R.C. Krishnaswami Naidu and ors. Vs. R. Chengalroya Naidu and ors.

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Court : Chennai

Decided On : Oct-05-1923

Reported in : AIR1924Mad114

Appellant : R.C. Krishnaswami Naidu and ors.

Respondent : R. Chengalroya Naidu and ors.

Judgement :

1. This is an appeal from an order of the Subordinate Judge of Chittore, dated 23rd September, 1921 refusing to set aside an order dismissing an appeal dated 4th March 1921.

2. The facts are that the petitioner being the appellant in the appeal before that Court instructed a Vakil to appear and conduct his appeal. We will assume on the evidence before the Court that this Vakil did not appear on 4th March, 1921 to Conduct the appeal in pursuance of his instructions by reason of the Vakil having taken up the attitude bf non-co-operation with the Courts and we will also assume that the appellant did not come to know of the order of the Court dismissing his appeal until sometime after it was dismissed and that he took immediate steps on making the discovery to bring the matter before the Court. Assuming these facts to be correct, the appellant has suffered grave injustice for his appeal, for no fault of his own, has never been heard although it may be that he has a remedy against his Vakil for negligence. Under Order 41, Rule 17 of the Civil Procedure Code, 'if on the day fixed the appellant does not appear when the appeal in called on for hearing, the Court may make an order that the appeal be dismissed,' and under Rule 19 where the appeal is so dismissed, 'the appellant may apply to the appellate Court for the readmission of the appeal; and where it is proved that he was prevented by a sufficient cause from appearing when the appeal was called on for hearing the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.' These rules provide a remedy in a case like the present for laving the appeal re-admitted. But by Article 168 of the Limitation Act, IX of 1908, an application for the re-admission of an appeal dismissed for want of prosecution must be brought within 30 days from the date of the dismissal. It, therefore, follows that, if the Court is confined to acting under Order 41, Rule 19, this application is 'statute barred.'

3. It is, however, contended that the Court has an inherent power under Section 151, C.P.C., or otherwise, to (sic) an appeal under such circumstances. There are two authorities quoted in support of that proposition: Debt Baksh Singh v. Habib Shah [1913] 35 All. 331 and Sonu Bai v. Shiwaji Rao [1920] 45 B. 648. In the former the Privy Council acted under. 151, C.P.C., in a case where a suit was dismissed for non-appearance, the plaintiff being dead and the Court being unaware of that fact, and their lordships say, 'The principle of forfeiture of rights in consequence of a default in

procedure by a party to cause is a principle of punishment in respect of such default but the punishment of the dead or the ranking of death under the category of default does not seem to be very stateable.' Their Lordships in effect, held that the Court had made a mistake in thinking that the plaintiff was alive that the plaintiff or appellant could not be said to have not appeared or to have defaulted in appearing when he was no longer alive, that, therefore, that was a case to which the rules d d not apply and that the Court, to do justice, could fall back on its inherent powers.

4. In Sonu Bai v. Shivaji Rao 45 Ind.Cas. 526 the facts were that a pleader employed to conduct an appeal died and his death was communicated to the guardian ad litem of the minor and such guardian at the time being insane took no steps and the appeal was dismissed for want of appearance. The Court held that it had an inherent power under Section 151, C.P.C. to reinstate the appeal thinking that the death of the pleader unknown, in fact, to the appellant was equivalent to the death of the plaintiff himself. If this case is rightly decided, we think that the assumed facts before us are as strong for the non-appearance of the Vakil due to his political attitude could not reasonably be imputed to his client. But the question as to when this Court can act under Section 151 or otherwise under its inherent powers is a matter which had been fully considered in Neelaveni v. Narayana Reddi [1920] 43. Mad. 94, and can be stated thus:--Where a Code declares the law on any matter specifically dealt with, the law must be ascertained by an interpretation of the language used by the legislature, for the essence of a Code is to be exhaustive on such matters. In that case, the Court held that Order 9, Rules 8 and 13 were exhaustive in respect of cases where the plaintiff made default in appearance in a suit and I think that we are bound to say that Order 41, Rules 17 and 19 are equally exhaustive. The Privy Council case referred to baove can be distinguished on the ground that there has been in fact, no failure to appear because failure to appear cannot include the case of a man who is dead; whereas in this case there has been a failure to appear by the Vakil and, if it is held that in such a case as this, the Court can act under its inherent powers, it would involve a finding that in every case of dismissal of an appeal or a suit by reason of the non-appearance of the Vakil, the Court has inherent powers which it must exercise almost ex debita justitia in favour of setting aside fie ordor dismissing the suit or appeal. In our judgnent Sonu Bai v. Shivaji Rao [1920] 45 B. 648 was wrongly decided. To hold otherwise in this case would be merely an evasion of the definite words of Article 168 of the Limitation Act.

5. We regret that we have came to this conclusion because, in our view, it is not right that a party's suit or appeal should be irrevocably dismissed by non-appearance through no fault of his own, and again through no fault of his own, by his not becoming aware of the dismissal for the short period of 30 days. The remedy for such injustice is not in our hands. Section 5 of the Limitation Act might have been made applicable by an enactment or rule to applications under Rules 17 and 19, and, in our judgment, it is very desirable that this should be done. It will, however, not help the present appellant. We regret that this appeal must be dismissed. In view of the fact that the respondent did not being the full facts before the Original Court at an early stage and has brought before us facts which we do nor accept, we think that the right order as to costs will be that there will be no costs here or below.