MANU/BH/0175/1939

Equivalent Citation: AIR1939Pat678

IN THE HIGH COURT OF PATNA
FULL BENCH

Decided On: 26.09.1939

Appellants: **Ramkhelawan Singh**
Vs.
Respondent: **Monilal Sahu and Ors.**

Hon'ble Judges/Coram:
Arthur Trevor Harries, C.J., Saiyid Fazl Ali and C.M. Agarwala, JJ.

JUDGMENT

Saiyid Fazl Ali, J.

1. This case has been referred to a Full Bench in the following circumstances: The petitioner had filed an appeal to this Court against a decree passed by the Subordinate Judge of Arrah and this appeal was numbered as First Appeal No. 3 of 1938. On 5th May 1938, the appeal was laid by the Registrar before a Bench of this Court for final order with a note pointing out that the petitioner had failed to comply with several orders calling upon him to supply the appellant's list. On that date no one appeared for the petitioner and the appeal was dismissed. On 11th June 1938, the petitioner made an application for the restoration of the appeal. This application bore a stamp of Rs. 3 and purported to have been made under Order 41, Rules 17 and 19 and Section 151, Civil P.C. The Stamp Reporter noted on the application that the court-fee was insufficient, his view being that such an application could have been made only under Order 47, Rule 1 of the Code. The matter was then placed before my brother Agarwala and myself and we decided to refer it to a Full Bench. The reasons which led us to make the reference as well as the point of law which we decided to refer are set out in the following extract from our order:

> The Stamp Reporter suggests that the application is in fact one for review of the order dismissing the appeal and that a court fee of about Rs. 405 is leviable. On behalf of the petitioner, on the other hand, it is contended that this is an application for restoration of the appeal on which Rs. 3 stamp is leviable. In Anant Potdar v. Mangal Potdar A.I.R (1926) pat. 27 the cases in this Court for and against the view of the Stamp Reporter are enumerated. It will appear that from the institution of the Court up to 1923 applications suoh as the present were always treated as applications for review. In 1924 a Bench of which Sir Jwala Prasad was a member took another view although Sir Jwala Prasad had been a member of at least one of the Benches which had decided the other way in earlier cases. The earlier cases of this Court applied the Full Bench decision in Fatimunnissa v. Deoki Pershad (1897) 24 Cal. 350. In Haridasi Devi v. Sajanimohan MANU/WB/0077/1932 : AIR1932Cal770 , it was pointed out that the decision in Fatimunnissa v. Deoki Pershad (1897) 24 Cal. 350 was based on the language of an earlier Code of Civil Procedure and held that the application was not an application in review. The question is continually arising in this Court and it is desirable that the matter should be settled one way or the other.

> The question which requires consideration is whether an application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed can be entertained, unless it, be treated as an application for review under Order 47, Rule 1, Civil P.C. We refer the matter to a Full Bench under Ch. 5, Rule 4 of the Rules of this Court.

2. In Ramhari Sahu v. Madan Mohan Mitter (1896) 23 Cal. 339 a Bench of the Calcutta High Court had held that art application for re-admission of an appeal dismissed for the appellant's failure to deposit the costs for the preparation of the paper, book was not an application for review, but an application under the rules of the High Court. This decision was overruled in Fatimunnissa v. Deoki Pershad (1897) 24 Cal. 350 by a Full Bench of five Judges who held that the remedy of the appellant in such a case was to apply for a review and the reasons they gave in support of this view were as follows:

> Under the Code there are only two ways known to the law by which a judgment and decree of a Divisional Bench of this Court can be set aside in India. These two methods are described Sections 558 and 623 of the Code. The present case is clearly not one in which default was made in appearing at the hearing of the case, for the record shows that the pleaders on both sides were in attendance and heard. It seems to us therefore that the view expressed in the reference is correct, and that the case in Ramharisahu v. Madan Mohan Mitter (1896) 23 Cal. 339, so far as it decides the contrary is wrongly decided.

