

## MISCELLANEOUS CIVIL

1936  
November, 30

Before Mr. Justice Ziaul Hasan and Mr. Justice  
H. G. Smith

IN *re* RAJA KRISHNA PAL SINGH (APPELLANT)\*

*United Provinces Encumbered Estates Act (XXV of 1934), section 4—Civil Procedure Code (Act V of 1908), order IX, rule 4—Application under section 4, Encumbered Estates Act, dismissed—Application to restore that application also dismissed—Fresh application under section 4, Encumbered Estates Act, if barred.*

The dismissal of an application for the restoration of the original application under section 4 of the Encumbered Estates Act does not debar the applicant from making a second application under that Act, the two remedies prescribed by order IX, rule 4, being not mutually exclusive.

Mr. K. P. Srivastava, for the appellant

ZIAUL HASAN and SMITH, JJ.:—This purports to be a miscellaneous appeal under order XLIII, rule 1(c) of the Code of Civil Procedure read with section 45 of the United Provinces Encumbered Estates Act.

The facts briefly stated are as follows:

The appellant, Raja Krishnapal Singh, made an application under section 4 of the Encumbered Estates Act, and the application was referred to the Court of the Special Judge, 1st class, Partabgarh, on the 30th of August, 1935. His written statement was filed after some delay, and the notices required by section 9 of the Act were ordered to be issued, the applicant being directed to deposit the costs of publication, and to take any other necessary steps. That order was passed on the 1st of November, 1935, and the application was directed to come up for hearing on the 3rd of February, 1936. The applicant did not appear on that date, and the learned Special Judge, apparently of his own motion, postponed the case till the 24th of February,

\*Miscellaneous Appeal No. 84 of 1936, against the order of Pandit Krishna Nand Pandey, Civil Special Judge, 1st class, Partabgarh, dated the 26th of September, 1936.

1936. On that date the applicant again failed to appear, and the application was dismissed as compliance had not been made with the orders passed on the 1st of November, 1935. Thereafter he applicant made an unsuccessful attempt to have the application restored to hearing. The order dismissing his restoration application was passed on the 24th of April, 1936. Thereafter, on the 2nd of June, 1936, he made a fresh application under the Act in the court of the Deputy Commissioner, and that application was referred to the Special Judge. A notice was sent to the applicant to appear before the Special Judge in support of that application, the 1st of September, 1936, being fixed. He did not appear on that date either, and the application was accordingly dismissed for default. On the following day, the 2nd of September, his agent made an application asking for the restoration of this application, but the learned Special Judge declined to restore it to hearing. That is the order, dated the 26th of September, 1936, which has given rise to this present appeal.

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*Ziaul Hasan,*  
*and*  
*Smith, J.J.*

The stage not having been reached for the issue of notices to the creditors of the applicant, there are no respondents named in the appeal, and the office has made a note calling our attention to this fact. The learned counsel for the appellant contends that the learned Special Judge was wrong in regarding the first application as having been dismissed under order XVII, rule 3 of the Code of Civil Procedure. He contends that the dismissal ought to be regarded as having taken place under order IX, rule 2, and that under order IX, rule 4, the applicant then had two remedies, one of them being to bring a fresh suit, and the other to apply for an order for setting aside the dismissal. As we have said already an application for the setting aside of the dismissal was made, but was rejected, and in these circumstances the question arises whether it was still open to the applicant to make a fresh application. For the principles applicable the learned counsel

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for the appellant has referred us to a case of the Allahabad High Court—*Tulshi Singh and another v. Sheo Saran Rai and others* (1). That decision followed a decision of the late Court of the Judicial Commissioner reported in *Daya Shankar v. Raj Kumar* (2). It was said by the learned Judge of the High Court who decided the case in question that the two remedies prescribed by order IX, rule 4, are not mutually exclusive. Following that view, we hold that the dismissal of the appellant's application for the restoration of his original application did not debar him from making a second application under the Encumbered Estates Act, and the only question that remains is whether the non-appearance of his agent on the 1st of September, 1936, in support of that second application was adequately accounted for. We have read the application of the 2nd of September by which the agent asked for the restoration of the second application of the appellant. It sets forth that the agent was overcome by stomachic pains when he was on his way to the court, and hence arrived after the application had been dismissed for default. This application was supported by an affidavit, and we see no sufficient reason to disbelieve its contents. The result is that we think that there was no legal bar to the institution by the appellant of his second application of the 2nd of June, 1936, and we are satisfied that there were sufficient grounds for the non-appearance of his agent on the 1st September in prosecution of that application. In view of the fact that the stage has not been reached for the issuing of notices to the creditors, there is no force in the objections suggested by the office to the effect that the creditors ought to have been made respondents to this present appeal.

The result is that we allow this appeal, and direct the learned Special Judge to take up again the application of the 2nd of June, 1936, and proceed to dispose of it according to law.

*Appeal allowed.*

(1) (1926) A.I.R., All., 678.

(2) (1916) 20 O.C., 66.