CALCUTTA HIGH COURT

Debendra Nath Dutt

Vs

Satyabala Dasi

(P Mukharji ,J.)

21.09.1949

JUDGMENT

P.B. Mukharji, J.

1. This is an application made by a notice of motion. The notice of motion is taken out by the attorney for the plaintiff and is dated 19th August 1949. By special leave the notice of motion was made returnable for 22nd August 1949, The notice of motion asks for the following reliefs :

> "1. Order getting aside the order of dismissal dated 5th May 1949.
>
> 2. Restoration of the suit for hearing.
>
> 3. If necessary, extension of time for making this application."

2. On the day when special leave was asked from the Court to make the notice of motion returnable on 22nd August 1949 the application was not noted as made on that date when the application came on the list on22nd August 1949 the plaintiff did not have the application noted as made even on that date. On 22nd August 1949 directions were obtained from this Court for filing affidavits. Time was taken to file affidavit in opposition by Tuesday week i. e., 30th August 1949 and to file affidavit in reply by the following Monday, i. e., 5th September 1949 and the application remained adjourned for hearing till 6th September 1949 when adjournment was asked, for and granted till the following Tuesday i. e. 13th September 1949. Even on 6th September when the motion was on the list the applicant did not have the motion noted as made on that date. When the motion appeared on the list on 13th September, it was again adjourned at the instance of the parties till the following Friday, 16th September 1949. The application was heard on 16th September 1949. I have stated in detail the career of this motion because an important point of limitation has been raised in defence to this application.

3. The facts giving rise to this application may be stated briefly.

4. This is a liquidated claim and the suit was instituted by the plaintiff on 1st December 1946. Plaintiff claimed in the suit the recovery of the sum of Rs. 2,570-1-6 alleged to be due on a hatchita. The hatchita was executed by the father of defendant 1 Kartick Chandra Nayak Saha as early as 9th January 1938. The drawer of the promissory note died in June 1946. The plaintiff filed the suit against the widow and the other minor sons of the deceased drawer. The suit appeared in the prospective list from 11th March 1948 and continued in the Prosective List for over a year till 30th April 1949. Under Chap. 10, Rule 7 of the Original Side Rules of this Court a suit is placed on the prospective list when it is ready to be heard, which, in my opinion, means when inspection, discovery and translation of documents have all been completed.

5. On 4th May 1949, the suit appeared in the warning list of liquidated claims of Sinha J. On 5th May 1949, the suit appeared in my daily list of liquidated claims for disposal. It was called on twice. On the first call no one appeared for the plaintiff when it was passed over. On the second call also, nobody appeared for the plaintiff. On both these occasions defendant 1 and his counsel were present. On the second call when no one appeared Mr. S. Sinha learned advocate for defendant 1 asked for the dismissal of the suit. The suit was accordingly dismissed and I consider the provision of Order 9, Rule 8, Civil P. C., to be mandatory.

6. On behalf of the plaintiff, this application is now made to set aside that order of dismissal which was made on 5th May 1949. In support of the notice of motion the only ground used is an affidavit of one Kanai Lal Chatterjee affirmed on 19th August 1949. The said Kanailal Chatterjee is a court clerk of the attorney for the plaintiff. The case made in his said affidavit may be summarised as follows :

(i) He did not know that the suit had been dismissed for default on 5th May 1949. The Court closed for the summer holidays after 14th Hay 1949 and re-opened on 15th June 1949.

(ii) Between 4th May 1949 when he saw the suit appearing on the warning list of Sinha J. and until 14th May 1949 when the Court closed for the summer holidays apparently no interest was taken in this suit. It is stated in para. 6 of the said affidavit the suit did not appear on the warning list or the prospective list of Sinha J.

(iii) After the Court reopened on 15th June 1949, he thought that the omission of the suit from the list was due to some reason or other and that the same would reappear on the warning list in due course and it is stated in paras. 7 and 9 of his affidavit that he was under the "impression" that the suit went out of the list through mistake or inadvertence. No reason or cause is given as to why he should have that impossible "impression".

