

of section 15, or otherwise. The proviso to section 17, when it talks of the term of the newly appointed member, can be construed in the manner that if a member of Market Committee resigns or ceases to reside permanently in the notified area of the Market Committee, he will be deemed to be continuing in office till his successor is appointed by the State Government.

(8) Adverting to the provisions of section 36 of the Act under which the notification appointing the Administrator has been issued by the State Government, after the decision of the learned Single Judge, we have no doubt in our mind that in a situation like this the provisions of section 36 of the Act can be brought into play. No doubt, the Government failed in its duty to hold the election before the expiry of the period of the term of the office of the previously elected members of the Committee, but certainly a situation had arisen wherein the purpose of the Act cannot be carried out in accordance with the provisions thereof and alternative arrangements had to be made by the State Government. Therefore, we see no reason to come to finding that the State Government cannot exercise its powers under section 36 of the Act in a situation like this.

(9) No other point has been pressed.

(10) For the reasons recorded above, there is no merit in this appeal and the same is dismissed. However, there will be no order as to costs.

D. K. MAHAJAN, J.—I agree.

K.S.K.

LETTERS PATENT APPEAL

Before Mehar Singh, C.J. and Bal Raj Tuli, J.

JAGAN NATH CHICHRA,—Appellant.

versus.

STATE OF PUNJAB AND ANOTHER,—Respondents.

Letters Patent Appeal No. 149 of 1967.

April 27, 1970.

Code of Civil Procedure (V of 1908)—Section 96 and Order 11 Rule 21—Defence in a suit struck off under Order 11 Rule 21—Decree passed—Appeal against such decree—Whether competent.

Jagan Nath Chichra v. State of Punjab, etc. (Mehar Singh, C.J.)

Held, that the right of Appeal against a decree as conferred under section 96 of the Code of Civil Procedure is a substantive right and whether an appeal succeeds or not on merits does not affect the existence of the right itself. Sub-section 2 of Section 96 gives a right of appeal even against an *ex-parte* decree. When a decree is passed in the absence of the defence of the defendant there is no difference whether it is because after service the defendant does not appear to defend the claim or his defence is struck off under Order 11 Rule 21. The decree is still a decree. Hence where the defence of a defendant in a suit is struck off and a decree is passed, an appeal against such a decree is competent under section 96 of the Code.

Letters Patent Appeal under Clause 10 of Letters Patent against the judgment dated 11th November, 1966 passed by Hon'ble Mr. Justice S. B. Kapoor in R. S. A. No. 1454 of 1965.

K. P. BHANDARI AND I. B. BHANDARY, ADVOCATES, for the appellant.

MR. JAGAN NATH KAUSHAL, ADVOCATE WITH M. R. AGNIHOTRI AND ASHOK BHAN, ADVOCATE, for respondent No. 2.

JUDGMENT

MEHAR SINGH, C. J.—The appellant, Jagan Nath Chichra, has been the plaintiff. He was in the employment of the State Bank of Patiala, defendant, the other defendant being the State of Punjab. In his suit he claimed declaration (i) that withholding of his promotion to Second Grade on January 1, 1952, was discriminatory, illegal and *mala fide*, so that he was entitled to the promotion on and from that date, (ii) that his posting as Accountant in the defendant-Bank's Branch at Narnaul from his position as Manager of the defendant-Bank's Branch at Kasauli, was illegal, *mala fide*, unauthorised and *ultra vires*, and (iii) that his compulsory retirement on June 7, 1958, was in substance removal from service and was null and void, and he also laid claim to decree that he was entitled to Rs. 511 as house-allowance, and to a sum of Rs. 4,000/ as some kind of arrears due to him, in addition to his claiming salary to the date of the decree.

(2) The appellant having obtained an order for issue of interrogatories to the defendants, no answers were given to the interrogatories by the defendants, so that the appellant obtained an order from the trial Court on August 8, 1961, according to Order 11, rule 21 of the Code of Civil Procedure, striking of the defence of the defendants.

The defendants ultimately, in appeal, had that order set aside in this Court on April 6, 1962, on payment of costs, but their failure to pay costs led the trial Court to order on May 18, 1962, that its earlier order striking off their defence subsisted. This second order was questioned by the defendants in appeal and in appeal under clause 10 of the Letters Patent, but without success; the Judgment of this Court in the appeal under clause 10 of the Letters Patent being dated February 27, 1963.

(3) On the case going back to the trial Court the defendants were denied cross-examination of the witnesses of the plaintiff as also opportunity to address any arguments on the merits of the appellant's claim.

