## PRIVY COUNCIL.

P. C.*
1935
Oct. 10.

# SRINIVAS PRASAD SINGH
*v.*
# KESHAVA PRASAD SINGH

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

*Default—Prospective List—Dismissal of suit—Discretion of court, how to be exercised—Letters to judge, how to be dealt with—Rules and Orders of the High Court, Original Side, r. 36.*

The default in r. 36 of the Original Side Rules of the Calcutta High Court under which a suit is liable to be dismissed, is not limited solely to a failure to appear in the Prospective List within six months from the institution of the suit but is a failure to appear in the Prospective List continuing to the date of action under the Rule.

*Haribux Shroff* v. *Dwijendramohan Ghosh* (1) and *Balkissen Das Ramkissen Das* v. *Hazarimull Sethia* (2) approved.

A court is not entitled to deprive a litigant of his right to have his case heard and disposed of, except on clearly ascertained grounds, excluding grounds which rest only on suspicion.

Judgment of the High Court reversed.

Appeal (No. 33 of 1934) from a judgment of the High Court in its appellate jurisdiction (July 11, 1932) affirming a judgment in its Original Jurisdiction (January 25, 1932).

The facts are stated in the judgment of their Lordships of the Judicial Committee.

*Dunne, K. C., Wallach* and *B. B. Lal* for the appellant. The Rule applies to a case which has not appeared in the Prospective List. The case was placed in the Special List. It was adjourned for a month and taken out. That shows that up to that time there was no default.

* Present: Lord Thankerton, Sir John Wallis and Sir Lancelot Sanderson.

(1) (1930) I. L. R. 58 Cal. 736.

(2) (1930) A. O. C. 76 of 1930, decided on Aug 6.

*Udoy Chand Pannalal* v. *Khetsidas Tilokchand* (1); *Haribux Shroff* v. *Dwijendramohan Ghose* (2); *Balkissen Das Ramkissen Das* v. *Hazarimull Sethia* (3).

*De Gruyther, K.C.*, and *Pringle* for the respondent, Ranjibay : Failure to appear in the Prospective List within six months is a condition precedent. The Registrar may then report to the Judge. After six months, the matter is in the discretion of the Judge. The Rule is a rule of practice. A court acting on its own rules ought not to be lightly interfered with. The court may refuse to dismiss the suit on the first occasion on finding that there was no default up to that time, but that would not preclude the court from dismissing on a subsequent default. If the court has jurisdiction in the matter, the discretion should not be interfered with. In the exercise of jurisdiction by the appellate court, there was no question of bringing in extraneous circumstances. If the plaintiff really wished to bring the case to a hearing, he could have done so in 1928. He received ten lakhs of rupees under the settlement in question and was made a ward of the court.

*Sir Leslie Scott, K.C.*, *Ramsay* and *Watkins* for the respondent, Maharajkumar Bishwanath: On the natural interpretation of the Rule, the Court had jurisdiction. Chapter X provides for the working of the Court. The essence of the chapter is that the case shall be kept moving from the time it comes into Court till judgment. There is no reason for limiting the word 'default' to default within six months. It would not serve the purpose of the chapter if so limited. 'Default' is chosen as a word of wide significance. It means the failure of a party to carry out his duty to the Court.

(1) (1924) I. L. R. 51 Cal. 905. (2) (1930) I. L. R. 58 Cal. 736.
(3) (1930) A. O. C. 76 of 1930, decided Aug. 6.

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It is a purely relative term. In re *Young and Harston's Contract* (1).

Unless the present Rule is ambiguous, it ought to be construed without reference to the previous Rule. The word 'may' gives the Registrar a discretion. The matter is left quite open. He may act at any time.

*Cyril Radcliff, K.C.*, and *Sir Thomas Strangman* for the respondent, the Maharanee Rajbansi, associated themselves with what had been said for the other respondents.

