

Durga Dass Vs. Smt. Gitan Devi and ors.

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Court : Himachal Pradesh

Decided On : Jun-20-1977

Reported in : AIR1977HP65

Judge : R.S. Pathak, C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 10

Appeal No. : Civil Revn. No. 15 of 1976

Appellant : Durga Dass

Respondent : Smt. Gitan Devi and ors.

Advocate for Def. : K.D. Sud, Adv.

Advocate for Pet/Ap. : R.K. Sharma, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

R.S. Pathak, C.J.

1. This is a defendants' revision petition against an order of the learned Senior Subordinate Judge, Hamirpur, refusing to stay a suit under Section 10, Code of Civil Procedure.

2. An application under Section 10 of the Code of Civil Procedure was made by the defendants in the suit alleging that the matter in issue in the suit was also directly and substantially in issue in a previously instituted suit and therefore the subsequent suit should be stayed. The learned Senior Subordinate Judge by the order dated February 5, 1976, rejected the application on the ground that inasmuch as the previously instituted suit had been disposed of by the trial Court it could not be described as a pending suit and the mere circumstance that a Letters Patent appeal had arisen out of that suit and was pending was of no significance. The present revision petition is directed against that order.

3. It is difficult to accept the view taken by the learned Senior Subordinate Judge. In *S. P. A. Annamalai Chetty v. B.A. Thornhill*, AIR 1931 PC 263 the Privy Council laid down that 'where an appeal lies the finality of the decree, on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata* between the parties'. In other words the controversy raised in the suit remains pending in appeal or, as is sometimes said, an appeal is a continuation of the suit. In the circumstances, I would have allowed the revision petition. But, unfortunately for the petitioner, there is no material on the record to show that the matter in issue in the present suit is also directly and substantially in issue in the previously instituted suit. There is no copy of the plaint, written statement and the issues pertaining to the earlier suit. There is no other material to indicate what was the matter in issue in that suit. Therefore, even if the present revision petition is allowed, the application under Section 10 of the Code cannot succeed. It must fail for want of supporting material. This is not a case calling for interference.

4. In the circumstances, the revision petition fails and is dismissed. But there is no order as to costs.