(4) On October 3, 1964, the trial Court decreed the claim of the appellant in these terms——“..... the order of the compulsory retirement of the plaintiff is illegal, unconstitutional *mala fide*, void and not binding on the plaintiff and that the plaintiff continues to be in the service of the Bank. It is further held that the plaintiff is entitled to be promoted to the Manager's grade of Rs. 250—15—340/EB—20—440 with effect from January 1, 1952, and that his promotion had been withheld illegally. A decree for Rs. 3,690 is passed in favour of the plaintiff and against the defendants. The defendants shall pay proportionate costs of the suit in addition. The defendants shall pay interest on the sum of Rs. 3,599 at the rate of 6 per cent per annum from December 30, 1959, till realization.” The defendants went in appeal, which appeal was heard by the Additional District Judge of Ambala (Camp Patiala), who by his order of September 27, 1965, in substance, following a Single Bench decision of the Calcutta High Court reported as *Idannessa Bibi v. Syed Abdul wadud*, (1) came to the conclusion that “the present appeal is not competent and it would be futile to consider the same on merits. The preliminary objection raised on behalf of the respondent, therefore, prevails and the appeal stands dismissed.” This was the conclusion of the learned Additional District Judge in appeal on a preliminary objection on the side of the appellant that the defence of the defendants having been struck off under Order 11, rule 21 of the Code from the decree made by the trial Court in the appellant's suit, an

(1) A. I. R. 1959 Cal. 462

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appeal was not competent on the side of the defendants. There was a second appeal by the defendants which was accepted by a learned Single Judge by his Judgment and order of November 11, 1966, reversing the Judgment and order of the Court of first appeal, the learned Judge holding (i) that striking off of the defence of a defendant under Order 11, rule 21, did not lead to the automatic decreeing of the suit of the plaintiff and in spite of such an order the trial Court still had to dispose of the plaintiff's claim on merits, giving instances where on the merits of the matter in the claim, it might fail on the very allegations and evidence of the plaintiff himself, (ii) that the position of such a defendant should not be worse than that of a defendant who chooses not to appeal at all (Order 9, rule 6(1), or absents himself during the course of hearing (Order 9 rule 12), or fails to comply with any specific provision of the Code directing him to file a written statement (Order 8, rule 10),) or does not comply with the direction of the Court made under Order 17, rule 3, and (iii) that an appeal has been provided from an *ex-parte* decree in spite of there having been a provision for having an *ex-parte* order itself set aside, and the position of a defendant whose defence has been struck off according to Order 11, rule 21, is not different. It is against the Judgment and order of the learned Single Judge that the plaintiff has come in this appeal under clause 10 of the Letters Patent.

(5) The only question that arises for consideration in this case is, whether a decree having been made against the defendants, after their defence had been struck off according to Order 11, rule 21, an appeal against the decree on the part of those defendants is or is not competent? The nature and scope of hearing, when the appeal comes up for hearing, if such an appeal is competent, does not arise for consideration in this particular appeal. There is no provision referred to by the learned counsel for the appellants which bars any appeal by the present defendants or which renders such an appeal on their part incompetent. It is not denied that the trial Court has made a decree in favour of the appellant as plaintiff and against the defendants.

Section 96 of the Code of Civil Procedure reads—

“96. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by

any Court exercising original jurisdiction to the Court authorised to hear appeals from the decision of such Court.

(2) An appeal may lie from an original decree passed *ex-parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties."

Sub-section (3) has no application to this case, but sub-section (2) provides an analogy of a complete nature which supports the claim of the defendants to a right of appeal from the decree against them by the trial Court, and nothing has been shown in any part of the Code or otherwise which bars or renders incompetent the appeal of the defendants, the right of appeal having been given to them by sub-section (1) of this section. Apparently, therefore, there is no way of denial of the right of appeal to the defendants from the decree made by the trial Court against them and in favour of the appellant. *Idannessa Bibi's case* (1) was under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 (Act 17 of 1950), and even in that case the learned Judge did not say that there was no right of appeal when the defence was struck off according to the statute or that the appeal was incompetent, but the learned Judge was of the opinion that such a right of appeal was a mere empty formality, for the learned Judge tended to the opinion that on merits the appeal must fail. It has already been pointed out above that the question of the merit of the appeal is not for consideration in the present appeal. The only question for consideration is, whether the defendants' appeal, in the circumstances, was or was not competent before the first appellate Court? *Idannessa Bibi's case* (1) is not an authority for the proposition that such an appeal is incompetent or that in such circumstances the defendants, as in this case, have no right of appeal under section 96 of the Code. The learned counsel for the plaintiff has referred to three other cases, *D. R. Gellatly v. J. R. W. Cannon*, (2), *Satya Narain v. Naraindas Dhanuka*, (3), and *Nagina Ram v. Bishwanath Prasad Khemani* (4), but the learned counsel had to admit that not one of these three cases concerns the question that arises in the present appeal. In those three cases the question for