(iv) That after the Court reopened on 16th June 1949 he gave requisition to the Registrar for

translation of three vernacular documents which the plaintiff had disclosed in his affidavit of documents.

(v) On 8th August 1949, the plaintiffs' younger brother Babu Ballav Dutt called at the office of the attorney for the plaintiff and made enquiries as to when the suit was expected to be heard, "although there is no supporting affidavit from Dutt. Thereafter be went to make enquiries at the court-office to put the suit in the warning list when he came to learn from the department of this Court that the suit had been dismissed for default on 5th May 1949. This enquiry according to para. 11 of his affidavit was made on 11th August 1949 so that the knowledge of the dismissal of the suit on 5th May 1949 was gathered on 11th August 1949.

(vi) It is said in para. 13 of his affidavit that although the names of the parties and the cause title in the suit were correctly set out the registered number of the suit and the respective names of the solicitors were not correctly set out in the daily list of 5th May 1949.

(vii) The notice of motion was taken out as I have said before on 19th August 1949.

7. Mr. S. Sinha, learned advocate appearing for the respondent, has urged before me that the application is out of time and barred by Article 163, Limitation Act, and should therefore be dismissed. His argument is that the dismissal of the suit for default of the plaintiffs' appearance made on 5th May 1949, was under Order 9, Rule 8, Civil P. C., when a suit is so dismissed under Order 9 Rule 8 the Code provides by specific provision how the suit is to be restored. That provision is contained in Order 9, Rule 9 of the Code which gives the plaintiff the right to apply for an order to set the dismissal aside on sufficient cause being shown for his non-appearance. According to Mr. Sinha this application is and must be treated under Order 9, Rule 9 of the Code and Article 163, Limitation Act provides that such an application should be made within 30 days from the date of dismissal. Unlike Article 164, Limitation Act, Article 163, Limitation Act, in my opinion, makes it clear that the starting point of limitation is the date of dismissal and not the date when the applicant has knowledge of the dismissal. The dismissal having taken place on 5th May 1949 and the notice of motion being dated 19th August 1949 the applicant is clearly out of time.

8. Mr. Sinha's further argument is that even assuming that time runs from the date of knowledge of the dismissal which is stated in the affidavit to be 11th August 1919 this application not having been actually "moved" before 16th September 1949 and it not having been "noted" as made on any date within 30 days from 11th August 1949, is in any event barred by limitation.

9. Mr. P. P. Ghose, learned counsel for the applicant, has submitted before me that Rules 8 and 9 of Order 9, Civil P. C., are not applicable to the original side of this Court. He has relied on the

well known decision of the Court of appeal of this Court S. N, Banerjee v. S. Surhawardy, , where learned Chief Justice Rankin holds that Order 9, Rule 13, Civil P. C., is couched in a language which indicates that a practice different from that which obtains from the original side of the High Court was in the contemplation of Order 9, Rule 13. Although this case does not turn on the interpretation of Order 9, Rule 13, Mr. Ghose has argued on a parity of reasoning that for the same reasons I should hold Rule 8 and Rule 9 of Order 9 of the Code are not applicable to the original side.

10. His next submission is that it is open to me to treat this application for restoration as within the inherent jurisdiction of this Court and such application should be treated as one tinder Section 151 of the Code. In that event Mr. Ghose argues that Article 163, Limitation Act, does not apply.

11. Both these arguments of Mr. Ghosh require careful consideration.

12. The decision in S. N. Bannerjee v. H. S. Suhrawardy , being a decision of the Court of Appeal is binding on me on the point it decides. But unfortunately for the applicant, that is not a decision on Order 9, Rule 8 or Rule 9 and it does not deal with or decide the question of Article 163, Limitation Act. This decision is therefore distinguishable from the present case. The Court of appeal in that case was concerned with Order 9, Rule 13 and with an application by the defendant and not by the plaintiff. The question therefore before me in the present application is not concluded by the decision of the Court of appeal. Although at the bar attention was drawn to Order 49, Rule 3 of the Code *S. N. Banerjee v. H. S. Suhrawardy*[1]*,* at p. 13 and , it is unfortunate that the decision of the Court of appeal contains no discussion as to how that point is met in the judgment. The judgment of the Court of appeal as reported in the authorised report does not state the reason why inspire of Order 49, Rule 3 of the Code it was held that Order 9, Rule 13 of the Code did not apply to the original side.