*Gavin Simmonds, K. C.*, and *Jopling* for respondents Nos. 2, 3 and 4 : The evil aimed at in the Rule is abuse of process, delays. The Rule divides cases into two classes, those that have appeared in the Prospective List and those that have not. With the former there is no reason for a special rule, with the latter, it is imperative that the Court should have power to deal with the case. It is not a question of interpreting a penal statute, but of the Court protecting itself. There is no compulsion under the Rules to put the case in the Prospective List within six months, therefore the default is not confined merely to failure to appear in the Prospective List within six months. There must be many cases which cannot go into the Prospective List within six months. If, after the grant of time to take out a commission under r. 31 and the time expires and the plaintiff then says he does not want a commission, the Court may come to the conclusion that the application for a commission was made to delay the case and that the Court had been deceived. The Court could then deal with the case. Its hand is not tied. Assuming the Court had jurisdiction to dismiss the case, and that the trial Judge allowed not only proper, but improper considerations to influence his mind in exercising his discretion, the appellate Court may conclude that the trial

(1) (1885) 31 Ch. D. 168, 174.

Judge's decision was right without approving his reasons. It is not bound to dissociate itself from the reasons that are wrong. The appellant has not established what he is required to establish to justify interference with the discretion of the Court. Reference was made to the Code of Civil Procedure, s. 3; O. XI, r. 21; O. IX, r. 3, 6 and 8.

*Dunne, K. C.*, replied.

The judgment of their Lordships was delivered by

LORD THANKERTON. The appellant, who attained majority in 1923, filed the present suit on June 12, 1926, seeking to set aside a compromise decree passed in 1912 by the High Court of Judicature at Fort William in Bengal. On January 25, 1932, the appellant's suit was dismissed for want of prosecution by a judgment and order of the High Court passed in its original jurisdiction (Lort-Williams J.), which was affirmed on appeal by a judgment and order of the High Court dated July 11, 1932. Hence the present appeal.

The litigation is concerned with the title to the Dumraon *râj*, a large and important estate situated in the Shahabad district of the province of Bihar and Orissa and other places, and other properties pertaining to the *râj*.

In 1894, the then Maharaja of Dumraon, Sir Radha Prasad Singh, died, leaving no male issue, but leaving a widow, Maharanee Benee Prasad Kuari, and a daughter. By an authority executed and registered in 1889, which he confirmed by his will, the Maharaja had empowered his widow to adopt a son to him. On his death, the widow took possession of the estate, and held it until her death on December 13, 1907, when it was claimed on the one hand by the present appellant, who maintained that he had been duly adopted by the widow on the

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day before her death, and, on the other hand, by Keshava Prasad Singh, who, failing such adoption, was the next person entitled to the estate, and was the first respondent in the present appeal, but has since died, his representatives being substituted in his place.

The Court of Wards, in exercise of its powers under Bengal Act IX of 1879, made the appellant, who was then five years old, a ward of court and took possession of the estate on his behalf. Thereafter, in 1909, Keshava Prasad Singh instituted a suit in the Court of the Subordinate Judge of Shahabad to recover possession against the present appellant, J. B. Rutherford, Manager under the Court of Wards, as his guardian-*ad-litem*, and the Collector of Shahabad, as representing the Court of Wards. After trial, the Subordinate Judge, on August 12, 1910, decided against the adoption and made a decree in favour of Keshava Prasad Singh awarding him possession with mesne profits and costs.

In September, 1910, J. A. M. Wilson, who had succeeded J. B. Rutherford as manager and guardian-*ad-litem*, obtained the leave of the High Court to prosecute an appeal against the decision of the Subordinate Judge. Thereafter the Court of Wards made over the estate to Keshava Prasad Singh, the latter furnishing security in court. Mr. Rutherford became manager under the latter, and Angus Ogilvy was thereafter appointed guardian-*ad-litem* to the present appellant. The appeal came on for hearing before the High Court in April, 1912, but it was adjourned on a suggestion from the Bench that a settlement might be effected. A compromise was arranged among the parties and was submitted by the said Angus Ogilvy to the court, by which, after certain alterations, it was approved as for the benefit of the present appellant. On May 17, 1912, the compromise was filed as of record and a decree was made in terms thereof. This compromise

and decree forms the subject matter of the present suit, by which the appellant seeks to set it aside and to be remitted to his original rights so as to proceed with the appeal which was the subject of the compromise.

