present case the order of the 6th of September, clearly laid down that if the sum of Rs.50 was not paid by the 2nd of October, 1933, the application for restoration of the appeal would automatically stand dismissed. The order under appeal of the 3rd of October, 1933, is therefore purely declaratory, and merely gives effect to the order of the 6th of September, 1933. In the ruling of the Allahabad High Court cited above, the effect of non-payment of the sum due to be paid as damages was not declared, and therefore the Court was held to have had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order for setting aside the *ex parte* decree upon payment of such sum of money as the Court thought fit. In other words, in that case the lower appellate Court had not become *functus officio* and could, therefore, under section 148 of the Code of Civil Procedure, extend the time allowed for payment of the damages which was a condition precedent to the setting aside of the *ex parte* decree.

Reliance has also been placed by the learned counsel for the appellant on a ruling reported in *Mohammad Sharif v. Din Mohammad* (1). In this case it was held that absence of knowledge of the date fixed for the hearing of the appeal was a sufficient cause for failure to appear when the appeal was called on for hearing, within the meaning of order XLI, rule 19 of the Code

(1) (1927) A.I.R., Lah., 365.

of Civil Procedure. This ruling, in our opinion, does not touch the question involved in the present appeal. The appellant in the present case knew perfectly well the date for payment of the money. The order directing conditional restoration of the appeal was passed in the presence of the appellant's general agent. It was the duty of the latter, whether he was hard of hearing or not, to have found out from his Pleader or from the Reader of the Court when exactly he was to make the payment of Rs.50 to the opposite-party. If the appellant has any grievance, it is against his own general agent rather than against the order of the Court below.

Reference was made by the learned counsel for the opposite party-respondents to a ruling reported in *Jagan-nath v. Bishwanath Ratan* (1), to which one of us was a party, in which it was held that as soon as the judgment, and final order prepared in pursuance of it had been signed by the learned Subordinate Judge, the latter became *functus officio* and was no longer seised with the case and it was, therefore, no longer open to him to extend the time fixed by his own order. This view is supported by the decisions in *Sheikh Hamidur-Rahman v. Shahananad Das* (2), and *Sajjadi Begam v. Dilawar Husain* (3).

The learned counsel for the respondent also referred to *Daya Singh v. Musammatt Kundan* (4), in which it was held that, except in the case of a decree in a mortgage suit to which order XXIV, rule 8 of the Code of Civil Procedure applied, a Court had no power to extend the time limited for the payment of money ordered by a decree to be paid as a condition precedent to its operation. Reference was also made to *Bansi Diwan v. Majahar Uddin* (5). In this case the facts were that two suits were remitted by the appellate Court to be reheard by the trial Court on payment of certain costs to

1935

 RAGHUBAR
 DAYAL
 v.
 SANEATHA
 BAKSHI

 King, C.J.
 and Nana-
 vally, J.

(1) (1933) I.L.R., 8 Luk., 502.

(2) (1925) A.I.R., Pat., 153.

(3) (1918) I.L.R., 40 All., 579.

(4) (1920) I.L.R., 42 All., 639.

(5) (1932) 36 C.W.N., 693.

1935

RAGHUBAR
DAYAL
v.
SANKATHA
BAKSH

King, C.J.
and Nana-
swamy, J.

the defendants. The order was to the effect that if the costs were not paid within two months from the date of the arrival of the records in the original Court, the suits would automatically stand dismissed, and that if the costs were paid within the time fixed the suits would be retried. The plaintiff did not pay in the money within the time prescribed for him to do so, but he paid it in some time later under an order of the trial Court passed in the absence of the defendants allowing him to do so on the ground that the fact of the arrival of the records in the trial Court had not been brought to the notice of the appellant's Pleader by the Officers of the Court. It was held by the learned Chief Justice and C. C. Ghose, J., that as the condition precedent to the retrial of the suits had not been complied with the suits must be deemed to have been dismissed under the order of the appellate Court, and that the trial Court had no jurisdiction to rehear the suits. It was further held that it was the plaintiff's duty to enquire and ascertain about the arrival of the records in the trial Court, and that no duty was cast upon the Court or its officers to inform the Pleader of the plaintiff of the fact. The principle laid down in this ruling is, in our opinion, clearly applicable to the circumstances of the appeal before us.

Similarly in *Kshetra Mohon Ghose v. Gour Mohon Kapali* (1), it was held that where a certain time was fixed by a decree of the Court for taking some steps and it directed that on failure of doing so within the time limited the case should stand dismissed, the Court had no jurisdiction to extend the time limited by the decree.

In *Shyam Lal v. Moti Ram* (2), the facts were that the plaintiff sought for recovery of possession and the parties agreed to abide by the statement of "KC". The latter made a statement to the effect that if the defendant No. 1 paid Rs.2,100 within a time prescribed by him the suit would stand dismissed, otherwise it would stand

(1) (1933) 37 C.W.N., 878.

(2) (1929) A.L.J., 968(969).

decreed. In terms of the statement of "KC", the trial Court passed a decree. The defendant No. 1 paid Rs.1,115 into Court on the day on which the specified period expired, and applied for further time to pay up the balance. Two days later the trial Court after hearing arguments of parties rejected the application, but on the same day defendant No. 1 deposited the balance. Thereupon the Court declared that this payment would have retrospective effect, with the result that the suit was dismissed. It was held by the Allahabad High Court in an application for revision that the Court below had no jurisdiction to extend time.

In view of the authorities cited above, we are clearly of opinion that the learned District Judge of Unao was right in holding that he had no power to restore the application or to set aside the order of dismissal, because he had already by his order of the 6th of September, 1933, made it clear that if the sum of Rs.50 was not paid on or before the 2nd of October, 1933, the application for restoration of the appeal would stand dismissed. The order now appealed against merely declares the effect of the order of the 6th of September, 1933. The fact that the appellant was willing to pay the full costs to the opposite party would not give jurisdiction to the lower appellate Court to extend the time prescribed by him for payment of that sum.

In our opinion there is no force in this appeal, and we accordingly dismiss it with costs.

Appeal dismissed.

1935

 RAGHUBAR
 DAYAL
 v.
 SANKATHA
 BAKSH

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 and Nana-
 vally, J.*