13. It has been observed in that judgment that Order 9, Rule 13 "is directed in terms to a different practice from that which obtains on the original side of the High Court because of the Words "appearing when the suit was called for hearing" in Order 9, Rule 13. But there again it appears from the judgment that the provisions of Rules 1 and 2 of Order 3, Civil P. C., which provide for appearance under the Code through agents and solicitors holding power of attorney escaped the notice of the Court of appeal.

14. This judgment proceeds to deal with the difference between the mode of appearance in the Districts (moffusil) and the original side of this Court and the decision there arrived at that Order 9 Rule 13 of the Code does not in terms apply to the original side appears to have been reached inter alia on account of that difference. It is necessary however to observe that in the case before the Appeal Court no appearance was entered unlike the present case before me where not only

appearance has been entered but also written statement has been filed. On that ground also, this present case is distinguishable and therefore it would still remain to be decided in future whether in such a case the terms of Order 9 Rule 13 of the Code would apply to the original side.

15. At the same time, I find nothing under the Rules on the original side which can be said to prevent the party from appearing when a suit is called on for hearing even though he has not "entered appearance". The words "enter appearance" are technical words used in the Rules of the original side of this Court. They must not be given any meaning save that the Rules attribute. And what are the Rules? They are contained in Chaps. VIII and IX of the Original Side Rules of this Court. Forms 4 and 5 under Chap. 8 of the Rules give the standard forms in which an "appearance is entered" which run as follows:

> "To The Registrar, Please enter an appearance for the defendant (or me) to the plaint in the above suit.
>
> Signature of the Attorney or of the defendant in person."

They materially follow and imitate the forms and procedure under Order 12 of the Rules of the Supreme Court of London. Chapter 8 Rule 6 of our Rules provides that if such appearance is not entered "the suit is liable to be heard ex parte", while Ch. 9 Rule 2 of our Rules provides that no written statement will be allowed to be filed if no appearance has been entered. Thus then there are two consequences of not entering appearance under the Rules. One is that the Suit is liable to be heard ex parte and the other is that no written statement can be filed. In that context, I am not inclined to impose more punishment than those two so explicitly stated by the Rules. Therefore I am of the opinion that a party subject to these handicaps imposed by the Rules can still appear under the Civil Procedure Code when the suit is called on for hearing from the undefended list, not only to cross-examine the witnesses of the plaintiff and demolish in such manner the plaintiff's case on evidence that the Court will not pass any decree in the plaintiff's favour but also to make such arguments and submissions on law and on such evidence as the plaintiff may have brought to the Court. These are, in my opinion, valuable rights under the Code which are not taken away by any Rules of the original side. If that be so I fail to see why in such a case the terms of Order 9 Rules 8 and 9 of the Code cannot be made applicable to the original side of this Court notwithstanding the technicalities of "entering appearance" as introduced by the Rules of the original side practice. It may be that when because of the default in "entering appearance" the suit is liable to be heard ex parte, the defendant may not know or have notice when the suit is going to be heard. But that is immaterial and that is a risk to which such a defendant makes himself open by such default. But should he by any means whatever know that the suit is being heard from the undefended list he can nevertheless appear at such hearing and exercise the rights I have mentioned. Rankin C. J. in the Court of appeal sees the possibility of cross-examination in

such a case by the defendant of plaintiff's witnesses. The learned Chief Justice observes as follows at p. 477 of that Report:

> "If he does not enter appearance within the time limited the case will go into what is called the undefended list and when the case is on the undefended list it is not possible for the defendant without obtaining leave to enter appearance. He has a limited right to cross-examine witnesses adduced on behalf of the plaintiff if he appears at the time when the undefended case is down for hearing, but his position is that of a man who for not entering appearance in time is precluded from defending the suit whether he appears at the hearing or does not appear at the hearing."

