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constituted two acts so connected together as to form part of one and the same transaction. Even if Babu Ram had been on his trial only in respect of the false claim preferred against Musammat Ganga Dei, the evidence given by Badri Prasad would have been relevant under more than one section of the Indian Evidence Act.

Sentence reduced.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1919. *June*, 26.

ABDUL AZIZ (DEFENDANT) *v.* SHEKHAR CHAND (PLAINTIFF.)*

Civil Procedure Code (1908), section 115—Jurisdiction—Revision—Powers of High Court.

A Munsif, having before him a suit on a promissory note, first passed an order (illegal in the circumstances of the case) dismissing the suit for want of prosecution. On this a decree followed, which was signed by the Munsif. Subsequently, the Munsif cancelled his first order and decree, and, having reinstated the suit, fixed a day for its hearing. On that date the plaintiff appeared and tendered some evidence, but the defendant did not appear. The Munsif thereupon passed a decree in favour of the plaintiff *ex parte*.

Held, on application by the defendant for revision of the Munsif's second order reinstating the suit, that the High Court had the power and ought to set aside, not only the order complained of, but all the proceedings of the Munsif and restore the suit to its original position. *Hingu Singh* v. *Jhuri Singh* (1) and *Gobind Singh* v. *Kalayn Dass*, (2) referred to.

THIS was an application in revision against an order passed by the Munsif of Nagina cancelling a previous order dismissing a suit "for default," and fixing a date for its hearing. The facts of the case are fully set forth in the order of the Court.

Mr. *S. A. Haidar*, for the applicant.

Dr. *Surendra Nath Sen*, for the opposite party.

PIGGOTT and WALSH, JJ.:—This was a suit on a promissory note. We find that three issues were framed as to which we should not have been prepared to say that there was not one issue at least on which the burden of proof would in the ordinary course of things lie on the plaintiff. However that may be, the learned Munsif who framed the issues recorded at the time a

* Civil Revision No. 129 of 1918.

(1) (1918) I. L. R., 40 All., 590. (2) (1916) 15 A. L. J., 24.

note to the effect that the burden of proof was placed on the defendant. He then fixed the 13th of June, 1918, for the hearing. On that date the plaintiff was present in person and the defendant was represented by pleader. The plaintiff in effect asked for an adjournment of the hearing, on the grounnd that his witnesses were not present. The defendant's pleader made a statement to the effect that his witnesses also were not present. The court refused to grant an adjournment. On this state of facts it is beyond question that the learned Munsif's duty was to take into consideration the plaint and the written statement and the frame of the issues. He would also have had jurisdiction, if he thought proper, to re-consider the note made by his predecessor in office, to the effect that the burden of proof was laid on the defendant, although it is reasonable to add that, if he had taken it upon himself to re-consider that point, it would have formed a strong argument against his decision to refuse an adjournment, because it would be tantamount to deciding that the parties had been misled as to their position by his predecessor's order. However, the learned Munsif adopted neither of these courses. He came to the conclusion, erroneously beyond question, that the suit was liable to dismissal for want of prosecution on the part of the plaintiff. He passed an order to that effect. Five days later a decree was prepared in accordance with that judgment and was signed by the Munsif. In the meantime however, other things had happened. On that same date, namely the 13th of June, 1918, the plaintiff re-appeared in court, this time accompanied by his pleader. An affidavit was put in, which in itself contained nothing very material; but the point of the proceeding was that pleader for the plaintiff now called the attention of the learned Munsif to his predecessor's order by which the burden of proof on the issues had been laid upon the defendant. The learned Munsif then came to the conclusion that his order dismissing the suit for want of prosecution was a bad order and he took it upon himself to endeavour to correct the mistake. He treated the application made to him by the plaintiff, through his pleader, as an application for setting aside an *ex parte* order. He took cognizance of it there and then, in the presence of the defendant's

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pleader, and passed an order setting aside his previous order of the same date, and granted the adjournment which he was probably ill-advised to have refused, fixing the 2nd of July, 1918, for the trial of the issues on the merits. We are informed that, on some subsequent date, the suit came up for trial, but the defendant did not appear. The plaintiff tendered sufficient evidence to justify an *ex parte* decree in his favour and such decree has been passed. In the meantime the defendant had presented before this Court the application in revision with which we are now dealing. The defendant's contention is that the second order of the 13th of June, 1918, was wholly without jurisdiction and is liable to be set aside. In our opinion, as we have already pointed out, the learned Munsif began by misunderstanding the position of the parties and the law applicable to that position. Under this double mistake he passed an order dismissing the suit, which, as it stands, is a bad order, for it purports to be a dismissal of the suit for want of prosecution, and no order to that effect could legally have been passed in the position in which the parties stood. In an endeavour to correct this mistake the learned Munsif has committed another one. His second order of the 13th of June, 1918, is also a bad order and liable to be reversed by this Court in revision. On behalf of the applicant stress has been laid on one of the latest reported decisions of this Court, the case of *Hingu Singh* v. *Jhuri Singh* (1). That was a first appeal from order, and the jurisdiction of this Court was limited by its jurisdiction in dealing with appeals from orders. The only point decided in that case, which is relevant to the case now before us, is authority for the proposition that the first order passed by the learned Munsif on the 13th of June, 1918, although in form purporting to be an order dismissing the plaintiff's suit for default, had nevertheless in law the effect of a dismissal of the suit on the merits. It is this which makes the Munsif's second order of the 13th of June, 1918, a bad order in law. Now the question is, what ought this Court to do on the above state of facts? The applicant wishes us to set aside the second of the two orders passed by the court below and to leave him the full benefit of

(1) (1918) I. L. R., 40 All., 590.

the erroneous decree dismissing the suit for default passed earlier on the same date. The jurisdiction of this Court in revision can only be limited by the words of section 115 itself. This Court has called for the record of this case, which has been decided by a court of subordinate jurisdiction, namely, the court of a Munsif. We have found, on examining the record, that the learned Munsif has acted in the exercise of his jurisdiction with material irregularity and has acted without jurisdiction in this attempt to correct the first erroneous order. The result is that we have power to make such order in the case as we think fit. We readily concede to the learned counsel for the applicant that our order must be based upon legal principles and must be directed towards the interests of justice. Looking at the matter from this point of view, we are satisfied that the only correct order for us to pass is one setting aside all the orders passed by the learned Munsif, beginning with his order and decree of the 13th of June, 1918, dismissing for want of prosecution a suit in which both parties were present before him. We set aside, first of all, the *ex parte* decree which has since been passed in favour of the plaintiff. We also set aside the order in respect of which this application in revision has been made, namely, the second order of the 13th of June, 1918. We also set aside the erroneous order and the decree passed earlier on the same date, by which the plaintiff's suit was dismissed for want of prosecution. A similar order was made by this Court in *Gobind Singh* v. *Kalyan Dass* (1). The result is that the record of the suit will go back to the trial court, to be tried on the merits on the issues originally framed, after due notice to both parties of the date fixed for trial. It is of course open to the trial court to amend the issues, or to fix further issues, if it thinks necessary; but the suit must be tried on the merits. The costs hitherto incurred by both parties will abide the result of the suit.

Appeal decreed.

(1) (1916) 15 A. L. J., 24.