REVISIONAL CIVIL

Before R. N. Mittal, J.

RADHA BALABH and Sons,—*Petitioner*

versus

GANGA DIN HAR PARSHAD,—*Respondent.*

Civil Revision No. 703 *of* 1977

28th February, 1978.

Code of Civil Procedure (*V of* 1908)—*Section* 115(2)—*Trial Court refusing to set aside* ex-parte *decree—Appellate Court affirming the said decision—Revision Petition against the appellate order—Whether maintainable.*

Held that that in case an appeal is maintainable against an order and the matter has been decided by the appellate Court a further revision is maintainable to the High Court. Sub-section (2) of section 115 of the Code of Civil Procedure, 1908, debars a person from filing a revision against an order of the trial Court from which an appeal is maintainable and not from a non-appealable order of the appellate court. Revision Petition is, therefore, maintainable against an appellate order refusing to set aside an *ex-parte* decree.

(Paras 5 and 6)

Petition under section 115 *of C.P.C. for revision of the order of the Court of Shri Jai Singh Sekhon, District Judge, Patiala, dated the 30th December,* 1976 *affirming that of Shri Paramjit Singh Ahluwalia, Sub Judge 1st Class, Amloh Camp at Nabha, dated the 26th July,* 1974 *dismissing the application with costs.*

S. C. Sibal, Advocate, *for the petitioner.*

Achhra Singh, Advocate, *for the respondent.*

JUDGMENT

R. N. Mittal, J. (Oral)

(1) This revision petition has been filed by M/s Radha Balabh and Sons defendant against the order of the District Judge, Patiala, dated December 30, 1976.

(2) Briefly the facts of the case are that M/s Ganga Din Har Parshad, Commission Agents, Mandi Gobindgarh, instituted a suit on June 11, 1969, for recovery of Rs. 17,200 against M/s Radha

Balabh and Sons, defendant in the Court of Subordinate Judge, 1st Class, Amloh Camp at Nabha. Summons regarding the suit were issued to the defendant on various dates from June 13, 1969 to July 6, 1970. On some of the occasions it was also ordered by the Court that the summons be issued under registered cover. The service of the defendant, however, was not effected. On July 6, 1970, the Court ordered that the defendant be served for August 4, 1970. After July 6, 1970, the plaintiff filed an application for substituted service on the ground that the defendant was evading service. The Court accepted the application and passed an order that the defendant be served by citation in the Tribune for August 4, 1970. In pursuance of the order of the Court, citation was issued in the Tribune on July 22, 1970. The defendant in spite of the said citation did not appear in the Court on August 4, 1970. The Court consequently took *ex-parte* proceedings against the defendant and adjourned the case to August 27, 1970, for *ex-parte* evidence. It recorded the evidence on that date and adjourned the case to August 29, 1970, for arguments. After hearing the arguments on behalf of the plaintiff the Court passed a decree for recovery of Rs. 17,200 against the defendant on the same date, i.e., August 29, 1970.

(3) The defendant moved an application on May 31, 1971, for setting aside the *ex parte* decree. It was opposed by the plaintiff. The trial Court held that there was no sufficient ground for setting aside the *ex-parte* decree and that the application was also not within limitation. Consequently it dismissed the same. The defendant went up in appeal before the District Judge, Patiala, who affirmed the order of the trial Court and dismissed it. It has come up in revision against the order of the District Judge to this Court.

(4) The learned counsel for the plaintiff-respondent has raised a preliminary objection that no revision petition against the impugned order was maintainable. In support of his contention he referred to M/s *Jokhi Ram Mohan Lal* versus *Smt. Gita Devi Tulsyan* (1). I have heard the learned counsel for the parties but regret my inability to accept the contention of Mr Achhra Singh. In order to determine this question it is necessary to refer to section 115 C.P.C. which is as follows:

> "(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High

(1) A.I.R. 1978 Patna 2.

Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

* * * *

(2) The High Court shall not under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

* * * *

(5) Mr. Achhra Singh has laid emphasis on sub-section (2) and submitted that from the said sub-section, it is evident that in case the appeal is maintainable against an order and the matter has been decided by the appellate Court no further revision is maintainable to the High Court. This interpretation, however, does not appear to be correct. The sub-section in my view, debars a person from filing revision against the order of the trial Court from which appeal is maintainable and not from non-appealable order of the appellate Court. Earlier there was some conflict regarding the jurisdictional powers of the High Court under sub-section (1). In order to clarify that position, this sub-section has been added by the Code of Civil Procedure (Amendment) Act, 1976. In *M/s. Jokhi Ram Mohan Lal's case* (supra) the learned judges examined different views The relevant discussion is as follows :

"Prior to introduction of sub-section (2) by amendment, there was some controversy in view of the language of S. 115 as to whether the revisional power of this Court is barred only in cases where appeal lies to this Court or even in cases where appeal lies before any Court subordinate to this Court. The words "in which no appeal lies thereto" occurring in section 115 were interpreted to mean that

