
(1951) 08 SHI CK 0002
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 13 of 1951

Mani Ram and Others

APPELLANT

Vs

Jhamru and Another

RESPONDENT

Date of Decision : 21-08-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 3, 115
Constitution of India, 1950 — Article 227
Government of India (Amendment) Act, 1935 — Section 224, 224(2)
Government of India Act, 1915 — Section 107

Citation : AIR 1952 HP 24

Hon'ble Judges : Chowdhry, J.C.

Bench : Single Bench

Advocate : Atma Ram, for the Appellant; Amarchand Sud, for the Respondent

Final Decision : Allowed

Judgement

Chowdhry, J.C.

1. This is a plaintiffs' application in revision against the order of the Subordinate Judge of Theog dated 31-1-1951, purporting to dismiss their suit under Order 9, Rule 3, C. P. Code, for non-appearance of parties.
2. The suit related to 14 bighas out of 74 bighas and 14 bis was of charand land situate within the former State of Madhan. By an order dated 29-6-1945 the said State conferred non-occupancy rights in the said 14 bighas on Jhamru defendant. The present suit was filed by the plaintiffs-petitioners on 10-8-1948 against Jhamru and the State of Himachal Pradesh as successor-in-interest of the Madhan State for a declaration that the order in question was illegal and for a perpetual injunction to restrain Jhamru from taking possession on the land in pursuance of the order. The suit was contested by both the defendants.
3. The plaintiffs' oral evidence was concluded on 11-12-1950 and on that date the suit was adjourned to 29-12-1950 for plaintiffs to file their documentary

evidence and for the defendants to produce their oral evidence. The case was however not taken up on 29-12-1950. There is no order of that date on the record. It was taken up after 11-12-1950 for the first time on 18-1-1951 when, it is recorded, the parties were absent, and the case was adjourned to 29-1-1951. On the latter date again the parties were absent and the case was adjourned to 31-1-1951, on which date, on the parties being again found absent, the Subordinate Judge dismissed the suit under Order 9, Rule 3, C. P. Code.

4. The plaintiffs filed the present revision against the said order dated 31-1-1951 on 29-3-1951 together with an affidavit that they were present in Court on 29-12-1950 but the case was not called on for hearing, that they were never informed that the case was to be taken up on 29-1-1951 or on 31-1-1951, and that it was only on 10-3-1951 that the plaintiffs' attorney, who had gone to ascertain what had happened in the case, came to know for the first time that the suit had been dismissed on 31-1-1951. These facts were not controverted and are in fact incontrovertible. The order of the trial Court dated 18-1-1951 in the order-sheet is to the effect that the office had by mistake fixed 29-1-1951 as the date, and therefore the case be adjourned to that date. There is nothing to show that 29-1-1951 had ever before 18-1-1951 been fixed as a date in this case. On the contrary, as already seen, it was 29-12-1950 to which date the case had been adjourned on 11-12-1950, but on that date, the case was not taken up at all. Naturally therefore the parties were absent on all the three subsequent dates 18-1-1951, 29-1-1951 and 31-1-1951, of none of which they had any intimation. The trial Court was therefore wholly unjustified in dismissing the suit on the last mentioned date under Order 9, Rule 3, C. P. Code.

5. Although the above facts are not controverted, it was argued on behalf of the defendants-respondents that this Court should not grant any relief to the plaintiffs-petitioners in exercise of its revisional jurisdiction since there were other remedies open to them. The other remedies referred to were an application to set the dismissal aside, an appeal and a fresh suit. Before proceeding further it may be stated here that although under Clause (3) of paragraph 35 of the Himachal Pradesh (Courts) Order, 1948, Section 115 of the C. P. Code is not applicable to Himachal Pradesh, the provisions of Clause (1) (a) of that paragraph, under which this revision has been filed, is, except for the omission of the word illegally from Clause (c) of Section 115, mutatis mutandis the same as the latter section. That being so, the rulings cited by the learned counsel for the parties in connection with the applicability of that section of the CPC would be equally relevant in the present case.

6. Now, there is no doubt that no appeal lay against an order of dismissal under Order 9, Rule 3, since an order under that provision is not a decree within Section 2(2) of the Code. As regards an application to set aside the order of dismissal, such an application is provided by Rule 4 of the said Order and the period of limitation prescribed for such an application is under Article 163 of the Limitation Act 30 days from the date of the dismissal. This period had, however,

