

**Nandan Sahu Vs. Hari Shankar**

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**Court :** Allahabad

**Decided On :** Mar-08-1932

**Reported in :** AIR1932All595

**Appellant :** Nandan Sahu

**Respondent :** Hari Shankar

**Judgement :**

Sulaiman, J.

1. This is a defendant's application in revision from an order of the Court below setting aside the dismissal of a suit and restoring it to its original number on payment of some costs. It is urged that the Court below had no jurisdiction to act under Order 9, Civil P.C. On two previous dates both the parties were absent and the Court adjourned the case in order that they might attend in person, with a view to take down their statements. On this last date, namely, the 12th January 1931, the defendant with his pleader was present, but the plaintiff was absent. It further appears that his learned pleader made a statement in Court that he had no instructions to go on with the case. The result was that the plaintiff was absent. The Court passed the following order.

The plaintiff is absent to day. He was absent on the last date of issues also and was warned through his advocate to attend Court to day as I wanted to examine him. Taking action under Order 10, Rule 4(2) the suit is dismissed with costs to the defendant.

2. On a subsequent application for restoration of the suit professedly under Order 9, Rule 9, Civil P.C., the Court was satisfied that there was good cause for the non-appearance of the plaintiff and restored the case. It is urged before us that the order having been made under Order 10, Rule 4(2), Civil P.C. it amounted to a pronouncement of judgment and could not be an order dismissing the suit for default. We are unable to accept the contention that I under Order 10, Rule 4(2) Court has no power to dismiss a suit for default of appearance. Obviously there are two alternative courses upon to the Court. It may either 'pronounce judgment against the absent party,' or 'make such order in relation to the suit as it thinks fit.' There is nothing to preclude the Court from not pronouncing judgment on the merits, but dismissing it for default of appearance. Order 9, Rule 12 expressly covers a case where a party has been ordered to appear in person and does not appear in person or show sufficient cause for failing to appear. In such a case he is subject to all the foregoing provisions of that Order. The Court therefore had clearly power to dismiss the suit for default of appearance. The learned advocate for the applicant relies on the case of Chengaru Chandu v. Raman Nair A.I.R. 1921 Mad. 417. The reported judgment does not clearly

indicate the exact form of the order which had been made by the Court in that particular case. We are however not prepared to hold that the power given to a Court under Order 10, Rule 4(2) 'to make such order in relation to the suit as it thinks fit' does not include a power to dismiss the suit for default of appearance under Order 9.

3. We are also of opinion that the Court in this particular case did not pronounce judgment on the merits, but really dismissed the suit for default of appearance. In fact it emphasised the fact that the plaintiff, in spite of a previous warning was again absent and did not refer to the merits of the case. We therefore think that there is no force in this application and it is accordingly dismissed with costs.

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