

[217] APPELLATE CIVIL.

The 30th September, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND
MR. JUSTICE KINDERSLEY.

Andrew Anthony.....(Plaintiff) Appellant
and
The Rev. J. M. Dupont.....(Second Defendant) Respondent.*

Specific Relief Act, Section 9—Rehearing—Review—Civil Procedure Code, Section 622.

Section 9 of the Specific Relief Act does not prohibit a rehearing under Section 105 of the Code of Civil Procedure.

A rehearing differs widely from a review.

A High Court can interfere under Section 622 of the Code of Civil Procedure without an application made to it by a party to the suit.

THIS was a case referred for the decision of the High Court under Section 617 of the Code of Civil Procedure by the District Judge of Ganjam in the following terms :—

“ The plaintiff instituted a suit under Section 9† of the Specific Relief Act to recover five villages, from which he alleged that he had been illegally dispossessed.

“ On 3rd February 1881, upon an adjourned hearing, the plaintiff did not appear either in person or by pleader, and the suit was dismissed under Sections 102, 157 of the Code of Civil Procedure.

“ The plaintiff applied on 28th February 1881 for an order to set the dismissal aside, on the ground that he was in jail (under a sentence reversed subsequently) and his pleader was on leave.

“ The Munsiff (9th April 1881) considered there was sufficient cause for his non-appearance, set aside the order of dismissal (Section 103‡), and appointed a day for proceeding with the case.

* Referred Case 12 of 1881 stated by J. R. Daniel, District Judge of Ganjam, in Civil Miscellaneous Appeal 164 of 1881.

†[Sec. 9 :—If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit. . . .

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.]

[‡Sec. 103 :—When a suit is wholly or partially dismissed under this Section, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside ; and if it be proved that he was prevented by any sufficient cause from appearing when the suit was called on for

hearing, the Court shall set aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

No order shall be made under the second paragraph of this Section unless the plaintiff has served the defendant with notice in writing of his application.]

“The case came on for hearing on June 22nd, and during the examination of the witnesses the defendant’s pleader drew the Munsif’s attention to the provision of Section 9 of the Specific Relief Act, ‘nor shall any review of any such order or decree be allowed.’

“The Munsif then cancelled his order under Section 103 and restored the former order, dismissing the suit for non-appearance.

[218] “The plaintiff appeals against this last order of the Munsif, but though I am of opinion that the order is wrong, Section 9, Specific Relief Act, provides that no appeal shall lie from any order or decree passed in any suit instituted under this section, and I cannot reverse the order in appeal.

“In my opinion an application under Section 103 to set aside an order of dismissal is not an application for review within the meaning of Section 9, Specific Relief Act; the first order of the Munsif was therefore right, and in cancelling that order I think the Munsif has acted illegally, and the case will be referred together with the record for the orders of the High Court.’

Mr. *Shaw* for the Defendants.

There was no appearance for the Plaintiff.

The argument appears in the Judgment of the Court (TURNER, C.J., and KINDERSLEY, J.) which was delivered by TURNER, C.J.

Judgment.—The learned Counsel for the defendants properly objects that as the Judge was, and held himself to be, precluded from entertaining the appeal, he could not make a reference under Section 617, Civil Procedure Code.

This is clear. The question then arises whether this Court cannot interfere under Section 622, Civil Procedure Code, without an application from a party. In all probability the party aggrieved has abstained from action owing to the action taken by the Judge. There is nothing to limit the power conferred by Section 622 to cases in which there is an application by a party.

The Judge having brought to our notice what he believes to be a grave error in the procedure of the Court of First Instance, we conceive we are at liberty to consider the point, and, if necessary, to interfere to correct the error. We are not prepared to hold that an application for a rehearing under Section 103, Civil Procedure Code, is prohibited by the terms of Section 9 of the Specific Relief Act. A rehearing differs widely from a review, in that in the latter case there has been a determination of the claim advanced, in the former there has not. We shall, therefore, set aside the order of 22nd June 1881, and direct the Munsif to proceed.

Ordered accordingly.