this bar on entertaining revision applications in cases in which an appeal lies, is only in respect of cases where appeal lies to this Court. Reference in this connection may be made to the case of *Tipan Prasad Singh* v. *Secy. of State* (2) in which Fazl Ali, J. (as he then was) was of the view that section 115 provided the High Court may act under that section in a case which has been decided by a Court subordinate to it and in which no appeal lies to the High Court. According to the learned Judge, it did not provide that the High Court cannot interfere in a case where an appeal lies to an inferior Court. In that case, it was found that an appeal lay before the District Judge. In that view of the matter, the revisional application to this Court was held not barred. Later, a Full Bench of this Court in the case of *Magbool Alam Khan* v. *Mt. Khodaija Begum* (3) having found that an appeal lay to the District Judge against the order in question, refused to exercise its revisional jurisdiction saying that the revision application was incompetent and the petitioner concerned should have availed of the remedy by filing an appeal before the District Judge concerned. Thus even in absence of provision like the present sub-section (2) of section 115 this Court refused to exercise its revisional jurisdiction even in cases where appeal was to be filed before the District Judge. It appears, to remove this controversy, present sub-section (2) of S. 115 has said in clear and unambiguous words that against an order if an appeal lies either to the High Court or to any Court subordinate thereto the High Court shall not under this section exercise its revisional jurisdiction for reversing any order or decree".

(6) In my view this case rather helps the petitioner. I consequently reject the objection and hold that revision petition against the impugned order is maintainable. Now I shall deal with the case on merits.

(7) The first question that arises for determination is whether there is sufficient cause for setting aside the *ex-parte* decree. It is not disputed that the petitioner had not been served from June 13, 1969 to July 6, 1970, either in ordinary way or through registered cover. An application was filed after July 6, 1970, for substituted

(2) A.I.R. 1935 Patna 86.

(3) A.I.R. 1949 Patna 133.

service and the Court ordered that the petitoner be served by citation in the Daily Tribune. The petitioner is carrying on business in Jaipur. It has produced a certificate Ex. A-1 from the Officer Incharge Information Bureau, Jaipur, that the Tribune has no circulation in that area. Moreover, the copies of the newspaper in which citation is published are required to be sent to the party concerned under certificate of posting by the office of the paper. In the present case in the certificate of posting the correct address of the petitioner has not been given. In the circumstances it cannot be held that the copy of the Tribune reached the petitioner and it came to know about the suit. In the aforesaid view I am supported by a decision of this Court in *Dina Nath* versus *Dev Raj* (4) wherein it was observed that the substituted service through publication has only meaning providing there is every reasonable chance of the notice of service coming to the knowledge of the person who is sought to be served. The paper in which the notice of service is published, it is further held, should have such circulation that in the normal course it should have reached the defendant or could have reached him. After taking into consideration the circumstances, I am of the view that the petitioner was not duly served.

(8) The next question that arises for determination is whether the application for setting aside *ex parte* decree is within time. It is not disputed that *ex parte* decree was passed on August 29, 1970, and the application for setting it aside was filed by the petitioner on May 31, 1971. Article 123 of the Limitation Act, 1963, provides a limitation of 30 days for setting aside *ex-parte* decrees. The period of 30 days is to be reckoned from the date of decree and where the summons of notice is not duly served then from the date when the applicant had the knowledge of the decree. There is, however, an explanation added to the aforesaid article which says that for the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure 1908 shall not be deemed to be due service. The petitioner in his application stated that he came to know about the decree on May 6, 1971, when his car was got attached by the plaintiff in pursuance of that decree. I have already held that the Tribune had no circulation in Jaipur and the address of the petitioner on the certificate of posting of the newspaper was not correct. There is no other evidence on the record which shows that the petitioner had come to know about the decree prior to May 6, 1971. I am, therefore, of the opinion that it came to know about the decree on the said date. The present

(4) 1970, R. C. J. 722.

application was filed on May 31, 1971, i.e., within 30 days from the date when the petitioner came to know about the decree. In the circumstances, the application is within limitation.

(9) For the reasons recorded above I accept the revision petition and set aside *ex parte* decree on payment of Rs. 150 as costs. No order as to costs of this petition. The parties are directed to appear before the Subordinate Judge, Amloh, on April 3, 1978.

N. K. S.

Before R. N. Mittal, J.

JULLUNDUR EX-SERVICEMEN MOTOR TRANSPORT COOPERATIVE SOCIETY LTD.,—*Defendant—Appellant.*

versus

THE GENERAL ASSURANCE SOCIETY LTD. ETC.,—*Plaintiffs—Respondents.*

First Appeal from Order No. 149 of 1971.

February 28, 1978.

Carriers Act (III of 1865)—*Sections* 9 *and* 10—*Arbitration Act (X of* 1940)—*Sections* 13(*b*) *and* 30—*Suit against common carrier for damage to goods entrusted—Plaintiff—Whether has to prove negligence of the carrier or his agents—Notice under section* 10—*Whether necessary before filing the suit—Fact regarding service of such notice—Whether to be mentioned in the plaint—Such notice served by the assured—Serving of another notice by the insurer—Whether necessary—Opinion given by the Court under section* 13(*b*)—*Arbitrator—Whether bound by such opinion—Application for setting aside an award—Court—Whether can examine such award on merits.*

Held, that if a suit is brought against a common carrier for loss, damage or non-delivery of the goods entrusted to it, it is not for the plaintiff to prove that the loss, damage or non-delivery was due to the negligence of the carrier, his servants or agents. Negligence is presumed by loss of or injury to goods. Section 10 of the Carriers Act, 1865 enjoins on the plaintiff to serve a notice on the carrier within six months before filing a suit regarding loss of or injury to goods entrusted for carriage. To maintain a suit for damages for loss of or injury to the goods against a common carrier, a notice under section 10 must be given to it. If without serving notice on the carrier a suit is brought, it is liable to be dismissed. Thus service of notice is a *sine qua non* for instituting a suit against a carrier.

(Para 8)