Under the compromise, the main terms were that the present appellant's adoption was negatived, and Keshava Prasad Singh was declared to be entitled to the estate, the Court of Wards was not to be liable for any monies spent prior to the handing over of the estate in September, 1910, and Keshava Prasad Singh was to pay a sum of rupees ten lakhs by ten annual instalments to the present appellant.

On July 30, 1923, the appellant attained the age of 21 years, and, having failed to obtain from the Collector of Shahabad and the Government authorities access to the correspondence and other papers relating to the compromise of 1912, he instituted the present suit on June 12, 1926. He impleaded as defendants (1) Keshava Prasad Singh, (2) the member constituting the Board of Revenue in Bihar and Orissa and as such forming the Court of Wards of the said province, (3) Mr. Murphy, I.C.S., who had been the Collector of Shahabad at the relevant times, and (4) the Collector of Shahabad as representing the Court of Wards. The defendants all duly entered appearance, and thereafter filed written statements. As already stated, the suit was dismissed for want of prosecution on January 25, 1932, under the Rules of the High Court, Original Side, 1914, of which the following rules from Chap. X are relevant to the present issue :—

6. There shall also be kept in the Registrar's office three lists of defended suits ripe for hearing, to be called:—

Prospective List A, for commercial causes.
Prospective List B, for liquidated claims.
Prospective List C, for other suits.

7. The attorney for any party or any party acting in person may, by requisition in writing to the Registrar, have a suit, other than a special suit, standing in the General Cause List, entered in its proper Prospective List, on the ground that it is ready to be heard and shall, at the same time, give notice to the opposite party or parties of such transfer :

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Provided that, where a written statement has been called for, no such requisition shall be made until, in the case of commercial suits or suits for liquidated claims the expiry of one week, and in other suits six weeks, after the filing or the expiry of the time or extended time fixed or prescribed for the filing of the written statements of the defendants appearing.

Where a suit is entered in any of the Prospective Lists, it shall, unless otherwise ordered by the Court or a Judge, be placed at the bottom of such list.

11. Where in any suit standing in any of the Prospective Lists a party dies, or where, except as provided in r. 13, the suit is stayed or postponed or ordered not to be taken before a certain date, the Registrar shall, on receipt by him of information in writing to that effect, cause the suit to be removed from such list, and notice thereof shall be given to the other parties by the party giving the information.

12. Where a suit has been removed from any of the Prospective Lists, it shall not, unless otherwise ordered by the Court or a Judge, be replaced therein without a further requisition under r. 7.

13. Where a day is specially fixed for the hearing of a suit, such suit shall be entered in the proper Prospective List, if not already standing therein, and a note shall be made in such list to the effect that the same will be taken on the day fixed, and such suit shall, unless otherwise specially ordered, be set down in the Peremptory List of defended suits for the day fixed for the hearing thereof, next after any part-heard suit or proceeding in such list.

19. From the Prospective Lists shall be taken, in turn, suits required for the Peremptory List of defended suits for each of the Courts, and except as otherwise provided by these rules, no suit or proceeding shall, unless otherwise ordered, be omitted from the Peremptory List in which it ought to be placed.

31. Unless otherwise ordered, a commission to examine witnesses issued in a suit or proceeding shall, until the return or the expiration of the time for the return thereof, operate as a stay of such suit or proceeding.

36. Suits and proceedings, which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their attorneys, to be dismissed for default, unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper.

At the time of its dismissal the suit had not yet entered the Prospective List, and the dismissal was in intended exercise of the discretionary power conferred by r. 36.

The appellant submitted two contentions to their Lordships. In the first place, he contended that the only default which justified dismissal under r. 36 was default during the first six months from the

date of institution, although subsequent conduct of the suit might affect the mind of the Court in deciding whether to exercise its discretion, and in the present case it was admitted that there was no default during the first six months. This argument raises a question of construction of r. 36. In the second place, failing his success on the first contention, he maintained that neither Court in India had properly exercised its discretion, and submitted that their Lordships should set aside their decision and allow him to proceed with his suit. It should be stated that the appellant did not challenge the rule as *ultra vires*, in view of the decision of the High Court in *Udoy Chand Pannalal* v. *Khetsidas Tilokchand* (1). Rule 36 was amended in 1922 by the deletion of an alternative ground of dismissal, but, in their Lordships' opinion, the rule should be construed as it now stands, without reference to its earlier form.

