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those case, I am to say that these decisions do not lay down the correct law. The view expressed in those three appeals or any other decided case by any learned Single Judge of this court in line with these judgments, stands over-ruled. On the contrary, the view expressed in Criminal Appeal No. 503 of 1976 enunciates the correct legal position.

9. In the case in hand, the learned Single Judge has affirmed the order of conviction on merits. After deciding the question of the applicability of section 360 of the new Code, as has been done above, nothing further remains to be done in this case and the appeal is hereby dismissed.

N. K. S.

Before Rajendra Nath Mittal, J.

DALIPA,—Petitioner.

versus

RULIA,—Respondent.

Civil Revision No. 750 of 1979.

January 28, 1980.

Code of Civil Procedure (V of 1908)—Section 151 and Order 9 Rule 8—Limitation Act (XXXVI of 1963)—Articles 122 and 137—Suit fixed for plaintiff's evidence—Miscellaneous application by the plaintiff fixed for an earlier date—Plaintiff absent on the date of hearing of the application—Court dismissing the suit in default—Application for restoration of the suit—Period of limitation for such application—Article 122—Whether applicable.

Held, that where the suit filed by the plaintiff is fixed for his evidence and a miscellaneous application filed by him comes up for hearing on an earlier date and the plaintiff is not present, the court could not dismiss the suit under Order 9 Rule 8 of the Code of Civil Procedure 1908, as it provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the said suit be dismissed. The words "the suit is called on for hearing" are important. These words show that the suit must be fixed for hearing for the date on which action is taken under the aforesaid rule. Where, however,

the suit was not fixed for hearing and a miscellaneous application was fixed, the application could be dismissed in default of the presence of the plaintiff but not the suit. Article 122 of the Limitation Act, 1963 provides a period of 30 days for restoration of a suit in case it has been dismissed for default of appearance of the plaintiff. This Article will be applicable if the suit is fixed for hearing and dismissed on account of default of appearance of the plaintiff. In case the suit is not fixed for hearing and the court dismisses it on that ground, it cannot be said that there was default of the plaintiff to appear within the meaning of that Article. In that situation, Article 137 which is a residuary Article and provides a limitation of three years for making applications will apply and not Article 122. However, the application in such circumstances shall be under section 151 of the Code. (Paras 4 and 5)

Petition under section 115 C.P.C. for revision of the order of the Court of Shri Raj Kumar Gupta, Additional District Judge, Karnal dated the 4th December, 1978, affirming that of Shri R. D. Aneja, Subordinate Judge, 1st Class, Karnal, dated the 18th August, 1975, dismissing the application of the petitioner.

V. K. Bali, Advocate, for the Petitioner.

H. S. Hooda, Advocate, for the Respondents.

JUDGMENT

Rajendra Nath Mittal, J. (Oral).

1. This revision petition has been filed by the plaintiff against the order of the Additional District Judge, Karnal, dated December 4, 1978.

2. Briefly the facts are that the plaintiff filed a suit for declaration to the effect that he was owner of one half share of the property in dispute. The suit was fixed for the evidence of the plaintiff for 6th June, 1972. No witness on behalf of the plaintiff was present in the Court on that date and the case was adjourned to 28th August, 1972. Some miscellaneous matter came up before the Court on July 19, 1972, on which date the plaintiff was not present. The Court dismissed the suit in default on that date. An application for restoration of the suit was filed by the plaintiff on October 3, 1972. The application was contested by the respondent on the grounds that there were no sufficient reasons for non-appearance of the plaintiff and that the application was not within the period of limitation. On

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the pleadings of the parties the trial Court framed the following issues:—

1. Whether there was sufficient cause for the non-appearance of plaintiff, when the suit was called for hearing and dismissed ?
2. Whether the petition has been filed within the prescribed period of limitation?

Both the issues were decided by the Court against the plaintiff. Consequently, the application was dismissed by it. The plaintiff went up in appeal before the Additional District Judge, Karnal, who reversed the finding on issue No. 1 and held that the dismissal of the suit on July 19, 1972 by the trial Court was wholly unjustified as the suit was not fixed for hearing on that date. He further held that there was sufficient cause for the appellant not to appear on the said date. On issue No. 2, he affirmed the finding of the trial Court and held that the application was governed by Article 122 of the Limitation Act and was not within limitation. Consequently, he dismissed the appeal. The plaintiff has come up in revision against that order to this Court.

