APPELLATE CIVIL.

Before Imam and Chapman JJ.

1914

March, 9.

ENATULLA BASUNIA

v.

JIBAN MOHAN ROY.*

Ex parte Decree—Appearance, what constitutes—Civil Procedure Code (Act V of 1908) O. IX, rr. 6, 13 ; O. XVII, rr. 2, 3—Part-heard suit—Adjourned hearing—Absence of defendant—Practice.

The provisions of O. IX by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in O. XVII which deals with adjournments. The distinction between rr. 2 and 3 of O. XVII is that while the former rule applies to hearings adjourned at the instance of the Court, the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted. There is yet another distinction between the two rules. Where there are no materials on the record, the proper procedure to follow would be that laid down in r. 2 but if there are materials on the record the Court ought to proceed under r. 3. To apply the procedure, therefore, laid down in r. 3 to a case there must be the presence of both the elements ; *viz.*, (i) the adjournment must have been at the instance of a party ; and (ii) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of r. 3.

Kader Khan v. *Juggeswar Prasad Singh* (1), *Mariannissa* v. *Ramkalpa Gorain* (2) and *Jonardan Dobey* v. *Ramdhone Singh* (3) referred to.

APPEAL by Enatulla Basunia and others, the defendants.

* Appeal from Order No. 254 of 1913, against the order of Chandra Kumar Chatterjee, Subordinate Judge of Rungpore, dated May 17, 1913.

(1) (1908) I. L. R. 35 Calc. 1023. (2) (1907) I. L. R. 34 Calc. 235.
(3) (1896) I. L. R. 23 Calc. 738.

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This appeal arose out of an order of the Subordinate Judge of Rungpore rejecting an application, under O. IX, r. 13 of the Code of Civil Procedure, to set aside a decree said to have been passed *ex parte*. The circumstances, under which the decree was passed, were these. On the day of the hearing both the parties appeared and the case was taken up from day to day. In course of 9 days 14 witnesses on behalf of the plaintiff were examined and cross-examined. The case for the plaintiff having been closed the defence pleader opened his case and examined one of the defendants. His cross-examination continued unfinished for three days, and the case stood over for the following day for further cross-examination. But on the day in question neither he nor the witnesses nor the pleader for the defence appeared. The Subordinate Judge, noting the case for the defence, as closed, proceeded to hear argument of the pleader for the plaintiff. There was no argument for the defendant, and the Subordinate Judge delivered judgment in the plaintiff's favour.

The defendant subsequently applied for setting aside the decree on the ground that it was an *ex parte* one. The Subordinate Judge rejected the application. Hence this appeal.

Babu D. N. Bagchi (with him *Babu S. K. Sinha*), for the appellants. In a case like this, appeal or review would be an immensely expensive remedy. In O. IX, r. 13, we have a cheap and effective remedy: *Jonardan Dobey* v. *Ramdhone Singh* (1). The case of *Kader Khan* v. *Juggeswar Prasad Singh* (2), referred to by the learned Subordinate Judge, has no application here. It was a case of failure to produce additional evidence coming under O. XVI, r. 3, and

(1) (1896) I. L. R. 23 Calc. 738. (2) (1908) I. L. R. 35 Calc. 1023.

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which under O. XVI, r. 2, was default in appearance. *Jonardan Dobey* v. *Ramdhone Singh* (1) is an authority for the proposition that, in any case at an adjourned hearing, if the defendant failed to appear and the case was proceeded with at the instance of the plaintiff and a decree passed, the decree would be considered *ex parte*. "*Ex parte*" was nowhere defined in the Code. It cannot be contended that because evidence was recorded on behalf of the plaintiff and even partly on behalf of the defendant, the jurisdiction of the Court to interfere under O. IX, r. 13, was at an end. The decision was no decision on merits. The defendant should be given an opportunity to place his entire evidence before the Court and should be allowed to explain the reason of his default. To hold otherwise, would be unfair and unjust to the defendant.

Babu Dwarka Nath Chakravarti (with him *Babu Naresh Chandra Sen*), for the respondent. It would be dangerous to allow an application under O. IX, r. 13, in a case such as the one before us, where evidence had been recorded on both sides—though not fully on behalf of the defendant. It may be very hard but the defendant has no remedy under Order IX, r. 13. His remedy lies either in appeal or in review. If such an application was entertained Courts would be at the mercy of defendants who would, to bring about a *de novo* trial, make default at any time convenient to them. The decision in the present case was a decision upon merits so far, of course, as materials were available and, therefore, no application under O. IX, r. 13, would lie. The decree was in no way *ex parte*. It could have been treated *ex parte* only if there had been default by defendant before any evidence was recorded on either side. Suppose, if

(1) (1896) I. L. R. 23 Calc. 733.

there was default, during arguments, would the Court allow an application under O. IX, r. 13?