The appellant seeks to read the words "to be "dismissed for default" in r. 36 as if the default related solely to the failure to appear in the Prospective List within six months from the date of institution, while the respondents maintain that the default refers to failure to appear in the Prospective List before the date of the notice under the rule. The only cases referred to were *Haribux Shroff* v. *Dwijendramohan Ghosh* (2) and an unreported case of *Balkissen Das Ramkissen Das* v. *Hazarimull Sethia* (3), decided by the same Bench on the same day. Both these cases related to suits which had reached the Prospective List, after the six months, but before the date of the notice, though they had subsequently been taken out of it, and it was held that r. 36 no longer applied, once the suit had reached the Prospective List. These cases clearly decided that the material time at which the failure to appear in the Prospective List is to be looked for is when the suit is

(1) (1924) I. L. R. 51 Cal. 905. (2) (1930) I. L. R. 58 Cal. 736.
(3) (1930) A. O. C. 76 of 1930.

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placed before the Judge in Chambers. Their Lordships agree with these decisions; in their opinion, the six months provides a minimum period, on the lapse of which action may be taken under the rule, that the failure to appear in the Prospective List must be still continuing at the date of such action, and that the default in respect of which the suit is liable to dismissal, is such continuing failure, and that the conduct of the suit as from its institution up to the date of the action under the rule is proper matter for the consideration of the Judge. This question of construction does not appear to have been argued or considered in the Courts below, but their Lordships reject the contention of the appellant on this question.

The appellant's second contention raises the delicate question of the proper exercise of a judicial discretion, and it is clear that the appellant must satisfy this Board that both the Courts below have failed to exercise their discretion properly. Unless the appellant succeeds in that task, this Board will not be willing to disturb the conclusions of the Courts below. Shortly stated, the submission of the appellant is that both the Courts have improperly taken into account—in addition to the history of the suit itself—considerations which should have been excluded and which have no foundation in fact. In order to support this absence of foundation in fact, the appellant filed an application to this Board on December 18, 1934, for leave to file a supplemental printed book of papers, which did not form part of the record in this appeal. The application was ordered to stand over until the hearing of the appeal, each of the respondents to be at liberty to prepare a supplemental volume of any documents which they might desire to have before the Board, in the event of the appellant's application being successful. At the hearing of the appeal, their Lordships refused the application on the ground that no adequate reason had been shown by the appellant for adding to the record as settled in the appeal in India. The appellant will pay the costs of this

application and any costs properly incurred by the respondents under the liberty afforded to them as above mentioned.

Their Lordships find it unnecessary to restate in detail the history of the suit up to August, 1929, as no serious suggestion is made of any blameworthy delay on the appellant's part during that period. In August, 1929, as the result of material produced under discovery, the appellant sought and obtained leave to amend the plaint, the respondents being at liberty to file additional statements, if they so desired. On November 15, 1929, defendants Nos. 2 to 4 filed an additional written statement. On January 30, 1930, a notice was issued under r. 36 that the suit would be on the Special List to be taken in Chambers on Friday, February 14. Affidavits were filed by the parties; the suit was not set down in the Special List on February 14, but it was set down on February 21. On February 20, the appellant had served notice on the defendants of an application for a commission to examine witnesses. On February 21, the parties came before the Court, when the appellant asked for liberty to proceed with the suit, and the defendants asked for its dismissal. Lort-Williams J. adjourned the case for a month, and on March 27, when it was again set down, appellant's counsel asked that the suit should go out of the Special List, the defendants' counsel consented and the Court agreed.

