

remand order is passed on any ground other than a ground mentioned under Order 41, rule 23 (*Umar Din v. Umar Hayat*) (9), *Chokkalingam Ambalam v. Maung Tin* (10) \*\*\* The Courts have resolutely refused to depart from the provisions of the statute even in cases of manifest hardship and oppression for it is well known that hard cases make bad law."

(18) In view of what I have said above and relying on the Full Bench decision in *Jawahar Singh Sobha Singh's case*, I am of the opinion that court-fees cannot be refunded in the instant case and consequently, the application filed by the appellant for that purpose is rejected, but with no order as to costs.

DHILLON, J.—I agree.

K.S.K.

REVISIONAL CIVIL

Before R. S. Narula, J.

M/S RUP CHAND DHARAM CHAND,—*Petitioner.*

*versus*

M/S. BASANT LAL BANARSI LAL,—*Respondent.*

Civil Revn. 856 of 1973.

February 12, 1974.

*Code of Civil Procedure (Act V of 1908)—Sections 10 and 15—Application under Section 10—Whether entertainable before the filing of written statement in the suit—Order under Section 10—Revision petition against—Whether lies.*

*Held*, that it is not the universal rule that an application under Section 10 of the Code of Civil Procedure cannot be entertained before filing written statement in the suit sought to be stayed. Normally the Court would not allow a party to move an application under section 10 unless he has filed his written statement, the Court however, would entertain an application of the defendant for stay

(9) A.I.R. 1927 Lah. 886(1).

(10) A.I.R. 1936 Rangoon 208 (F.B.)

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in a case where he has annexed the copy of the plaint in the previously instituted suit and it can be found out from the copy of the plaint as to what the dispute between the parties is. Even if a Judge thinks that the perusal of the plaint is not enough to find out whether the subject-matter of the controversy between the parties in the two suits is identical or not, he can keep the application pending and decide it after getting the written statement from the defendant. It should not be dismissed before calling for a written statement from the defendant.

*Held*, that the expression 'case' in Section 115 of the Code is of much wider amplitude than the word 'suit'. Whereas the interlocutory order in a suit does not amount to a case decided, the final disposal of an application under section 10 of the Code of Civil Procedure does amount to the decision of the *lis* between the parties under that particular provision. The decision of the application under Section 10 is not appealable and cannot possibly be reopened in any subsequent proceeding. It is a final decision of the trial Court on the statutory rights of a party to have the subsequently instituted suit stayed in certain specified circumstances. Such an order amounts to a "case decided" within the meaning of Section 115 of the Code. If a subordinate Court exercises its jurisdiction to stay a suit under Section 10 of the Code, where that provision does not allow such an order being passed or refuses to exercise jurisdiction vested in it under section 10 of the Code of Civil Procedure or exercises such jurisdiction with material irregularity or illegality, it would always be open to High Court to revise such an order under section 115 of the Code.

*Petition under Section 115 of Civil Procedure Code for revision of the order of Shri Sarwan Singh Chahal, Sub Judge 1st Class, Dhuri, dated 20th April, 1973, dismissing the application.*

Bhagirath Dass, Advocate, for the petitioner.

Harbans Lal, Advocate, for the respondent.

JUDGMENT

NARULA, J.—In connection with certain contract for the sale of cotton by the plaintiff-respondent Firm to the defendant-petitioner, a suit was filed by the petitioner Firm at Kanpur on April 29, 1972, for the recovery of Rs. 2,125. Subsequently, on August 17, 1972, the respondent-Firm filed a suit for the recovery of Rs. 5,454.21 paise at Dhuri. In the suit filed at Kanpur, Dharam Chand described himself as the sole-proprietor of Messrs Rup Chand Dharam Chand.

