APPELLATE CIVIL.

Before Mr. Justice Carr.

1928
Feb. 7.

A. T. K. P. L. M. MUTHU PILLAY
v.
LAKSHMINARAYAN.*

Review, grounds for—Disposal of suit on a date not notified to parties—Civil Procedure Code (Act V of 1908), O. 9, r. 9 ; O. 43, r. 1 (w) ; O. 47, rr. 1, 7—Period of limitation—Appeal against order granting application for review.

Where a Court dismisses a suit for default of appearance of the plaintiff on a date which the Court under a mistake supposes to be fixed for the attendance of the parties and supposes that the plaintiff was so notified when he was not, and is under a misapprehension that the case was privately settled between the parties, *held* that an application for review would lie under such circumstances. Although a review application would not lie against an order dismissing a suit for default when no application had been made under O. 9, r. 9 of the Civil Procedure Code within the period of time allowed, such a rule would not apply and the party would not be restricted to such period in a case like this where the plaintiff could not be expected to know immediately the dismissal of his suit. *Held also* that an appeal lies from an order admitting an application for review, but such appeal is restricted to the three cases mentioned in O. 47, r. 7 (1).

Chajju Ram v. *Neki*, 3 Lah. 127 ; *Mahadeo* v. *Lakshminarayan*, 49 Bom. 839—*distinguished.*

Anklesaria for the applicant.

Sein Tun Aung for the respondent.

CARR, J.—This arises out of Civil Regular Suit No. 40 of 1926 of the Subdivisional Court of Akyab in which the present respondent was the plaintiff and the petitioner the defendant. In the Diary of that suit under date 27th January 1927 the Judge passed an order sending the proceedings to arbitrators agreed upon by the parties and directing them to submit their award on or before the 4th of February 1927. On turning next to page 39 of the Process

* Civil Revision No. 302 of 1927 against the order of the District Court of Akyab in Civil Appeal No. 60 of 1927.

Record I find a letter dated 4th February in which the arbitrators asked for an extension of time of seven days. This was granted by an order written on the letter. Again on page 38 is a similar letter dated 11th February again asking for seven days' extension of time. This again was granted in the same way. Next on page 37 there is a letter from the arbitrators dated 21st February in which they say that they are informed that the parties have agreed to an amicable settlement of the case and that they therefore return the records. Whether any further extension of time had been asked for or granted on the 18th of February does not appear from the record nor are there any intermediate entries made in the Diary. On the 25th of February the case was called up and there is the following entry: "Arbitrators report that the parties have come to terms. Chowdhry absent. Das present. Suit dismissed for default with costs. Proceedings received only to-day."

Mr. Chowdhry was the pleader for the plaintiff and Mr. Das was for the defendant. In the Diary entry the date "25th February" of the dismissal has been altered, but it is not suggested that the "25th" was not the date on which the actual order was passed. But the previous Diary entry fixing the case for the 4th February has been altered by the figures "25" being written over the figure "4". It is necessary to refer to another paper to be found on page 36 of the Process File. This is a letter to the Judge purporting to be from the plaintiff and signed by him in which he states that he withdraws the case because it has been settled by the parties. How this letter came into the hands of the Court there is nothing to show.

On the 2nd May, that is, more than two months after the dismissal of the suit, the plaintiff filed an

1928

A.T.K.P.L.M. MUTHU PILLAY v. LAKSHMI-NARAYAN.

CARR, J.

application for review of the order dimissing his suit. In this application it was alleged that the plaintiff's agent was all along under the impression that the case was still with the arbitrators and that he did not hear of the dismissal of the suit till the 8th of April. He submitted that the 25th February was not the day fixed for the hearing of the case or for the attendance of the parties, and that his absence on that day did not constitute a default as contemplated by Order IX, rule 8 of the Civil Procedure Code. He added that the Court apparently was under the impression when it dismissed the suit that the parties had been informed of the date fixed and required to attend on that day.

In paragraph 3 of the application it was stated that on or about the 25th of February the plaintiff's agent had signed a paper brought to him by a durwan of Mr. Muthia Chettyar, apparently one of the arbitrators, which he could not read presumably because it was in English, and that he signed it thinking that it was merely some matter connected with the arbitration. The Subdivisional Judge allowed the application and set aside the order of dismissal of the suit.

On appeal the District Judge held that no appeal would lie except on the ground set out in Order 47, rule 7 of the Civil Procedure Code. In this application it is contended firstly that a review application did not lie; and secondly, that if it did lie there was a right of appeal to the District Court under Order 43, rule 1 (*w*) of the Civil Procedure Code.

On the question whether an appeal lay to the the District Court there is some difference of opinion between the High Courts but I think that the weight of authority is in favour of the view taken by the District Judge. I see no reason for interference in this respect.

As to the question whether an application for review was admissible there was prior to the decision of the Privy Council case *Chajju Ram* v. *Neki* (1), a considerable amount of authority in support of the view that a review application would lie against an order dismissing a suit for default when no application had been made under Order 9, rule 9 within the time allowed. But on this question since the decision by the Privy Council in the above-mentioned case, the Bombay High Court has held in *Mahadeo Govind Wadkar* v. *Lakshminarayan Ramratan Marwadi* (2), that under that decision such an application for review would not lie. I do not propose to discuss this general question; but it seems to me that on the facts of this particular case an application for review would lie. Considering the facts already mentioned it would seem clear that the Judge, when he passed the order, was under some misapprehension as to the facts. So far as the record goes the parties had never been directed to attend on the 25th of February and, in the absence of any such direction, the Court certainly had no power to dismiss the suit, and in the absence of any such direction it could not be expected that the plaintiff would immediately come to know of the dismissal of the suit. It would obviously therefore be unjust to restrict him to an application made within the time allowed for an application under Order 9, rule 9, the period of the limitation for which commences at the time at which the order is passed.

Section 5 of the Limitation Act does not apply to such an application and apparently no extension period could be allowed on the ground that the application did not come under Order 9, rule 9

(1) (1922) 49 I.A. 144; 3 Lah. 127. (2) (1925) 49 Bom. 839.

1928

A.T.K.P.L.M. MUTHU PILLAY v. LAKSHMI-NARAYAN.

CARR, J.

until his right to apply to set it aside had become time-barred. In my opinion an application for review does lie in the present case because it appears from the record that the Judge when he dismissed the suit did so under a misapprehension of the actual facts. There is, therefore, I think ground for review which falls within the terms of Order 47, rule 1, and, therefore, in this particular case I think that the application was rightly admitted. But I do not think that the question should be allowed to rest here. From the correspondence referred to there appear to be grounds for believing that the parties had, in fact, come to some settlement and I think that before proceeding to try the case on the merits the Judge should proceed to enquire into the facts of what occurred at that time, whether a settlement was, in fact, agreed upon and, if so, what its terms were. If there was a settlement agreed to by both parties the settlement should be enforced, and it would not be necessary to hear the parties on the original issues raised in the suit. I find, therefore, no sufficient reason for interference with the order of the Subdivisional Court setting aside the dismissal order of the suit but I direct that before proceeding with the hearing of the suit on the merits the Subdivisional Court should hear the parties on the question of what happened between the 27th January and the 25th of February and should make such enquiry as seems to it necessary to determine whether the suit should be decided on the merits of the original pleadings or otherwise. In the circumstances I pass no order as to the costs of this application.