

CIVIL RULE.

Before Mookerjee and Cuming JJ.

RAJENDRA LAL SUR

v.

ATAL BIHARI SUR.*

1916.

June 23.

*Jurisdiction of High Court—Civil Procedure Code (Act V of 1908), s. 115 ;
O. XXIII, r. 1—Withdrawal of suit under O. XXIII, r. 1—Notice
to the other side, if necessary—Judicial order—Practice.*

The High Court has power to set aside orders made under Order XXIII, rule 1, in the exercise of the powers vested in it by section 115 of the Code of Civil Procedure.

*Kharda Coal Co. v. Durga Charun (1), Mabulla v. Hemangini (2),
Ram Krishna v. Ram Kirpanidh (3), Umesh Chandra Palodhi v. Rakhal
Chandra Chatterjee (4), Buratha Gunta v. Thurlapatti (5)* referred to.

Though rule 1 of Order XXIII of the Code of Civil Procedure does not specifically require that notice of an application under it must be given to the opposite party, still it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard.

Ajant Singh v. F. T. Christian (6) referred to.

Bansi Singh v. Kishun Lall Thakur (7) dissented from.

THIS was a Rule to set aside an order under rule 1 of Order XXIII of the Code of Civil Procedure. The facts are briefly these. On the 30th of June 1915, the plaintiffs instituted a suit for partition in the Court

* Civil Rule No. 276 of 1916, against the order of Umesh Chandra Chakrabarty, Subordinate Judge of 24-Parganas, dated Jan. 13, 1916.

(1) (1909) 11 C. L. J. 45.

(4) (1911) 15 C. W. N. 666.

(2) (1910) 11 C. L. J. 512.

(5) (1910) 9 Mad. L. T. 204.

(3) (1912) 9 All. L. J. 358.

(6) (1912) 17 C. W. N. 862.

(7) (1913) I. L. R. 41 Calc. 632.

of the first Subordinate Judge of Alipore against the present petitioner and others and valued the properties at Rs. 8,000. The petitioner and the other defendants filed their respective written statements on various dates. In these several written statements the defendants did not raise any objections with regard to non-joinder of parties, but contended, *inter alia*, that the suit was not a *bonâ fide* one and that the plaintiffs had neither title nor possession and that they could not sue on a court-fee stamp of Rs. 10.

Issues were settled on the 21st of August 1915. No issue was raised on behalf of any of the parties as to the non-joinder of parties. On the 6th of January 1916, plaintiffs applied for time for production of evidence on the question of court-fee. The case was adjourned till the following day for evidence on the question of court-fee. Both parties were directed to come with their evidence. On the 7th of January the Court, after examining four witnesses on behalf of the plaintiffs and one on behalf of the petitioner, on the point of valuation and court-fee, reserved judgment. On the 12th of January 1916, the plaintiffs, without notice to the petitioner or to any other defendants, applied for an order that they might be allowed to withdraw that suit with liberty to bring a fresh suit. On the 13th of January 1916, the Subordinate Judge without notice to the petitioner or to any other defendant made the following order: "Plaintiffs are permitted to withdraw and bring a new suit. In the special circumstances of the case I make no order as to costs."

The petitioner moved this Court against the order of withdrawal and obtained a Rule.

Babu Provas Chandra Mitter and Babu Sailendra Nath Mookerjee, for the petitioner.

Babu Niranjan Roy Chowdhury, Babu Kshitis

1916

RAJENDRA
LAL SUR
v.
ATUL BIHAR
SUR.

1916

RAJENDRA
LAL SURv.
ATAL BIHARI
SUR.

Chandra Chakrabarti and Babu Bimala Charan Deb,
for the opposite party.