3. It is vehemently contended by the learned counsel for the petitioner that the case was not fixed for hearing on July 19, 1972 when it was dismissed for default. He submits that, therefore, the dismissal cannot be said to be under Rule 8 Order 9, Civil Procedure Code (hereinafter referred to as the Code) or any other rule of the said Order. According to the counsel, in such circumstances, Article 122 of the Limitation Act, 1963 will not be applicable and that Article 137 will apply. In support of his contention he places reliance on *Rahimuddin Sheikh and others v. Sarifan Nesa and others* (1), *Ram Reddy and another v. Yenka Reddy* (2) and *Vishwanath Nagnath Andage v. Mahadeo Sultanappa Waghmode and another* (3). On the other hand the learned counsel for the respondent has argued that the dismissal was under Order 9 Rule 8 of the Code and the application was governed by Article 122 of the Limitation Act.

(1) A.I.R. 1954 Assam, 92.

(2) A.I.R. 1956 Hyderabad, 139.

(3) A.I.R. 1964 Bombay 40.

4. I have heard the learned counsel and given thoughtful consideration to the arguments. I, however, agree with the contention of the learned counsel for the petitioner. The facts of the case are not disputed. The case was fixed for evidence of the plaintiff for June 6, 1972 and on that date it was adjourned for his evidence for August 28, 1972. Before that date, a miscellaneous application of the plaintiff came up for hearing on July 19, 1972. On that date the plaintiff was not present. Instead of dismissing that application the Court, through oversight, dismissed the suit. The Court could not do so under Order 9, Rule 8, as it provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. The words "the suit is called on for hearing" are important. These words show that the suit must be fixed for hearing for the date on which action is taken under the aforesaid rule. In the present case, however, the suit was not fixed for hearing. On the other hand miscellaneous application was fixed on that date and in default of the presence of the plaintiff that application could be dismissed. Article 122 of the Limitation Act provides a period of 30 days for restoration of a suit in case it has been dismissed for default of appearance of the plaintiff.

(5) The Article 122 will be applicable if the suit is fixed for hearing and dismissed on account of default of appearance of the plaintiff. In case the suit is not fixed for hearing and the Court dismisses it on that ground it cannot be said that there was default of the plaintiff to appear within the meaning of that Article. In that situation, Article 137, which is a residuary Article and provides a limitation of three years for making applications, will apply. It may also be clarified that the application in such circumstances shall be under Section 151 of the Code. In the aforesaid view I am fortified by the observations of a Division Bench in *Rahimuddin Sheikh's case* (supra) wherein it was held that where a date for hearing is not fixed or is not notified to the plaintiff or the petitioner, Order 9 Rule 8 has no application and the period of limitation for restoration of the application would be three years under Article 181 of the Limitation Act, 1908, which is a residuary article. It was further held that in such a case the restoration application could only be made under Section 151 and not under Order 9 Rule 9 and Article 163 would not apply. Similar view was taken by a Division Bench of Hyderabad High Court in *Ram Reddy's case* (supra). It may be mentioned that Articles 163 and 181 of the Limitation Act, 1908 are equivalent to

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Article 122 and 137 of the Limitation Act, 1963. I am in respectful agreement with the above observations. The observations in *Vishwanath Nagnath Andage's case* (supra) are, however, not of much assistance.

(6) In the present revision, as already stated, the case was fixed for August 28, 1972 for hearing and, therefore, the Court could not dismiss it on July 19, 1972. Consequently, the petitioner could make an application for restoration within three years of the dismissal of the suit. The application for restoration is admittedly within a period of three years and, therefore, within limitation.

(7) For the aforesaid reasons, I accept the revision petition, set aside the orders of the Courts below and restore the suit. The parties are directed to appear before the trial Court on March 3, 1980.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia C.J., B. S. Dhillon and G. C. Mital, JJ.

FLORABEL SKINNER and others,—Petitioners.

versus

JAI BAJRANG KALA MANDIR RAM LILA MANDAL,—Respondent.

Civil Revision No. 58 of 1978.

November 5, 1979.

Contract Act (IX of 1872)—Sections 2(a) and 5—Code of Civil Procedure (V of 1908)—Order 23 Rule 3—Evidence Act (I of 1872)—Section 20—Offer by a party to a suit to be bound by the statement of the opposite party—Opposite party accepting the offer and agreeing to make a statement—Such offer—Whether an agreement enforceable at law—Party making the offer—Whether could withdraw the same before the statement is recorded—The agreement—Whether an adjustment of the suit within the meaning of Order 23 Rule 3—Such agreement—Whether covered by section 20 of the Evidence Act.

Held, (per S. S. Sandhawalia C. J., and G. C. Mittal J.) that an offer made by a party to a suit to be bound by the statement of the