Babu D. N. Bagchi, in reply. *De novo* trial was not at all necessary in a case such as this, nor would anybody ask for it. The case might be taken up from the point it was stopped.

Cur. adv. vult.

IMAM AND CHAPMAN, JJ. This is an appeal against an order of the Subordinate Judge of Rungpore rejecting an application to set aside a decree said to have been passed *ex parte*. The application was made under Order IX, r. 13 of the Code of Civil Procedure. The decree sought to be set aside was passed under these circumstances. On the day the hearing of the case commenced both the parties appeared. The case then proceeded from day to day. The plaintiff in the course of 9 days examined 14 witnesses, who were cross-examined by the defendants' pleader, and then closed his case. The defence pleader then began his case and examined one of the defendants whose cross-examination, not having been finished on the third day of his examination, stood adjourned to the next day when neither he, the witness, nor the pleader for the defence appeared. The Subordinate Judge consequently noted the case for the defence as closed and proceeded to hear the argument of the pleader for the plaintiff. There was no argument for the defendants, and the Subordinate Judge delivered his judgment decreeing the suit in plaintiff's favour.

The defendants made the application, out of which this appeal has arisen, for setting aside the decree alleging that it had been passed *ex parte*. The Subordinate Judge, relying on the case of *Kader Khan* v. *Juggeswar Prasad Singh* (1), held that he had no

(1) (1908) I.L.R. 35 Calc. 1022.

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power to set aside the decree under r. 13 of Order IX, and that the defendants' remedy lay in a review or an appeal.

In this appeal it has been argued for the appellant that the decree was passed *ex parte*. The expression *ex parte* has not been defined anywhere in the Code nor does it appear to have been the subject of a judicial decision for its definition. Its accepted meaning, however, according to Wharton's Law Lexicon seems to be "a proceeding by one party in the absence of the other." We may remark here that this accepted meaning does not help us in this case one way or the other. Rule 6 of Order IX lays down that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then if it is proved that the summons was duly served, the Court may proceed *ex parte*. For correctly applying this rule it is important to consider what constitutes "appearance" of the defendant. The nature of the defendant's appearance in obedience to the summons is best explained by the language of the form, prescribed in the first schedule Appendix B, for summons to a defendant. The form directs the defendant to appear in person or by pleader duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions. The defendant's failure to appear in either of the ways specified would lead to the determination of the suit in his absence. The test of a defendant's "appearance" is whether such of the repuirements of the summons as relate to appearance have or have not been fulfilled. In the present case the defendants appeared by their pleader whose being furnished with due instruction cannot be doubted as he conducted the case for the defence up to the stage when he failed to attend the hearing of

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the case. Thus it cannot be said that the Subordinate Judge proceeded under r. 6 of Order IX.

The provisions of Order IX by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in Order XVII which deals with adjournments. Rule 2 of that Order lays down that "where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX, or make such other order as it thinks fit;" while rule 3 of the same Order lays down that "where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

The distinction between the two rules is that the former rule applies to hearings adjourned at the instance of the Court, while the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted. A further distinction between the two rules has been pointed out in case of *Mariannissa* v. *Ramkalpa Gorain* (1), that in a case where there are no materials on the record the proper procedure to follow would be that laid down in r. 2 (s. 157 of the former Code) but if there are materials on the record, the Court ought to proceed under r. 3 (s. 158 of the former Code). Thus to apply the procedure laid down in r. 3 to a case there must

(1) (1907) I. L. R. 34 Calc, 235.

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be the presence of both the elements, *viz.*, (i) the adjournment must have been at the instance of a party; and (ii) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of rule 3.

The question in this appeal is whether the procedure of the Subordinate Judge on the default of the defendants was under rule 2 or rule 3 of Order XVII. The hearing of the case was proceeding from day to day and the case stood over for the next day as the cross-examination of the witness had not been finished. The adjournment therefore was not at the instance of a party. In the circumstances, we are of the opinion that on the default of the defendants the Subordinate Judge proceeded under rule 2 to dispose of the suit in one of the modes directed in that behalf by Order IX. That being our view we think, on the authority of the Full Bench decision in the case of *Jonardan Dobey* v. *Ramdhone Singh* (1), that the appellant's application under rule 13, Order IX, should have been entertained. The order of the lower Court is set aside.

The appeal is decreed. The Subordinate Judge will now proceed to consider if the appellants make out sufficient cause for the decree to be set aside.

S.K.B. *Appeal allowed.*

(1) (1896) I. L. R. 23 Calc. 736.