

Hingo Singh and ors. Vs. Jhuri Singh and ors.

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SooperKanoon Citation : sooperkanoon.com/467290

Court : Allahabad

Decided On : Apr-30-1918

Reported in : AIR1918All333; 46Ind.Cas.390

Judge : P.C. Banerji and ;Abdul Raoof, J.

Appellant : Hingo Singh and ors.

Respondent : Jhuri Singh and ors.

Judgement :

1. This is a somewhat unfortunate case. The facts which have given rise to it are as follows. The plaintiffs, who are six in number, brought a suit for the same relief which they have claimed in the present suit. That case was taken up for hearing and one of the plaintiffs was examined. The parties then informed the Court that they would abide by the deposition of a particular person, A date was fixed and on that date the person named appeared but refused to make any statement. Thereupon the case was postponed and the 15th of September 1914 was fixed for hearing and the parties were ordered to produce their evidence on that date. On the 15th of September 1914, when the case was called on for hearing, the defendants or their Pleader did not appear. The plaintiffs' Pleader also did not appear. One of the plaintiffs Jhuri Singh was present but he did not 'prosecute the suit', by which we understand the trial Court to mean that he adduced no evidence. Thereupon the Court made an order dismissing the suit 'for want of prosecution' (ba adam-pairawi). The plaintiffs applied to have this dismissal set aside but their

application was refused on the ground that their remedy was a separate suit. They thereupon instituted the present suit for the same reliefs. The Court of first instance dismissed it on the ground that the suit was not maintainable in view of the dismissal of the former suit. It held that the dismissal must be deemed to be a dismissal on the merits under Order XVII, Rule 3 of the Code of Civil Procedure, and, therefore, a subsequent suit could not be maintained. This decision of the Court of first instance was reversed by the lower Appellate Court, which was of opinion that Order XVII, Rule 2 of the Code of Civil Procedure, was applicable to the case and that the suit was maintainable. That Court accordingly remanded the case to the Court of first instance. From this order of remand the present appeal has been filed.

2. The question we have to consider is, whether under the circumstances mentioned above, a second suit is maintainable. It is clear that on the date which was fixed for the hearing of the former suit, namely, on the 15th of September 1914, what the Court had to do, when it took up the case, was to ascertain whether the parties were present and which of them. After this the Court had to take action under the provisions of Order IX. If neither party was present it had to dismiss the suit under Rule 3 of that Order. In that case the remedy of the plaintiffs would be either to apply to have the suit restored or to bring a fresh suit on the same cause of action, if not barred by limitation. If the plaintiffs were present and the defendants were absent, the Court had to proceed under Rule 6 and hear the case ex parte. If the plaintiffs were absent and the defendants were present, it had to proceed under Rule 8 and decide the case accordingly. In the present case one of the plaintiffs Jhuri Singh was, as stated above, present and this is also stated in the judgment of the Court which heard the first suit. It has been found in this suit and the finding was never impugned, that he was the general attorney of all the other plaintiffs. Therefore, we must take it that all the plaintiffs were present before the Court, through Jhuri Singh, who appeared for himself and represented the other plaintiffs as their general attorney. As the plaintiffs were present, the Court could not take action under Rule 3 and the only rule under which it could proceed was Rule 6. In proceeding under Rule 6 it had to consider whether the plaintiffs' case was proved and it could either decree the claim or dismiss it. In the present case the Court dismissed the claim. We must hold that the case was dismissed

under Order IX, Rule 6, because the plaintiffs did not satisfy the Court by the evidence on the record or any evidence which they might have produced that their case was a true one. The Court, it is true, did not say that it dismissed the suit because no evidence was adduced which satisfied the Court that the claim was a true one, but the Court said that there was an absence of prosecution. These words can only be understood as meaning that the plaintiffs did nothing to support their claim, that is to say, that there was no evidence which established the claim. The Court's action could only be under Order XVII, Rule 3, that is to say, the Court decided the case upon the materials before it. We are unable to hold that under these circumstances the suit must be deemed to have been dismissed under Order XVII, Rule 2, read with Order IX, Rule 3. It was not a case in which the plaintiffs were absent nor was it a case in which the plaintiffs' Pleader was present but had no instructions. If Rule 3 of Order IX had applied, the plaintiffs certainly would have been entitled to bring a fresh suit. As that rule, under the circumstances of the present case, could not apply, the dismissal can only be regarded as one on the merits and thus bars the institution of a fresh suit. It is true that when an application was made to the Court to restore the suit to its original number, the Court seemed to think the dismissal was one under Order IX, Rule 3, but as has already been pointed out, that dismissal as a matter of fact was not and could not be one under Order IX, Rule 3, and, therefore no application could be made under Rule 4 of that Order. We think that the view taken by the Court of first instance was right. We accordingly allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs.