and another, C.W. No. 1447 of 1962, a short note of which appears in 1965, P.L.R. S.N. 109 at page 57. There is no force in the contention of the learned counsel for the respondent to the effect that relief should be denied to the petitioner on the ground that there is delay in filing of his case in this Court by about six months.

For the foregoing reasons, this writ petition is allowed and the impugned orders of the rehabilitation authorities declining to give compensation to the petitioner for his verified claim for the house property, are set aside and quashed. There will be no order as to costs.

R.N.M.

APPELLATE CIVIL

Before S. B. Capoor, J.

THE STATE OF PUNJAB AND ANOTHER,—*Appellants*

versus

JAGAN NATH CHHICHARA,—*Respondent*

Regular Second Appeal No. 1454 of 1965

November 11, 1966

Code of Civil Procedure (Act V of 1908)—S. 105, Order 11, Rule 21 and Order 43, Rule 1(f)—Plaintiff or defendant failing to comply with the order to answer interrogatories or for discovery or inspection of documents—Effect of—Defendant filing no appeal from the order passed under Order 11, Rule 21—Whether can challenge the order in an appeal from decree—Defendant whose defence is struck off under Order 11, Rule 21—Whether can file appeal against the decree.

Held, that the failure of the plaintiff to comply with any order to answer interrogatories or for discovery or inspection of documents renders him liable to have the suit dismissed for want of prosecution. But if the defendant makes a similar default, the suit is not to be automatically decreed. All that the rule lays down is that he is to be placed in the same position as if he had not defended and the Court has to consider the plaintiff's case on merits, disregarding any defence, which may have been offered by the defendant by written statement or otherwise. It has to give a finding on the various issues raised and a decree in favour of the plaintiff will follow only if the Court finds, in the

exercise of its judicial discretion, that the material issues have been established in favour of the plaintiff and against the defendant.

Held, that if the defendant, till the stage of the decree, has not filed any appeal under clause (f) of Rule 1 of Order 43 of the Code against the order striking off his defence, it cannot be said that he is debarred from filing an appeal against the decree and in that decree raising, in view of S. 105 of the Code, the error or irregularity in the inter-locutory order made under Rule 21 of Order 11 of the Code. He may, however, choose not to press that point and may confine his attack to the insufficiency of the evidence produced by the plaintiff on the record to prove any material issue in the case. The defendant, against whom, in the course of hearing of the suit, an order striking out the defence is made for non-compliance with direction to answer interrogatories or for discovery or inspection of documents, should not, *qua* his right of appeal be placed in a worse position than a defendant who chooses not to appear at all, or absents himself during the course of hearing, or fails to comply with any specific provision of the Code directing him to file a written statement, or does not comply with the direction of the Court made under Rule 3 of Order 17. The right of appeal is not shut out in these cases.

Regular Second Appeal from the decree of the Court of Shri Surinder Singh, Additional District Judge, Ambala (Camp Patiala), dated the 27th September, 1965, affirming that of Shri M. L. Mirchia, Sub-Judge, 1st Class (D), Patiala, dated the 3rd October, 1964, ordering that 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 1st January, 1952 and that his promotion has been withheld illegally and granting a decree for Rs. 3,690 in favour of the plaintiff.*

H. L. Sibal and M. L. Agnihotri, Advocates *for the* Advocate-General, for the Appellant.

Jinender Kumar, Advocate, for the Respondent.

JUDGMENT

Capoor, J.—This regular second appeal raises an interesting legal point which is so unique that no direct authority could be cited by the learned counsel for the parties.

The suit from which this appeal has arisen was instituted as far back as the year 1959. The plaintiff prayed for a declaration that the order, dated the 1st August, 1957, passed by the State Bank of Patiala posting him as an Accountant in its Branch at Narnaul degrading him

from the post of Manager of Kasauli Branch was illegal, *mala fide* and *ultra vires*. In addition to claiming some house-rent allowance, he also prayed for a declaration that the withholding of the plaintiff's promotion from 1st January, 1952, was illegal, *mala fide* and an act of discrimination and that he was entitled to promotion to that grade from the aforesaid date. The plaintiff also challenged the order of his premature compulsory retirement, dated the 7th June, 1958, contending that it was void and that the plaintiff still continued to be in service. A money claim as regards arrears of salary and future salary, which would accrue to him, was also made. The defendant was initially the State of Punjab and subsequently the State Bank of Patiala was also joined. The defendants resisted this suit and as many as 15 issues were framed.