already expired by 10-3-1951 on which date the plaintiff's came to know for the first time of the order of dismissal. It was however argued on behalf of the respondents that as no date had been fixed in the presence of the parties for 18-1-1951 or the subsequent dates, it could not be said within Order 9, Rule 3, C. P. Code, that the suit was called on for hearing on 31-1-1951, and that therefore the order of dismissal passed on that date could not be one under that provision, so that the proper Article of the Limitation Act applicable to an application to set aside the order of dismissal was 181 and not 163. And in support of this contention the ruling reported as Mt. "Zainab Bibi v. Behari Lal" A. I. R. 1935 Pes 186 was cited. It was urged therefore that the remedy to have the order, of dismissal set aside by an application was, and in fact even now is, open to the petitioners. It must however be noted that as the order in question purports to have been passed under Order 9, Rule 3, C. P. Code, the apparent remedy under Rule 4 was by 10-3-1951 time barred. It may be that had the petitioner's lawyer gone deeper into the question, he would have come across the ruling cited on behalf of the respondents showing that he had in fact three years under Article 181 of the Limitation Act for filing an application to set the order of dismissal aside, but it would be too much to expect that he should have filed an application on that authority rather than come up in revision, to this Court, He could not possibly be certain that the said authority would not but be followed, and where the other remedy is doubtful the High Court would interfere in revision. "Ghulam Shabbir v. Dwarka Prasad" 18 All 163.

7. As. regards relief by way of suit, there is no doubt that a fresh suit was not time-barred by the time that the, present application in revision was filed inasmuch as the six years period of limitation for such a suit under Article 120 expired on 29-6-1951. But u/s 115, C. P. Code, or paragraph 35 of the Himachal Pradesh (Courts)" Order, the only remedy which, if still open, has been specifically laid down as barring revision is the remedy of appeal. That being so, where there is any remedy other than appeal open to a party, the question whether revisional powers should or should not be exercised should be decided on the particular facts and circumstances of each case. One such instance is, that of the Allahabad ruling just cited where the remedy by a separate suit was doubtful. Another circumstance which is taken into consideration in favour of the exercise of revisional jurisdiction, even though another remedy by way of suit be available, is that the alternative remedy by suit would not be equally prompt or certain and would put the aggrieved party to additional expense. "Shiva Nathaji v. Joma Kashinath," 7 Bom 341. In the present case the plaintiffs' suit, which was filed after the statutory two months' notice u/s 80, C. P. "Code, had already lasted over two years 5 1/2 months before it was dismissed on 31-1-1951. Remedy by another suit could not therefore have been prompt. Nor could it have been certain because it is possible that some of the witnesses whom he had produced might have been won over by the opposite side in the meanwhile, a feature by no means uncommon. And there is no doubt that the production of oral evidence all over again and the paying of court-fee and other expenses

would have put the petitioner to additional cost. In these circumstances, I would exercise my discretion in favour of giving relief to the petitioners under the revisional jurisdiction of this Court even though a separate remedy by suit may have been open" to them when they filed the present petition.

8. The learned counsel for the respondents cited the following rulings before me: Shair Ali Vs. Jagmohan Ram and Another Leoh Moses Vs. Solomon Judah Meyer, and "Nanak Chand: v. Ahmed Din A. I. R. 1930 Lah 440. The ratio decidendi of the Allahabad and Bombay rulings was that because remedy by way of an appeal was open to the aggrieved party he was not entitled to invoke the revisional jurisdiction of the High Court. In the present case the remedy by way of appeal was not open to the petitioners. As regards the Lahore case, it does not help the respondents since the High Court interfered u/s 151 of the Code on the ground that period of limitation for a fresh suit had expired.

9. Even if there be any doubt as to the propriety of interference in exercise of revisional jurisdiction, I have no doubt that the order in question can be set aside by this Court under the much wider powers of superintendence over subordinate Courts under Article 227 of the Constitution of India. These powers correspond more to those laid down u/s 107 of the Government of India Act, 1915, than those u/s 224 of the Government of India Act, 1935, since the limitation placed upon the exercise of powers of superintendence by Sub-section (2) of Section 224 of the 1935 Act did not find place in the 1915 Act and are absent from the aforesaid Article of the Constitution of India. In exercise of similar powers u/s 15 of the Statute 24 & 25 Vic., Cap. 104 it was held by the Allahabad High Court in "Abdullah v. Salaru," 18 All 4, that where a subordinate Court had signally failed to do its duty, and there had been no patent neglect on the part of the petitioner, it was competent for the High Court, on an application for revision, to direct the subordinate Court to do its duty and complete the case, according to law. In the present case also the subordinate Judge has signally failed to do his duty in that he has arbitrarily dismissed the suit for default taken place, and though no default had in fact taken place, and there has also not been any patent neglect on the part of the petitioners in that they filed the present application in revision on 29-3-1951 after having come to know of the order of dismissal on 10-3-1951. This is therefore in any case, a fit case in which this Court should set aside the order in question in exercise of the power of superintendence under Article 227 of the Constitution of India.

10. The plaintiffs' application in revision is allowed, the order of dismissal of suit dated 31-1-1951 is set aside and the trial Court is directed to re-admit the suit under its original number in the Register of Civil Suits and proceed with the case, after giving due notice to the parties, from the stage at which the case was on 11-12-1950. In view of the circumstances in which the order in question was passed, I make no order as to the costs of this revision. The parties are hereby directed to appear before the trial Court on 17-9-1951.