3. In this Court before 1924 there was on the whole a tendency to follow the practice which had prevailed in the Calcutta High Court since the decision of the Full Bench; but in some cases it was observed that; the dismissal of an appeal for failure to file the appellant's list or deposit the printing cost within the time allowed by the Court could be set aside under Order 41, Rule 19, read, with Section 151, Civil P.C. In 1924 the question as to what was the proper procedure for setting aside such a dismissal was directly raised before a Division Bench of this Court in Anant Potdar v. Mangal Potdar A.I.R (1926) pat. 27 and the learned Judges who sat on the Bench held, following the decision in Fatimunnissa v. Deoki Pershad (1897) 24 Cal. 350, that an application to set aside the dismissal must be regarded as one for review under Order 47, Rule 1. The learned Judges recognized that the order dismissing the appeal was no longer a decree under the amended Code, but they pointed out that it was still a judgment. The correctness of this decision has been recently doubted in Haridasi Devi v. Sajanimohan MANU/WB/0077/1932 : AIR1932Cal770 in which it has been held that an application for restoring an appeal dismissed for default in the payment of initial deposit is not an application for review but an application under Order 41, Rule 19 read with Section 151 of the Code. The same view seems to have been taken by the Bombay High Court in Sonubai v. Sivajirao A.I.R (1921) . Bom. 20 and by the Judicial Commissioners of Bind in Mt. Dhayani v. Ishak A.I.R (1931). Sind. 153. The question which has now to be decided by this Bench is which of the two conflicting views is correct. Order 47, Rule 1 provides that a party aggrieved by a decree or an order specified in Clauses (a), (b) and (c) of Rule 1 may apply for review on any of the following grounds: (1) on the ground of the discovery of new or important matter or evidence which after the exercise of due diligence was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made; (2) on account of mistake or error apparent on the face of the record; and (3) for any other sufficient reason.

4. It seems me that grounds 1 and 2 would not be ordinarily applicable to cases where an appeal is dismissed for the appellant's failure to file the list or to deposit, the printing cost. In such cases the appellant usually applies for the restoration of the appeal on the ground that there was not indent cause for his not depositing the printing cost or filing the list, as the case may be, within the time prescribed by the Court; and therefore if the application can be treated as an application for review it can be treated as such only on ground No. 3. It has however been clearly pointed out by the Judicial Committee in Chhajju Ram v. Neki A.I.R. (1922) P.C. 112 and Bisheshwar Pratap Sahi v. Parath Nath MANU/PR/0040/1934 that Rule 1 of Order 47 must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in Rule 1. In view of these decisions it is no longer possible to hold that an application like the present can be treated as an application for review. As was remarked by the learned Judges of the Calcutta High Court in Haridasi Devi v. Sajanimohan MANU/WB/0077/1932 : AIR1932Cal770 ,

> it would require no ordinary flight of imagination to treat a failure to deposit initial cost as being an omission of the same kind or description as an omission to produce a matter or evidence subsequently discovered or a mistake or error apparent on the face of the record.

5. The points which we must bear in mind are firstly that under Order 47, Rule 1 the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, that the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. That being so, in my judgment the decisions in Fatimunnissa v. Deoki Pershad (1897) 24 Cal. 350 and Anant Potdar v. Mangal Potdar A.I.R (1926) . Pat. 27 can no longer be relied on as good authorities on the subject.

6. The next question to be considered is whether in a case like the present the applicant has any remedy at all. It is plain that Order 41, Rule 19 which is the only provision in the Civil Procedure Code for the restoration of the appeal does not apply to such a case. Rule 19 enables the Court of appeal to re-admit an appeal which is dismissed under Rule 11, Sub-rule (2) or Rule 17 or Rule 18. Rule 11 and Rule 17 provide for cases where on the date fixed, or another date to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing. Rule 18 provides for cases where it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit within the period fixed the sum required to defray the cost of serving the notice.