In the course of trial of the suit an application was made by the plaintiff for the issue of interrogatories to the defendants and the trial Court ordered the issue of notice of the application to the other side on the 14th July, 1960. However, the interrogatories were not answered and on the 22nd August, 1960, the plaintiff filed an application praying that the defence of the defendants be struck off for the defendants' non-compliance. Eventually by an order, dated the 8th August, 1961, the trial Court struck off the defence of the defendants on the ground that reply to the interrogatories had not been put in though several adjournments had been granted for the purpose. The defendants appealed against that order and,—*vide* his order, dated the 20th February, 1962, the Additional District Judge, Ambala (at Patiala), dismissed the appeal and held that it was not competent in his court. The defendant then approached the High Court which by its judgment, dated the 6th April, 1962, allowed the appeal and set aside the order striking off their defence subject, however, to the payment of Rs. 100 as conditional costs. These costs in the High Court were even not paid before the due date and so the trial Court by its order, dated the 18th May, 1962, held that its earlier order striking off the defence of the defendants subsisted. This order was again challenged in the High Court in appeal, as well as Letters Patent Appeal, but with no success. The copy of the judgment of the Letters Patent Bench, dated the 27th February, 1963, has been placed on the record.

On the case being remitted to the trial Court, the defendants prayed for an opportunity to cross-examine the plaintiff's witnesses but this was not permitted on the ground that their defence had been struck off. The trial Court by its order, dated the 3rd

August, 1964, held that the defendants were barred even from addressing arguments to it.

Ultimately, considering the evidence already on the record, the trial Court in its elaborate judgment dated the 3rd October, 1964, held that "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 1st January, 1952 and that his promotion had been withheld illegally. A decree for Rs. 3,690 is passed in favour of the plaintiff 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 from 30th December, 1959, till realisation".

Against this order the defendants appealed to the District Judge and Shri Surinder Singh, Additional District Judge, Ambala (Camp Patiala), by his order, dated the 27th September, 1965, held on the objection of the plaintiff that once the defence of the appellants had been struck off by the High Court, their appeal on the merits was incompetent and the appellants were not even entitled to urge anything in their favour by making a reference to the evidence produced by the plaintiff himself. This is the order impugned in the present second appeal.

The order striking off the defence for failure of the defendants to answer the interrogatories was one made under Order 11, rule 21, of the Code of Civil Procedure, which is as follows :—

> "O. 11, r. 21. Where any party fails to comply with any order to answer interrogatories, or for discovery, or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect and an order may be made accordingly."

Now, this rule does not say in so many terms that the defendants would not even be permitted to address arguments to the

trial Court on the evidence already on the record, but, of course, with this point I am not here concerned. In any case it does not say anything at all about the right of the defendants to be heard in appeal. There is a specific provision in clause (f) of rule 1 of order 43 of the Code laying down that an appeal under the provisions of section 104 of the Code shall lie against an order under rule 21 of Order 11 of the Code. The defendants have, of course, exhausted that remedy long ago and the legal question for consideration and the sole question which arises for determination in this appeal is whether the defendants have now a right to be heard in an appeal against the decree eventually made in the suit.

"Decree" is defined in clause (2) of section 2 of the Code as follows :—

> "'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default."

Under section 96 of the Code, save where otherwise expressly provided in the body of the 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 authorized to hear appeals from the decisions of such Court. Under sub-section (2), an appeal may lie from an original decree passed *ex parte* and under sub-section (3), no appeal shall lie from a decree passed by the Court with consent of parties. Section 105 of the Code is also material and is as follows :—

> "105 (1). Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1) where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

The contention advanced by Mr. Sibal, on behalf of the defendant-appellants, is that in view of the provisions of section 105 read with the provisions previously discussed, the appellants are competent to file this appeal. He has relied on *Garikapati Veerava* v. *N. Subbiah Choudhry and others* (1), in which it has been held that the right of appeal is vested right and it can only be taken away by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise. This case is not of much bearing on the point under issue. For deciding whether an appeal to the District Court was competent, it is necessary to consider the scope and implication of rule 21 of Order 11 of the Code. So far as the plaintiff is concerned, his failure to comply with any order to answer interrogatories or for discovery or inspection of documents renders him liable to have the suit dismissed for want of prosecution. The suit being at an end a decree follows dismissing the suit and whether the plaintiff appeals under section 96 of the Code or under clause (f) of rule (1) of Order 43, obviously the only point which he can agitate is whether the order under Order 11, rule 21 of the Code was a proper one or not to be made in the circumstances of the case and whether the Court acted properly in exercise of its judicial discretion in dismissing this suit for want of prosecution. But if it is the defendant who is in default for non-compliance with the order made under Order 11, rule 21 the suit is not to be automatically decreed. All that the rule lays down is that he is to be placed in the same position as if he had not defended and the Court has then to consider the plaintiff's case on the merits—disregarding any defence which may have been offered by the defendants by written statement or otherwise—it has to give a finding on the various issues raised and a decree in favour of the plaintiff would follow only if the Court finds in exercise of its judicial discretion that the material issues have been established in favour of the plaintiff and against the defendants Suppose, till the stage of the decree the defendant has not filed any appeal under clause (f) of rule 1 of Order 43 of the Code against the Order of the Court striking off his defence, it cannot be said that he is debarred from filing an appeal against the decree itself and in that decree raising in view