About one year and ten months later, on January 19, 1932, a second notice was issued, under r. 36, intimating that the suit would be on the Special List to be taken in Chambers on Friday, January 22, 1932. The notice in fact is dated December 19, 1931, and, while this is probably an error, nothing material turns on it. While the defendant No. 1 had taken advantage of the liberty given to him to file an additional written statement on November 20, 1930, the appellant had taken no step in Court since

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March 27, 1930. The solicitors of defendant No. 1 had written to the Assistant Registrar on January 18, 1932, requesting that the suit should be placed on the Special List, and, in their Lordships' opinion, they were entitled to call the attention of the Court to the position of the suit.

On January 25, the appellant filed an affidavit, the material portion of which is as follows :—

2. Thereafter (*i.e.*, after March 27, 1930) an application was made for the issue of a commission. The said application stood over from time to time to suit the convenience of counsel of both the parties and the same has not yet been disposed of.

3. One Rai Bahadur Rameshwar Nathani, who was financing this suit, owing to certain difficulties in his business, has stopped doing so.

4. Since then I have been trying to secure another capitalist and with great difficulty I have succeeded in getting a person in Bombay. The necessary arrangement will be put through in a week's time and then I shall be in a position to go on with the suit.

On the same day an affidavit by the private secretary and attorney of defendant No. 1 was filed on the latter's behalf, the material portion of which is as follows :—

15. That the plaintiff is in impecunious circumstances and this suit has been filed by a gang of persons consisting of one Rameshwar Nathani, one Abdul Halim Guznavi and others who have entered into a champertous agreement in writing on February 8, 1926, in order to finance this suit and to divide the said *râj* amongst themselves in certain proportions.

16. That the main champerter Rameshwar Nathani is a heavy gambler and speculator in the Stock Exchange and Jute and Gunny *borâs*. He has incurred heavy losses and is in great difficulties.

On the same day, January 25, 1932, the matter was heard in Chambers by Lort-Williams J., who dismissed the suit with costs. In the judgment delivered by him the learned Judge, after narrating the history of the suit down to March 27, 1930, states as follows;—

Since that date, which is a year and ten months ago, nothing has been done. The only explanation which the plaintiff offers is that a certain person who was financing the suit has himself got into difficulties and has ceased to

do so. He says that now he has obtained another financier in Bombay, but does not mention his name. The defendant Maharaja of Dumraon states in his affidavit that the plaintiff is in impecunious circumstances and that the suit has been filed at the instance of a number of persons, some of whose names he gives and who, he alleges, have entered into a champertous agreement in writing on February 8, 1926, to finance this suit and divide the *râj* between them in certain proportions. He also alleges that one of these persons is a heavy gambler and speculator who has incurred heavy losses and is in great difficulty.

It is stated by counsel on behalf of the plaintiff that already two lakhs of rupees have been expended in costs and it is suggested that another lakh has been spent by the defendants. In my opinion, it is clear from these facts that this is not a suit which ought to be allowed to continue. As far as I can see the only persons who are getting any advantage out of it are the various lawyers engaged in it. Upon the face of it it appears to be a suit the main object of which is to harass the defendants, and in view of the fact that no steps have been taken since March 1930, the suit must be dismissed with costs.

It appears to their Lordships that r. 36 is mainly conceived in the public interest, as the defendants will usually be able to force progress under r. 7. Every litigant has the right to have his case heard and disposed of, but that right must not be abused, even though the defendant, for reasons of his own, is not anxious to complain of the plaintiff's delay. But the Court is not entitled to deprive the litigant of his right, except on clearly ascertained grounds, and to the exclusion of grounds which rest only on suspicion.

The history of the suit and its delays, the champertous agreement—which is lawful in India—and the financial difficulties of one of the parties to that agreement, along with the causes of those difficulties, rested on material which the learned Judge was entitled to take into consideration. But their Lordships are unable to find any material such as would justify the learned Judge in the very serious charge which he makes in the last two sentences of his judgment, and in their Lordships' opinion it was an unjustifiable and improper consideration to take into account in the judicial exercise of the discretionary power of dismissal under r. 36.

