21 *bighas* 5 *cottahs*. The decision of the settlement officer was that the fair rent for 21 *bighas* 5 *cottahs* was Rs. 18, this being an enhancement upon the rent of Rs. 15 for the original 25 *bighas*. If, therefore, this question depends upon any one proposition, that proposition is this: whether the tenant is able to-day, and, after the settlement officer's decision, to say, that he holds 25 *bighas* at an entire rent. It appears to me that unless we are to set aside the settlement officer's decision and give no effect to it at all, it must be held that in respect of the 21 *bighas* it has been found that the fair and equitable rent is Rs. 18; in other words, the entirety of the original rent is inconsistent with and has been destroyed by the finding of the settlement officer. I think, therefore, that the order proposed is a correct one.

S. M. *Appeal allowed*.

APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and Mitter J.

S. N. BANERJEE

v.

H. S. SUHRAWARDY.*

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July 14.

Practice—Procedure—High Court, Original Side—Ex parte decree, setting aside—Discretion of the High Court in the Original Side to restore suit decreed ex parte—Civil Procedure Code (Act V of 1908), O. IX, r. 13, how far it applies to the High Court, Original Side—Practice as to appearance of defendant, difference between High Court and mofussil Courts.

O. IX, r. 13 of the Code of Civil Procedure is directed in terms to a practice different from that which obtains on the Original Side of the High Court. It refers to the case which is the usual case in a mofussil Court, where a summons has gone to a defendant informing him that on a given

* Appeal from Original Civil No. 43 of 1927.

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date the case will come on before the Court for hearing or for settlement of issues. In the mofussil, therefore, the question arises in the form whether or not the defendant was prevented by "sufficient cause" from appearing when the suit was called on for hearing. In the High Court, the question is whether or not the defendant has entered appearance in the office. If he has not entered an appearance within a certain time, then his right to enter appearance comes to an end upon the suit being sent to the undefended list, in the absence of leave from a Judge.

It is the general practice on the Original Side to follow the analogy of r. 13 of O. IX of the Code on general principles of justice. As a rule the case will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case comes before the Court. But on the Original Side, at all events, the terms of r. 13 do not prevent the Court, where there is an element of negligence, from restoring in its discretion the suit upon proper terms. The main purpose of r. 13, O. IX is to give a right to a party who could show sufficient cause to get a restoration on certain terms independently of having to make a plea to the mercy of the Court.

Appeal from a judgment of Buckland J.

The plaintiff, H. S. Suhrawardy, obtained an *ex parte* decree for damages for Rs. 7,500 against the first defendant, Mr. B. Chakravarti, at that time the editor, and the second defendant, S. N. Banerjee, the printer of the newspaper *Bengalee* for libel published in its issue of July 27, 1926 under the heading "Raj Rajeswari Procession."

Thereafter, the first defendant obtained an order from Pearson J., who passed the *ex parte* decree, for setting it aside on the ground that the summons was not served on him. Subsequently, the second defendant also applied for setting aside the decree against him on the ground that although he was served with summons, the manager of the paper did not defend the suit as he promised to do.

Mr. Justice Buckland, before whom this application came on for hearing, dismissed it, under O. IX, r. 13 of the Code of Civil Procedure, holding that this

was not sufficient reason for his non-appearance at the time of the hearing.

Against this order, the second defendant appealed.

Mr. S. N. Banerjee (with him *Mr. B. C. Ghose* and *Mr. D. N. Sen*), for the appellant. I contend in the first place that there was sufficient cause which prevented the appellant from defending the suit. He could reasonably rely on the manager for the defence, as he promised to do. In the next place, if the decree against the appellant were to stand, there might be inconsistent decrees, the printer being held liable and not the editor, in respect of the same article. Lastly, O. IX, r. 13, of the Code is not quite applicable in the High Court, Original Side. This Court has a discretion in the matter of restoration in cases like this. The judgment of Buckland J. cannot be supported.

Mr. J. N. Mazumdar, for the respondent. The appellant has not shown sufficient cause for setting aside the decree. He cannot, therefore, get the benefit of the provisions of O. IX, r. 13 of the Code.

[RANKIN C. J. does O. IX, r. 13 apply to the Original Side of this Court?]

Yes, it does. O. XLIX, r. 3 of the Code enumerates the rules which are not applicable to any Chartered High Court. O. IX, r. 13 is not one of them.

[RANKIN C. J. O. IX, r. 13 refers to a practice different from that which obtains on the Original Side of this Court. The question that arises in the mofussil Courts is whether the defendant was prevented by "sufficient cause" from appearing when the suit was called on for hearing or not. In the High Court, the question is whether the defendant has entered appearance in the office or not.]

If a defendant does not take proper steps in time to insure that an *ex parte* decree may not be passed

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against him, he is without any remedy afterwards. The Court will regard him negligent and will not exercise its discretion in his favour.

[RANKIN C. J. After a judgment is passed against an editor of a newspaper for libel, can a fresh suit for the same libel be brought against the printer?]

I think I can sue again.