MOOKERJEE AND CUMING JJ. We are invited in this Rule to set aside an order made under rule 1 of Order XXIII of the Code of Civil Procedure. The petitioner was a defendant in a suit for partition of joint property, and contested the claim on the ground, amongst others, that the plaint was insufficiently stamped. An issue was raised upon this preliminary point, and after various interlocutory orders, which need not be set out in detail for our present purpose, the Court decided on the 6th January 1916, to determine the question of court-fees thus raised. On the day following, witnesses were examined, arguments were heard and judgment was reserved. Six days later, we find the following entry in the order-sheet: "Plaintiffs are permitted to withdraw and bring a new suit. In the special circumstances of the case, I make no order as to costs." What had happened was that on the 12th January, the plaintiffs presented an application to the Subordinate Judge under rule 1 of Order XXIII of the Code of Civil Procedure. They alleged that the suit as constituted was defective for want of parties and that full relief could not be had, unless the suit was reconstituted. No notice of this application was given to the defendants; but the Court proceeded to make the order set out above. The petitioner now prays that the order may be set aside, and his application is supported by some of the other defendants to the suit.

The plaintiffs contend that this Court has no jurisdiction to set aside the order of the Subordinate Judge, and relies upon the *dictum* of Mr. Justice Coxe in the case of *Bansi Singh v. Kishun Lall Thakur* (1), that

(1) (1913) I. L. R. 41 Calc. 632.

a case could not well be said to have been decided within the meaning of section 115 of the Code of Civil Procedure, when the Court had not adjudicated on the merits but had merely permitted the withdrawal of the plaintiff from the suit. We observe, however, that Mr. Justice Digambar Chatterjee did not share the doubt expressed by Mr. Justice Coxe, as to the competency of this Court to interfere with an order improperly made under Order XXIII, rule 1. We may point out that instances are by no means rare where the High Court has set aside orders improperly made under Order XXIII, rule 1, in the exercise of the powers vested in it by section 115 of the Code of Civil Procedure: *Kharda Coal Co. v. Durga Charun* (1), *Mabulla v. Hemangini* (2), *Ram Krishna v. Ram Kirpanidh* (3); or under section 25 of the Provincial Small Cause Courts Act: *Umesh v. Rakhal* (4) *Burath v. Gunta v. Thurlapatti* (5). We feel no doubt whatever that in any view we have ample jurisdiction under section 107 of the Government of India Act, 1915, to set aside the order of the Subordinate Judge which cannot possibly be supported, as it was passed without opportunity afforded to the defendants to contest the application for withdrawal made by the plaintiffs. It has been contended, however, on behalf of the plaintiffs that rule 1 of Order XXIII of the Code of Civil Procedure does not specifically require that notice of such an application must be given to the opposite party. That is perfectly true. But as pointed out in the case of *Ajant Singh v. F. T. Christian* (6), it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly

1916

RAJENDRA
LAL SUR
v.
ATAL BIHARI
SUR.

(1) (1909) 11 C. L. J. 45.

(4) (1911) 15 C. W. R. 666.

(2) (1910) 11 C. L. J. 512.

(5) (1910) 9 Mad. L. T. 204.

(3) (1912) 9 All. L. J. 358.

(6) (1912) 17 C. W. N. 862.

1916
RAJENDRA
LAL SUR
v.
ATAL BIHARI
SUR.

affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard; this is merely an instance of the application of the maxim, *audi alteram partem*. In the present case, the defendants have incurred costs to resist the claim of the plaintiffs. They have not had opportunity given to them by the Subordinate Judge to contest the truth of the allegations made by the plaintiffs in their application for withdrawal from the suit. If they had notice of the application, they might well have appeared and contended, that although the plaintiffs might be allowed to withdraw from the suit, they should not be permitted to harass the defendants with a fresh suit on the same cause of action. They might also have urged that even if an order were made in terms of the petition, the defendants should be indemnified to the extent of the costs incurred by them. We are of opinion that the Subordinate Judge should not have made an *ex parte* order of this description and that he has acted with material irregularity in the exercise of his jurisdiction.

The result is, that this Rule is made absolute, the order of the Subordinate Judge discharged and the case remitted to the Court below in order that the application of the plaintiffs may be heard in the presence of all the parties concerned. The petitioner is entitled to the costs of this Rule.

S. K. B.

Rule absolute.