The only defendant in that suit is the Firm Messrs Basant Lal Banarsi Lal of Dhuri. In the suit filed at Dhuri by Messrs Basant Lal Banarsi Lal, Messrs Rup Chand Dharam Chand is the first defendant and one Hans Raj Sharma is arrayed as defendant No. 2. Whereas the Kanpur suit mentions the date of the contract in dispute as August 25, 1969, the relevant date cited in paragraph 3 of the plaint of this suit is August 23, 1969. The description of the goods and the rates, etc., are, however, the same. In the suit filed at Dhuri, a sum of Rs. 64.07 has been claimed on account of the balance of some previous dealings in addition to the damages claimed for breach of the contract in dispute.

(2) On the date fixed for filing the defendants' written statement, that is, on January 15, 1973, the defendant-petitioner filed an application under section 10 of the Code of Civil Procedure (without filing his written statement) for staying the Dhuri Suit on the ground that the Kanpur suit had been instituted earlier and related to the same dispute. By his order dated April 20, 1973, Shri Sarwan Singh Chahl, Subordinate Judge, First Class, Dhuri, dismissed the application of the petitioner on two grounds, namely, (i) that Exhibit D. 2, the certified copy of the plaint of the Kanpur suit, had not been properly proved; and (ii) that the application under section 10 of the Code of Civil Procedure could not be entertained before the written statements had been filed.

(3) Mr. Harbans Lal, the learned counsel for the respondent submits that the certified copy of a plaint is not a public document and cannot prove itself by merely having been tendered in evidence. In this case, however, Dharam Chand had appeared as A.W. 1 and given lengthy statement in the course of which he proved the certified copy of the plaint Exhibit D. 2. The deposition of A.W. 1 has been scribbled by the learned Subordinate Judge in such a way that neither I nor my Reader nor any of the counsel for the parties has been able to decipher anything from the statement of A.W. 1—Dharam Chand. I was at one stage, inclined to send for the learned Subordinate Judge to see if he himself could read the same or not. In view, however, of the admitted fact that the certified copy of the plaint was proved in the course of the statement of A.W. 1 and not by having been merely tendered in evidence, I have not adopted that course. The application under section 10 of the Code of Civil Procedure was supported by the affidavit of Hans Raj Sharma, Exhibit D 3, on behalf of the defendant-petitioner. Mr. Bhagirath Dass, the

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learned counsel for the petitioner, says that Hans Raj Sharma was a mere representative of the petitioner and that even the respondents have referred to him in their plaint only as the person who talked to the respondents on telephone on behalf of the petitioner.

(4) I am inclined to think that the certified copy of the plaint had been properly proved in this case by the statement of A. W. 1 and the learned Subordinate Judge had, therefore, no jurisdiction to rule it out of consideration.

(5) So far as the stage at which an application under section 10 of the Code of Civil Procedure has to be considered is concerned, it is not the universal rule that the application cannot be entertained before filing the written statement. Mr. Bhagirath Dass has relied on a judgment of the Calcutta High Court in *S. K. Rungta and Company (Jute and Seeds) v. Nawal Kishore Debi Prosad and others* (1), where in it has been held that though normally the Court would not allow a party to move an application under section 10 of the Code of Civil Procedure unless he has filed his written statement, the Court would entertain an application of the defendant for stay in a case where he has annexed the copy of the plaint in the previously instituted suit and it can be found out from the copy of that plaint as to what the dispute between the parties is. Reliance was placed by the learned Judge of the Calcutta High Court on an earlier Judgment (*S. M. Modi v. Mansata Film Distributors*) (2) of the same Court for that proposition. The plaint of the earlier suit was before the trial Court, and there could be no difficulty in finding out what was the real dispute between the parties. Even if the learned Subordinate Judge thought that a perusal of the two plaints was not enough to find out whether the subject-matter of the controversy between the parties in the two suits was identical or not, he could have kept the application pending and could have taken it up for decision after getting the written statement of the defendant-petitioner filed, but he should, not have dismissed the application at that stage. In fact, the defendant-petitioner has since filed his written statement dated May 16, 1973, in the Dhuri Court. The liability of the defendant-Firm to pay some

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(1) A.I.R. 1964 Cal. 373.