(1) A.I.R. 1957 S.C. 540.

of section 105 of the Code, the error or irregularity in the interlocutory order made under rule 21, Order 11, of the Code. He may, however, choose not to press that point and may confine his attack to the insufficiency of the evidence produced by the plaintiff on the record to prove any material issue in the case. No provision in the Code could be pointed out which would debar the defendant from doing so.

If the provisions of rule 21 of Order 11 are interpreted in the strict sence in which they have been by the Court below, viz., that by the passing of such an order the mouth of the defendant is shut for ever so far the case is concerned, several anomalies may arise. For instance, the trial Court might have through inadvertence or partisanship committed an error of jurisdiction either territorial or pecuniary while passing its decree on failure of the defendant to comply with an order striking out his defence, or again the court might have decreed the plaintiff's claim in excess of the claim in the plaint, e.g., while the suit was for a declaration it might have given the plaintiff a decree for possession, or if the suit was for judicial separation the court might have granted a decree for divorce. It would be anomalous, unjust and even unthinkable that in such circumstances the defendant should not be able to approach the superior court for redress and I do not see how in view of the provisions of section 96 of the Code of Civil Procedure his right to appeal could be shut out.

As mentioned above, there is no direct authority bearing on the point. On behalf of the plaintiff reliance is principally placed on *Idannessa Bibi* v. *Syed Abdul Wadud* (2), which the lower appellate Court has followed. That appeal arose from a suit for ejectment in which during the pendency of the suit an application under section 14(4) of the West Bengal Premises Rent Control (Temporary Provisions) Act of 1950, was filed on behalf of the landlady (the appellant in the case) for a direction to the tenant to pay arrears of rent and also to pay current rent month by month according to the provisions of that section. That application was allowed. Before the suit came up for final hearing, the tenant committed some defaults in payment of current rent and on the application made by the plaintiff, the trial Court made an order striking out the defence of the tenant against ejectment. Thereafter the defendant failed to appear and the suit was decided *exparte*. The lower appellate Court held that there was no default of the description found by the trial Court and that the

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

tenant was not disentitled to get protection from eviction. A conditional order was made for payment of rent which was complied by the tenant and the lower appellate Court dismissed the suit of the plaintiff. The argument addressed to the High Court on behalf of the plaintiff was that the defendant was precluded by statute from urging as a ground of defence that he was not a defaulter and, accordingly, the same ground could not be urged by way of attack in the appeal. This contention was upheld by the High Court. It was observed that it was only after showing that his defence had been improperly or erroneously struck out that a defendant could urge that defence in appeal by way of challenge against the *ex parte* decree passed by the trial Court. The emphasis in the judgment all the time was on the consideration that it was not competent to the tenant to press his case against eviction in appeal before the lower appellate Court. It was not held in that case that if the trial Court had acted in excess of its jurisdiction or that the decree passed by it was void on some ground, such as being passed on a statute which had been repealed, that ground could not be taken in appeal by the defendant. In other words, the principle laid down in that case applies to its own particular facts and cannot be stretched to support the conclusion that the appeal in the present case would *per se* be incompetent.

Another case cited on behalf of the plaintiff and relied upon by the lower appellate Court is *S. B. Trading Co. Limited* v. *Olymia Trading Corporation Limited and another* (3). All that was held in the case was that when the defence of the tenant is struck out under the provisions of sub-section (4) of section 14 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, the defendant has no right to cross-examine the plaintiffs' witnesses as to the facts establishing the claim to ejectment. That case can also be distinguished on the same ground *as Idannessa Bibi* v. *Syed Abdul Wadud* (supra).