16. I have not been able to pursuade myself to take the view that a suit can only be defended by filing a written statement or by "entering appearance" under the Rules. In my opinion filing of written statement is not the only way of defending a suit. A defendant in my judgment may ably and successfully defend a suit against him by cross-examination and arguments. The confusion that should be avoided in this context is that the expression "entering of appearance" under the original side Rules is not co-extensive in its signification and import with the word "appears" or "appearance" of Order 9 Civil P. C. Rules of the original side do not say that a defendant who has not "entered appearance" cannot in any way "defend" the suit. They punish default of entering appearance only in two ways that I have mentioned, and in no other.

17. This judgment in S.N. Banerjee v. H.S. Suhrawardy , not only binds me but has acquired all the veneration of a stare decisis and has been regarded and followed as a well-known authority on the original side of this Court. It may perhaps be necessary in future for a Full Bench of this High Court to reconsider the grounds and limits of this decision. I will only be content here to say as I have said before that this decision does not conclude the point that has been raised before me, and is distinguishable from the present case in the manner I have already indicated.

18. Reliance has been placed by Mr. Ghosh on three other decisions, The first decision is *Lalta Prasad v. Ramkaran*[2], where the Court held that notwithstanding the provision contained in Order 9 Rule 9 of the Code it has inherent powers of passing orders necessary for the ends of justice. At page 428 of that Report the following observation appears:

> "Nothing in the Code of Civil Procedure can limit or otherwise affect such power under which in our opinion a Court can restore such a case as this on grounds other than sufficient cause for non-appaarance. Order 9 Rule 9 makes it compulsory on a Court to set aside a dismissal under Order 9 Rule 8 where the plaintiff satisfies the Court that there was sufficient cause for non-appearance. It however cannot take away the Court's power to restore the case for any other valid reason."

This case however was not concerned with the question of limitation. Morover I find it difficult to imagine a case where the Court finds that there is no "sufficient cause" for non-appearance and yet can hold that there is a "valid reason" for such non-appearance under its inherent jurisdiction. A Division Bench of the appellate side of this High Court presided over by Sir Ashutosh Mukherjee J. sitting with Beachcroft J. in *Charu Chandra v. Chandi Charan*[3], did not follow this Allahabad decision and made the following observations at p. 27 of that Report:

"Reliance however has been placed upon the oases of *Somayya v. Subamma, 26 Mad. 599 and Lalta Prasad v. Ramkaran*[4], in which an Attempt was made to draw a distinction between "'sufficient cause" and "valid reason" for non-appearance. We are not impressed by the distinction suggested." I am in respectful agreement with the views expressed by the Division Bench of the appellate side of this High Court and I respectfully dissent from the Allahabad decision.

12. The second decision is *Bilasrai Laxminarayan v. Cursondas Damodardas*[5],. Sir Norman McLeod C. J. delivering judgment relied on the observation in the Allahabad decision and exercised the inherent jurisdiction of the Court for ends of justice independently of the fact whether under Order 9, Rule 9, Civil P; C. there was or was not sufficient cause for such restoration.

13. The third decision is to the same effect and reported in *Saw Mg. v. Ma Bwin Byu*[6],

14. Neither the Bombay nor the Rangoon decision is an authority on the point of limitation and no question of limitation arose for decision in any one of those cases, and both these cases are based on the Allahabad decision which I am not able to follow for reasons I have given above.

15. I propose to refer to certain decisions of this Court which in my opinion are binding on me and which I regard as authorities dealing with the point that is raised on this application. In Biswanath v. Gostabehari, 44 C. W. 576 Panckridge J., one of the most experienced Judges on the original side of this Court, made the following observations at p. 577 :

> "If the suit was dismissed under the circumstances contemplated by Order 9, Rule 8, Civil P. C., the plaintiff was entitled as of right to apply to have this dismissal set aside under Order 9, Rule 9 and the Court was bound to set aside, if satisfied, that there was sufficient cause for plaintiff's non-appearance. On the other hand, if the circumstances in which the suit was dismissed did not fall within the purview of Rule 8 the only remedy would be by way of an appeal."