(2) A.I.R. 1957 Cal. 727.

little amount left as balance out of the transaction referred to in paragraph 2 of the plaint of this suit has not been disputed by the defendant-Firm. There is, therefore, no real dispute in regard to the petty claim of Rs. 64.07. The rest of the written statement relates to the contract in dispute.

(6) Since both the grounds on which the order under revision is based have been found by me to be incorrect, it appears to me that the trial Court in this case refused to exercise jurisdiction vested in it by law to entertain and dispose of the application of the petitioner under section 10 of the Code of Civil Procedure on merits.

(7) Mr. Harbans Lal, the learned counsel for the plaintiff-respondent, besides contesting the petition on merits, has also raised an objection to the maintainability of this petition for revision of the trial Court's order. He has referred to the judgment of a learned Single Judge of the Allahabad High Court in *Sri Bhola Prasad v. Shrimati Jagpala and another* (3); and argued that an order passed under section 10 of the Code of Civil Procedure; is not a case decided and does not, therefore, attract the provisions of section 115. There is a good deal of divergence of opinion on that question. The learned Single Judge who decided *Bhola Prasad's case* (*supra*) dissented from the earlier view expressed in *Sahdeo Singh v. Mt. Chanun Kuer and others* (4), because of that view having been dissented from in *Madan Mohan v. Kuar Kamla Narain Dube* (5). The expression "case" is of much wider amplitude than the word "suit". Whereas the interlocutory order in a suit does not amount to a case decided, the final disposal of an application under section 10 of the Code of Civil Procedure, does in my opinion amount to the decision of the *lis* between the parties under that particular provision. The decision of the application under section 10 is not appealable and cannot possibly be re-opened in any subsequent proceeding. It is a final decision of the trial Court on the statutory right of a party to have the subsequently instituted suit stayed in certain specified circumstances. Such an order amounts to a case decided within the meaning of section 115 of the Code. I am, therefore, of the opinion that if a subordinate Court

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(3) A.I.R. 1955 All. 384.

(4) A.I.R. 1928 Oudh. 355 (F.B.).

(5) A.I.R. 1934 All. 520.

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exercises its jurisdiction to stay a suit under section 10 of the Code of Civil Procedure, where that provision does not allow such an order being passed or refuses to exercise jurisdiction vested in it under section 10 of the Code of Civil Procedure or exercises such jurisdiction with material irregularity or illegality, it would always be open to this Court to revise such an order under section 115 of the Code of Civil Procedure. I have in these circumstances no hesitation in repelling the preliminary objection raised by the learned counsel for the respondent. Since the trial Court has not dealt with the merits of the application under section 10 at all but has in its order under revision dismissed the application on two hypertechnical grounds, the same will have to be decided by the Court below after hearing the counsel for the parties. The trial Court will have to decide whether a case for stay under section 10 of the Code of Civil Procedure is or is not made out on merits. It is not open to this Court to decide that issue for the first time in revisional proceedings.

(8) Before parting with this case, I also want to specifically notice the fact that the original order dated April 20, 1973, on the record of the trial Court has, in fact, not been signed by the Subordinate Judge at all. I have not been able to understand how the copying department has shown in the certified copy produced by the petitioner and filed with the revision petition "Sd/- Sarwan Singh Chahl" when the original order is not signed at all. Since the order has not been signed by the learned Subordinate Judge, there is, in fact, no legal order in existence but in view of the fact that the order was pronounced in open Court and the parties feel bound by it, I have to set it aside on that additional ground.

(9) For the foregoing reasons, I allow this petition, set aside the order of the trial Court dated April 20, 1973, and direct the trial Court to hear and decide the defendant-petitioner's application under section 10 of the Code of Civil Procedure in accordance with law. Parties may appear before the trial Court on March 18, 1974. The lower Court records should be returned to the trial Court immediately. There is no order as to costs of this application.

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K.S.K.