On behalf of the plaintiff *D. R. Gellatly* v. *J.R.W. Cannon* (4), was also referred to. This is also a case under the same provision of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. The tenant had submitted to the order made under section 14(4) of the Act by making payment of rent month by month and after committing default in payment, he turned round and tried to avoid the result of his default by setting up a plea that section 14(4)

(3) A.I.R. 1952 Cal. 685.
(4) A.I.R. 1953 Cal. 409.

did not apply to his case as he was not a tenant. It was held that he could not be permitted to do so.

Then reference on behalf of the plaintiff was made to *Ramkarandas Radhayallabh* v. *Bhagwandas Dwarkadas* (5), at page 1145. It was held in that case that as an express provision is made under rule 4, Order 37 of the Code, a Court is empowered to set aside a decree passed under the provisions of that Order. If a case does not come within the ambit of rule 4, there was no scope to resort to section 151 for setting aside such a decree. It was argued that on the same analogy since express provision was made by clause (f) of rule 1 of Order 43 and rule 21 of Order 11 of the Code for an appeal against the order of striking off the defence, the same order could not be challenged in appeal. That argument, as discussed above, is not correct and this is in view of the combined result of sections 96 and 105 of the Code. The only exception to the provisions of sub-section (1) of section 105 appears to be the one given in sub-section (2) thereof, that is, when a party aggrieved by the order of remand, from which an appeal lies, does not appeal therefrom, he shall then be precluded from disputing its correctness. An appeal against an order of remand is mentioned in clause (u) of rule (1) of Order 43. However, no such exception is found in section 105, so far as order under rule 21, Order 11, is concerned.

There seems no reason why a defendant against whom in the course of hearing of the suit an order striking out the defence is made, for non-compliance with direction to answer interrogatories, or for discovery or inspection of documents, should *qua* his right of appeal be placed in a worse position than a defendant who chooses not to appear at all (see rule 6(1) of order 9), or absents himself during the course of hearing (*see* rule 12 of Order 9), or fails to comply with any specific provision of the Code directing him to file a written statement (*see* rule 10 of Order 8) or does not comply with the direction of the Court made under rule 3 of Order 17. The right of appeal is not shut out in these cases. An order pronouncing a judgment against a party who defaults to comply with the direction made under rule 10, Order 8, is appealable,—*vide* clause (b) of rule 1 of Order 43. Similarly, an Order under sub-section (2) of section 96 specifically provides that an appeal may lie from an original decree passed *ex parte* and under clause (d) of rule 1 of Order 43, an order under rule 13 of Order 9, rejecting an application (in a case open to appeal) for an order to set aside a decree

(5) A.I.R. 1965 S.C. 1144.

passed *ex parte*, is also appealable. A person aggrieved by an order made under rule 3 of Order 17 has also a remedy by way of appeal as held in *Panna Lal Mandwari v. Mt. Bishen Dei* (6), and *Pitamber Prasad* v. *Sohan Lal and others* (7).

For all the reasons given above, the conclusion is that the view of the lower appellate Court as to the appeal before it being *per se* incompetent is not correct. The appeal is accordingly allowed but in the circumstances of the case with no order as to costs. The parties are directed to appear before the lower appellate Court on 5th December, 1966.

R.N.M.

CIVIL MISCELLANEOUS

Before R. S. Narula, J.

RAM CHANDER SINGH,—*Petitioner*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents*

Civil Writ No. 2024 of 1966

November 15, 1966

Punjab Co-operative Societies Act (XXV of 1961)—S. 29—Act of society or its committee or officers—Grounds on which can be challenged—Resolution of co-operative society—Whether amounts to 'act' of the society—A resolution of the society passed in utter disregard of the statutory provisions—Whether saved by section 29—"Defect of procedure"—Meaning of—Whether covers violation of mandatory and statutory provision—Punjab Co-operative Societies Rules (1963)—Rule 80(1)(i)—Shorter notice—Whether can be equated to no notice at all—Registrar—Whether can permit complete dispensation with the requirement as to notice.

Held, that an analysis of section 29 of The Punjab Co-operative Societies Act, 1961, shows that it is only an act of the society itself, or of its committee or officer which is made immune to an attack on its validity on the following grounds and no others—

(*a*) the existence of any defect in procedure; or

(*b*) the existence of any defect in the constitution of the co-operative society or its committee, as the case may; or

(c) in a case where the act of an officer of the society is sought to be declared invalid—

(*i*) the existence of any defect in the appointment or election of the officer concerned; or

(*ii*) the existence of any disqualification for the appointment of such officer.

(6) A.I.R. 1946 All. 353 (F.B.).

(7) A.I.R. 1957 All. 107.