(2) A.I.R. 1953 Cal. 409

(3) A.I.R. 1954 Cal. 31

(4) 1964 Bihar L.J. 197

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consideration, was the right of a defendant to participate in the proceedings after his defence had been struck off. So those cases are not directly relevant to the present controversy.

(6) What is urged by the learned counsel for the appellant is that after the defendants' defence had been struck off according to Order 11, rule 21, their right to cross-examine the plaintiff's witnesses and to address argument as to the merit or demerit of the plaintiff's case is completely taken away, and as an appeal is a continuation of the suit itself, such rights are also denied to such defendants at the stage of appeal. Assuming this to be correct, without expressing any final opinion on this, as for the purposes of this appeal that is unnecessary, this approach concerns the hearing of an appeal on merits and not the competency or otherwise of the appeal or the existence or non-existence of a right of appeal. Similarly the next argument of the learned counsel for the appellant is also in the same line that an appeal in such circumstances is merely an empty formality. The right of appeal is a substantive right and whether an appeal will or will not succeed on merits does not affect the existence of the right itself. The learned counsel for the appellant then contends that a right of appeal as claimed by the defendants here is a personal right and the defendants have denied that right to themselves by their own conduct, which, if I have been able to understand this argument, again does not mean that there is no right of appeal in the defendants under section 96 of the Code of Civil Procedure, but the learned counsel seems to think that because of their conduct they will not succeed in their appeal, an aspect with which this appeal has nothing to do. The learned counsel for the appellant has further urged that a decree, as in the present case against the defendants, cannot be equated with an *ex-parte* decree against them, because in a case like the present there is a positive order by the trial Court striking off the defence of the defendants, whereas in the case of an *ex-parte* decree there is only a note made on the file that a defendant had not, in spite of service, attended Court, which is not the same thing as to deny him defence. However, what is being lost sight of by the learned counsel is that when a decree has been made in the absence of the defence of a defendant, whether it is because after service he did not appear to defend the claim against him, or whether his defence was struck off, as in the present case, the decree still is a decree under the Code of Civil Procedure against which an appeal under section 96 of the Code is competent unless it was shown otherwise that it was barred or incompetent, which has not been done in

this case. The learned counsel has lastly urged that when a defendant's defence is struck off under Order 11, rule 21, as in the present case, the defendant is expelled from the proceedings, but this is only a different way of repeating the same argument and it comes to nothing as he either voluntarily does not appear to defend the claim against him or is debarred by an order of the Court from doing so, yet after a decree has been made against him, he has been given a right of appeal against the decree under section 96 of the Code, there being nothing which takes away such a right of appeal or renders an appeal on the part of such a defendant incompetent. The learned counsel for the appellant was unable to refer to any provision either in the Code of Civil Procedure or in any other law which has taken away the right of appeal of the defendants in this case.

(7) So obviously the learned Additional District Judge was wrong in reaching the conclusion that the defendants' appeal before him was not a competent appeal. The learned counsel for the defendants has lastly turned round and said that the Additional District Judge at the stage of the first appeal did not merely say that the appeal was not competent but he said that there was no merit in the appeal itself, so that he disposed of the appeal of the defendants on merits also. This is not so. The operative part of the judgment and order of the Additional District Judge has already been reproduced above and it is apparent that he dismissed the appeal of the defendants as not competent and did not go into the merits of the matter.

(8) In the approach as above, the present appeal of the appellant fails and is dismissed with costs.

B. R. TULI, J.—I agree.

K.S.K.

APPELLATE CIVIL

Before Mehar Singh, C.J. and B. R. Tuli, J.

GURBACHAN SINGH, etc.,—Appellants.

versus.

FINANCIAL COMMISSIONER, PUNJAB, etc.,—Respondents.

L. P. A. No. 208 of 1967

April 28, 1970.

Pepsu Tenancy and Agricultural Lands Act (XIII of 1955)—Section 7-A—Termination of tenancy under—Conditions in clause (b) of the section—Compliance of—Whether essential—Words "the land" in second part