It appears that before January 19, 1932, when the notice was issued, a letter was received, which

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was dated December 8, 1931, and was addressed to the learned Judge and signed by a name, which cannot be identified as that of any real person. This letter is endorsed "Lort-Williams J.—Let this be kept with the records of the suit. S. Palsett. 17-12-31"; it was thus filed, but it was not brought to the notice of the parties, and did not become known to them till much later. In this letter the following passage occurs :—

> Of course you will be pleased to see from the records to what stage the case has reached, but it is purely a money making device of the Calcutta lawyers and attorneys for robbing the money from both the parties. These people do not like that the case should be either struck off or opened for final disposal, as their bread and butter will be taken away if the case is finally disposed of.

At the hearing of the application for special leave to appeal their Lordships thought right to request the learned Judge to inform them as to the precise history of this letter. In his reply to the Registrar, the learned Judge states that he has no recollection of the particular letter, but that it is his invariable rule, after ascertaining that any letter is written to him in his judicial capacity, to send it unread to the Registrar to take such action upon it as he may think fit. He further states that he can say, without hesitation, that the contents of the letter were unknown to him when he gave his decision, and that any expression used in his judgment which may suggest knowledge must have been based upon some similar statement appearing in the affidavits, or in the arguments of counsel. This makes clear that this letter did not form the foundation of the learned Judge's charges, dubious though such foundation would be. Their Lordships are unable to find anything in the affidavits to justify the charges, and, even if the arguments of counsel contained any such improper suggestion, which their Lordships do not assume, it would not justify its adoption by the Court. Their Lordships would add that while destruction would seem to be the more suitable method of dealing with such a letter, it would be better, if it is to be filed, that the parties should at once be informed of its existence.

Accordingly, their Lordships are of opinion that the learned Judge did not properly exercise his judicial discretion in the matter, and it becomes necessary to consider the decision of the appellate court. Rankin C. J., with whose judgment Ghose J. agreed, after referring to the history of the suit up to the order of March 27, 1930, states :—

> The result of that was that the plaintiff's case having become very stale the plaintiff got a most elaborate warning that it was necessary for him to take steps to be diligent, otherwise the suit would be regarded as a water-logged suit which the plaintiff did not intend to bring on for hearing and which he wanted to keep on the stocks for other purposes..... In my judgment, upon the facts of this case, the learned Judge has exercised his discretion under the rule very properly.

The appellate Court has thus identified itself with that which their Lordships hold to have been an improper exercise of judicial discretion and their decision must also be set aside.

It then remains for their Lordships to consider the exercise of the discretion conferred by r. 36. The appellant stated, as he had done before the appellate court, that he was ready to go to trial at once, on such terms as to costs and security for future costs as might be imposed. In view of the nature and history of the case, and the large amount of costs already incurred, along with the appellant's readiness to proceed forthwith to trial, their Lordships do not think that the public interest is sufficiently involved to lead to the deprival of the appellant's right as a litigant, and they are of opinion that he should be allowed to proceed, but on terms as to the period within which he is to have the suit entered on the Prospective List, failing which the suit will be dismissed, and as to costs incurred prior to the notice of January 19, 1932, and security for future costs—such terms to be settled by the High Court.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgments and orders of the High Court of January 25, 1932, in its Original Jurisdiction and of July 11,

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1932, in its Appellate Jurisdiction should be set aside, and that the suit should be remanded to the High Court to allow the appellant to proceed with the suit, under such terms as the High Court shall think fit to impose as to the time within which he is to have the suit entered in the Prospective List, failing which the suit will be dismissed, and as to the costs incurred prior to the notice of January 19, 1932, and as to security for future costs. The appellant will have the costs of this appeal, except those relating to the application of December 18, 1934. These must be paid, as stated, to the respondents and there must be a set-off respecting them. The appellant will also have the cost of the proceedings in the Courts below since the notice of January 19, 1932.

Solicitors for appellant: *Douglas Grant & Dold.*

Solicitors for respondents Nos. 1(a), 1(b) and Maharanee Rajbansi Koer: *Watkins & Hunter.*

Solicitor for respondents Nos. 2 to 4: The *Solicitor, India Office.*

C. S.