16. This decision implies that there is no inherent jurisdiction of this Court to restore the suit which has been dismissed and which dismissal does not come within the purview of Order 9,

Rule 8 and appeal is the only remedy according to Panckridge J. It is needless for me to say that the learned Judge was dealing with an application on the original side of this Court.

17. The other decision is one of the Court of appeal from the original side of this Court and is the case of Surendra Nath v. Hrishikesh[7], there it was held that an application to have an ex parte decree passed on the original side of the High Court set aside is covered by Article 164, Limitation Act and must be made within So days from the date of the decree or the date of the applicant's knowledge. An application to set aside an ex parte decree is provided in Order 9, Rule 13 of the Code. If according to the decision of the Court of appeal in S. N. Banerjee v. H. S. Suhrawardy such an application on the original side cannot be made under Order 9, Rule 13 and is only made under the inherent jurisdiction of this Court under Section 151 of the Code then the decision of the Court of appeal in *S. N. Roy v. Hrishikesh Saha*[8], can only be reconciled by saying that even an application under the inherent jurisdiction of the Court to set aside an ex parte decree of the original side is also governed by Article 164, Limitation Act. Derbyshire C. J. in delivering judgment in *S.N. Roy v. Hrishikesh Saha, in*[9] says as follows :

> "I see no reason why the matter should not be governed by Article 164, Limitation Act which provides that an application for an order to set aside a decree passed ex parte should be made not later than 30 days from the date of the decree or where the summons were not duly served when the applicant had knowledge of the decree.
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> "It has been suggested that this Court is not bound by the provision of the Article 164, Limitation Act. I would say with regard to that contention that if it were correct then there is every reason why the Court if it is indeed free to decide after what period it may set aside ex parte decree should be guided by the provision of Article 164. It would be unfortunate if the length of time which would be a bar to an application of this kind would be different from one side of the circular road from the other."

18. While delivering this judgment Derbyshire C. J. referred to and passed by the decision of Kankin C. J. in the case of S.N. Banerjee v. H. S. Suhrawardy without any comment. The case of S.N. Banerjee v. H.S. Suhrawardy was concerned with an application by the defendant and not by the plaintiff but does deal with the question of limitation.

19. There is, however, another pronouncement of the Court of appeal where a suit on the original side of the High Court was dismissed for default and on an application being made to set aside such dismissal it was held that such application must be moved within the period of limitation prescribed by Article 163, Limitation Act. That is the well-known decision of Sri chand Daga v. Sohanlal Daga . From the arguments in that case it will appear at p. 230 of the report that the learned Advocate-General distinguished the decision of the Court of appeal in S.N. Banerjee v.

H.S. Suhrawardy by stating that that decision did not deal with the question of limitation but was only considering the grounds on which ex parte decree could be set aside. At p. 240 of the report Derbyshire C. J. comes to the following conclusion :

"Therefore Article 163, Limitation Act is part of the general law of land and in my view it applies on the original side of this Court. Article 163 is framed to meet all cases where steps are to be taken to aside dismissal of suits for default."

20. This decision is binding on me. It is also a decision on Order 9, Rule 9 and on Order 9, Rule 8 of the Code and on Article 163, Limitation Act. The same argument was made there as will appear from the report of the argument at pp. 229-30. The argument was this :

"Thirdly this is not an application under Order 9, Rule 9, Civil P. C. The High Court in its original side can vacate any order before it is drawn up and it is an application to the High Court in the exercise of its inherent jurisdiction to restore the suit by vacating the original order. See *S.N. Banerjee v. H.S. Suhrawardy ; Padmabati Dassi v. Rasiklal Dhar*[10]*,* and *Sarupchand Hukumchand v. Madhoram which follows the English authority like ex parte Brown, In re Suffield & Watt*[11]*,* There is no time limit to such an application and the Limitation Act does not apply."

21. That argument did not find favour with the Court of appeal and was overruled. The argument that is made before me is on the same lines and I feel I am bound by the decision of the Court of appeal in Srichand Daga v. Sohanlal Daga and I am bound to hold that such argument cannot prevail.