7. In the present case the appeal was dismissed not under any specific provision of the Code but under one of the rules framed by the High Court (Part 2, Chap. 9, Rule 23). Are we then to hold that the petitioner is without any remedy, even if he is able to convince the Court that he was prevented by sufficient cause from filing the appellant's list or depositing printing cost within the time fixed by the Court? Unfortunately in our rules there is no rule corresponding to Order 41, Rule 19, but I am unable to hold that merely because there is no rule on the subject, this Court is powerless to grant any relief in such cases. In my opinion the failure to file a list or deposit the printing; costs stands on no worse footing than the default referred to in Rules 11, 17 and 18 of Order 41 and I find it difficult to hold that if there had been

any rule in the Code corresponding to Rule 23 (Ch. 9) of this Court, there would not have been any corresponding provision for restoring the appeal for sufficient cause. In my view if we have power to dismiss an appeal for the appellant's failure to file the appellant's list or deposit the printing cost, we have also power to restore the appeal in, a proper case. Section 151 expressly saves the inherent power of the Court and every Court must be deemed to possess as inherent in its very constitution all such powers as are necessary to do right acid undo a wrong in the course of the administration of justice. Thus, in my judgment, the answer to the question referred to this Bench is that an application to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under Section 151 of the Code and generally speaking such an application cannot be made under Order 47, Rule 1 of the Code.

8. I shall now proceed to deal with the facts of the present case in order to decide whether this particular appeal should be restored. It appears that on 3rd March 1938 an advocate, Mr. N.C. Roy who appeared for the petitioner applied for the inspection of documents and on 4th March the documents were actually inspected. Notwithstanding this fact, the appellant's list was not filed in time and on 4th April 1938 the Registrar directed the appellant to file it within 14 days of the date. On 25th April the list still not being filed the Registrar recorded the following order in the order-sheet:

> Time has been twice allowed for the purpose of filing the appellant's list. The last order, though peremptory, has not been carried out. Final adjournment for seven days is given for compliance, failing which the appeal will be laid before the Bench with a recommendation for dismissal.

9. On 3rd May the Registrar directed the appeal to be laid before the Bench as the final order for filing the list had been disregarded and the appeal was dismissed by the Bench on 5th May. It is stated by the petitioner in his affidavit that his advocate was fully instructed to file a list and he was in no way responsible for his appeal not being prosecuted properly but this is not borne out by the contents of a letter which was written to him by Mr. Roy on 8th May 1938. This letter which has been quoted in the petitioner's affidavit runs as follows:

> Dear Ramkhelawan Babu,
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> > I wrote to you a few days ago that unless list la your F.A. 3/38 was filed immediately, your appeal would be dismissed on 5th May, but when the High Court closed, the appeal (F.A. 3/38) came up before the Bench. I was, as you know, unwell and so did not go to Court, but I instructed somebody to apply for time. The Judges however have dismissed the appeal as the list has not been filed. An application for restoration should be filed soon. The petition should be drafted and kept ready at once. The High Court is closed and I shall' leave Patna within five or six days. My fees Rs. 48 (as I wrote to you before) together with the fees for preparing the list should be paid now. The' list should be kept ready and this may be prepared by us during this vacation. Please therefore come with sufficient money and do not spoil the case. Unless money is paid nothing will be done. One of your men saw me on 3rd May, but he told me he was going to Muzaffarpur.

10. This letter shows that the advocate had given due warning to the petitioner in a previous letter and that his fees as well as the fees for preparing the list had not been paid. The petitioner filed a fresh affidavit on the date on which this application was heard to the effect that he had paid a sum of Rs. 36.1.0 to his advocate, but the advocate is now dead, and, in view of the fact that the statement in question was not made in the petition itself which was filed during his lifetime, I am not prepared to act upon it or hold that the advocate did not act honestly and that he was negligent in the discharge of his duty towards his client. It is to be borne in mind that Section 161 should be applied with great caution and only when the ends of justice require its application.

11. In order to decide whether the ends of justice require the application of this Section to a particular case, we have to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under this Section. In my opinion upon the materials on the record it is difficult to hold that the petitioner has made out a sufficient cause for restoring the appeal and I would, therefore dismiss this application with costs.

Arthur Trevor Harries, C.J.

I agree.

C.M. Agarwala, J.

I agree.