22. The language of Article 163, Limitation Act is in my opinion such that it covers any application by the plaintiff for an order to set aside any dismissal for default of appearance and I find nothing in the Limitation Act either to exclude from its operation, or to give special privilege to, an application on the original side by the plaintiff to set aside a dismissal for default. I find nothing in the language of the Limitation Act on which to hold that the limitation of 30 days from the date of dismissal which is provided for in Article 163, Limitation Act does not apply to an application by the plaintiff on the original side of this Court to set aside a dismissal for default of appearance. That in my view is the proper interpretation and construction of Article 163, Limitation Act.

23. In my judgment Article 163, Limitation Act is not confined only to applications made under Civil Procedure Code. Article 163, Limitation Act occurs in the 3rd Division of Schedule 1, Limitation Act. The 3rd Division begins with Article 158 and ends with Article 183. Wherever applications under the Civil Procedure Code are intended under the 3rd Division the Legislature

has said so expressly as for instance Articles 159, 165, 166, 171, 172, 174, 176, 177, 178, 179, 181, 182, The 3rd Division refers to many miscellaneous applications not all of which are under Civil Procedure Code as all, e. g., Article 158 as now amended which provides for application under the Arbitration Act 1940 and Article 161.

24. The facts in this case are clear enough. It is clear beyond doubt that from 15th June 1949 until 19th August 1949 although the plaintiff knew that the suit was not on the list neither he nor his attorney took any steps to find out where it was and whether it has been disposed of. If any enquiry had been made then it could have been found out on 15th June 1949 when, the Court reopened that the suit had already been dismissed for default. The affidavit of the attorney's court-clerk that he was under the "impression" that the suit had been omitted from the list through mistake or inadvertence is groundless and he had no reason to cherish, that impression. Although the suit had appeared in the warning list the plaintiff had taken no steps to make the suit ready for hearing and the clerk now comes forward with an affidavit that he gave requisition for translation of three vernacular documents although that requisition has not been producted before me. I have the gravest suspicion about the bona fides of such a statement. If such requisition was given it appears to me it was given to make out a case that there was no knowledge of the dismissal of the suit on 5th May 1949.

25. Even assuming every fact in favour of the applicant there remains an insuperable difficulty on his way on the applicants own showing the knowledge of the dismissal of the suit dated from nth August 1949. The application was not "made" to the Court until 16th September 1949, which is more than a month after the date of the knowledge of the dismissal.

26. It is true that the notice of motion is dated 19th August 1919 and it is also true that by special leave it was made returnable on 22nd August 1919. But the application was not "made to the Court" within the language of the notice of motion until 16th September 1949. The applicant could have this application "noted as made" either on 19th August 1949 when the notice of motion was taken out or on 22nd August 1949, when the notice of motion was made returnable and when being on the list the application was adjourned, at the instance of the parties for filing their affidavits or even on 6th September 1949, when it appeared on the list for disposal. If the application was made noted on any one of these days it might have been argued that at any rate limitation ceased to run as from the day of such noting. After the decision of Srichand Daga v. Sohanlal Daga it can no longer be contended that taking out of a notice of motion, per se, operates to save limitation. It is now settled law that the application has to be moved and made to the Court. That not having been done, the decision of the Court of appeal in Daga's case: is clear and I must hold that even if the limitation operated from the date of the knowledge of the dismissal, even then this application is barred by time. I am however of the opinion that it is

incontestable that the time from which limitation runs under Article 163, Limitation Act is not from the date of the knowledge but from the date of the dismissal.

27. Sale J. who had large experience of the practice and procedure on the original side of this Court took the same view in Hinga Bibee v. Manna Bibee, 8 C. W. N. 97 : (31 Cal. 150). It is also a decision which holds that an application by the plaintiff on the original side of the Court to set aside a dismissal for default must be made within 30 days (Art. 163, Limitation Act) of the date of dismissal.

28. Incidentally I must observe that the order of dismissal made on 5th May 1949, has not only been drawn up, completed and filed but was also signed on 14th July 1949, so that I cannot even exercise the jurisdiction that I have as a Judge sitting in the original side to recall or vary any Older that I may have passed before such order is drawn up or completed or signed and filed, on the principles laid down in *Sarupchand Hukumchand v. Mardhoram, and In re Steel Construction Co. Ltd*[12]*,,*

29. Section 151, Civil P. C., does not formulate any new doctrine but is only a legislative recognition of the well-known principle that every Court has inherent power to act ex debito justitia and to do that real justice for the administration of which alone it exists. "Ends of justice" are solemn words and no mere polite expression in juristic methodology and here secreted in the solemn words is the aspiration that justice is the pursuit and end of all law. But the words "ends of justice" wide as they are do not, however, mean vague and indeterminate notions of justice, but justice according to the statutes and laws of the land. They cannot mean that express provisions of the statute can be overriden at the dictates of what one might by private emotion or arbitrary preference call or conceive to be justice between the parties. There is a wholesome temptation to which the Courts willingly succumb when a suit is dismissed without being heard for default of appearance of the plaintiff to restore such suit with a view to grant the defaulting party an opportunity to have his case heard and decided on merits and the judicial conscience is set at rest by ordering payment of costs against the defaulting party. Costs are the sovereign palliative for the judicial conscience and I must confess at one stage I felt inclined to apply that palliative and restore this suit. On a closer consideration and reflection, I have however come to this opinion that the words "ends of justice" in Section 151, Civil P. C. do not permit the Court to take a step or a procedure which defeats a statutory provision or the law of the land, when the plaintiff does not appear and the defendant only appears Order 9, Rule 8, Civil P. C., makes the clear and mandatory provision that the Court shall dismiss the suit. Where there is such clear provision for such a case it is not open in my judgment to treat the order of dismissal as one under the inherent jurisdiction of the Court. When again Order 9, Rule 9 of the Code lays down a particular procedure by which the dismissal could be set aside I am of the opinion it is not open

to the Court to say that nevertheless the defaulting party may choose not to adopt that procedure and yet ask the Court to set aside the dismissal by invoking the inherent jurisdiction of this Court. It is well established law that there is no room for the application of the inherent power where there is an express provision in the Civil Procedure Code.

30. In my judgment Order 9, Rule 8 and Order 9, Rule 9 Civil P. C., are applicable to the original side oft this Court. I am fortified in that view by the decision of the Court of appeal in Srichand Daga v. Sohan Lal Daga and by the decisions of Sale and Panokridge JJ. two very experienced Judges of the original side of this Court. I do not consider that the words "appear" in Order 9. Rule 8 and "his non-appearance" in Order 9; Rule 9, are such as would indicate that these rules in terms do not apply to the original side. I consider that the words "appear" and "non-appearance" must be read and construed so as to mean and include not merely appearance by the party himself but also appearance through recognised agents and solicitors on the original side who hold power of attorney. These words in Rule 8 and Rule 9 of Order 9 of the Code should, in my opinion, be read and interpreted in accordance with the meaning of the word "appearance" as provided by Rule 1 and Rule 2 of Order 3 of the Code. While saying this I am not unmindful of the observations made by Bankin C. J., in S.N. Banerjee v. H.S. Suhrawardy where the learned Chief Justice discusses the case when the defendant need not "personally" attend in some of the cases on the original side of this High Court and yet his case need not go ex parte. That is quite true. It is unfortunate however that the word "personally" creeps into the judgment of the learned Chief Justice. That is a word which does not appear under Order 9, Rule 13, which the learned Chief Justice was considering in that case. Appearance of a plaintiff under the provisions of Order 9 of the Code does not necessarily mean appearance "personally" by that party but must include appearance through agents and solicitors within the meaning of Rules 1 and 2 of Order 3 of the Code. If that view is taken, there is no difficulty in applying the terms of Order 9 of the Code to the original side of this Court. This, in my view, adds fresh reasoning to the conclusion that I have arrived at quite apart from the provisions of Order 49, Rule 3, which does not exclude Order 9 of the Code from the original side of this Court. Had the present application been one under Order 9, Rule 13, I should have held myself bound by the decision of the Court of appeal in S.N. Banerjee v. H.S. Suhrawardy , notwithstanding my own opinion on the point. As the present case, however, is one under Rules 8 and 9 of Order 9 of the Code and as this was the point decided also by the Court of Appeal in Srichand Daga v. Sohanlal Daga I consider it is not only open to me to follow that decision but also that decision is binding on me.

31. I am also of the view that it is not permissible for this Court to invoke the inherent jurisdiction under Section 151, Civil P. C., to avoid the provisions of the Limitation Act. As I have said before Section 151, Civil P. C., should not be interpreted to mean that the Court has any power in the name of its inherent jurisdiction to suspend or dispense with the statutory

provisions or the laws of the land. It is said that no limitation is provided for in an application under Section 151, Civil P. C., But if an application is of the nature which is before me i. e., an application by the plaintiff to set aside the order of dismissal then Article 163, Limitation Act, must be given effect to. It will not help the plaintiff applicant in such a case to say that the Court should invoke its inherent jurisdiction. One short answer to that is that even then it has to be regarded as an application under Section 151, Civil P. C. and if it is an application under the Code then there is no escape from Article 163, Limitation Act. As I have said before however that the language of Article 163 is not such which says that it must be an application under the Code at all. In that view of the matter whether the present application is treated as one under the Code or not it is in my judgment in any event barred by Article. 163, Limitation Act.

32. As a last resort Mr. Ghosh for the applicant asked me to treat this application as one for review under Order 47 Rule 1 of the Code and Mr. Ghosh submitted that the application can come under the words "any other sufficient reason" occurring therein. In support of this proposition he relies on the judgment of Sir Ashutosh Mukherjee and Chotzner JJ. in Gopika Raman Roy v. Meher Ali . He has also relied on the case *Rajnarain v. Ananga Mohan*[13],. I do not see how these authorities help the applicant. These decisions do not deal with any question of limitation. There is a shorter period of limitation for review of judgments of the original side of this Court. Article 162, Limitation Act, provides that an application for review of such a judgment of this Court must be made within 20 days from the date of the decree or order and not from the date of the knowledge of the decree or order. Even if it were regarded as an application for review then also it will be barred by limitation on the facts of this case.

33. In the notice of motion, extension of the period of limitation for making this application has been asked but not pressed in the argument by learned counsel for the applicant. Such extension is asked obviously under Section 5, Limitation Act. In order to obtain such extension, the party asking for such extension must satisfy the Court that there was "sufficient cause" for not making this application within the time prescribed by the Limitation Act. In my opinion the affidavit of the court clerk of the applicant's attorney does not disclose sufficient cause on the fasts of the case. He has disclosed no reason or cause why nothing was done from 15th June 1949 till 19th August 1949, when the notice of motion was taken out. No reason or cause is disclosed why he should wait for months under the "impression" that the suit was not appearing in the list through some mistake or inadvertence, I am therefore unable to hold that there was "sufficient cause" on the facts of this case for not making this application within time. So far for the facts on this point. On the law I only observe that Panckridge J. sitting on the original side of this Court and deciding the case of Madhoram v. Mt. Tapoo Rubhani held that when an application was made by the plaintiff under the provisions of Order 9, Rule 9, Civil P. C., after the expiry of the period of limitation prescribed under Article 163, Limitation Act, the Court was not entitled to extend

the period of limitation by taking into consideration certain circumstances which appeared to operate harshly against the plaintiff.)

34. The application, therefore, fails and is dismissed with costs.

Cases Referred.

132 C. W. N. 10
234 ALL. 426 : (14 I. C. 187)
319 C. W. N. 25 ; (A. I. R (2) 1915 Cal. 539
434 All. 426 : (14 I. C. 187)
544 Bom. 82 : (A. I. R. (7) l920 Bom. 337)
64 Rang. 18 : (A. I. R (13) 1926 Rang. 109
746 C. W. N. 280
8(46 C. W. N. 280)
946 C. W. N. 280 and 281
1037 Cal. 259 : (6 I. C. 666)
11(1888) 36 W. R. (Eng.) 303 : (29 Q. B. D. 693)
1289 C. W. N. 1259
1326 Cal. 598