[RANKIN C. J. I am not quite sure. Have you ever heard of separate suits against the editor, the printer and the writer for the same publication of libel?]

It appears from Fraser on Libel that such separate suits do not lie.

[RANKIN C. J. You cannot bring separate suits against joint tortfeasers for the same publication.]

Cur. adv. vult.

RANKIN C. J. This is an appeal from a judgment of Mr. Justice Buckland, whereby he refused to restore a suit, which was decreed *ex parte*. It appears that a newspaper, of which the first defendant was the editor and the present appellant—the second defendant—was the printer, published an article on the 27th July, 1926, referring to the plaintiff. The plaintiff says that the article is defamatory and, on the 8th November, 1926, he brought a suit for damages against the editor and the printer. On the 6th December, summons was served upon the printer. It appears to have been established that the summons was not served upon the editor. The printer says that he handed over the summons to be attended to by the manager of the newspaper, but that owing to the fact that the summons was not served on the editor or owing to some independent negligence, the manager took no steps though he had promised to do so, to have the suit defended on the part of the printer. It is necessary that it should be understood what

happened upon this default. Under the rules of the Original Side, a person served with a summons is required to enter an appearance in the office of the Court. That is an act which does not require his personal attendance and it does not involve his appearing before the Court himself with or without his witnesses. If he does not enter appearance within the time limited, the case will go into what is called the undefended list and when the case is on the undefended list, it is not possible for the defendant, without obtaining leave, to enter appearance. He has a limited right to cross-examine witnesses adduced on behalf of the plaintiff if he appears at the time when the undefended case is down for hearing, but his position is that of a man who, for not entering appearance in time, is precluded from defending the suit, whether he appears at the hearing or does not appear at the hearing. A similar form of procedure is applicable to a case where a person has entered appearance but has made default in the filing of his written statement and again in the case of a person who has failed to obtain leave to defend in a suit on a negotiable instrument under O. XXXVII, Civil Procedure Code. In the present case no appearance was entered. The suit came on the undefended list on the 3rd January, 1927, and the minute shows what took place before the Court on that occasion. Learned counsel, Mr. I. B. Sen, when the plaintiff had given his evidence in part, appeared and represented to the Court that the writ had not been served on the first defendant—the editor, and he asked that the case might stand over to enable the first defendant to enter appearance. I should have explained that this case came on the undefended list on the footing that both these defendants had been served and both had made default in entering

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appearance. It was being heard, therefore, against both as an undefended suit. Mr. Sen stated in reply to the Court that he had not yet been instructed on behalf of the first defendant. Whether this means that Mr. Sen, by that time, was instructed on behalf of the present appellant is not quite clear. The Court refused Mr. Sen's application for time, holding that he had no *locus standi*. That, of course, was quite correct. A person who is not allowed to enter appearance cannot employ an attorney or counsel to appear on his behalf, except possibly for a limited purpose specially provided for. Under these circumstances, a decree for Rs. 7,500 for damages was passed against both the defendants. Then the editor applied to have the decree set aside as against him and he succeeded in his application, ostensibly on the ground that the writ of summons was not served on him. The printer applied on the 18th of January, 1927, to have the decree set aside so far as he was concerned and the learned Judge has refused that application holding that, as he was served on the 6th of December, the negligence of the manager—his failure to provide for the defence of the suit—was not a "sufficient cause" within the meaning of O. IX, r. 13, C. P. C. He has held further that this case is not one within the concluding proviso to that rule. On that the printer brings this appeal. It would appear from the judgment of Mr. Justice Buckland that the plaintiff said that he did not oppose the application of the editor to have the suit restored as against him because he wanted him to have an opportunity of putting in a plea of justification. The position, therefore, is that the plaintiff, according to him, is anxious to fight out this question with the editor, but desires that the judgment against the printer should stand in any event. I have some difficulty in seeing that this

course is either reasonable or heroic and, in my opinion, it is necessary for us to consider whether this Court is bound either to affirm that there is "sufficient cause" within the meaning of O. IX, r. 13, C. P. C., or to refuse to set aside the decree.

In my judgment O. IX, r. 13, C. P. C, is directed in terms to a different practice from that which obtains on the Original Side of the High Court and was followed in this case. It refers to the case which is the usual case in a mofussil Court where a summons has gone to a defendant informing him that on a given date the case will come on before the Court for hearing or for settlement of issues. The ordinary practice under O. V and the forms in the Schedule to the Code sufficiently elucidate that. In the mofussil, therefore, the question arises in the form whether or not the defendant was prevented by "sufficient cause" from appearing when the suit was called on for hearing. In the High Court the question is whether or not the defendant has entered an appearance in the office. If he has not entered an appearance within a certain time, then his right to enter appearance comes to an end upon the suit being sent to the undefended list in the absence of leave from a Judge. It does seem to me that there are many cases in the High Court where the mere fact that the plaintiff himself or the defendant himself was unable personally to attend on the day of the hearing would be no excuse at all, because there are many cases in which the party is not a necessary witness and in which he was really intending to present his case by the assistance of attorney and counsel. I am unable to hold that the exact words of r. 13 of O. IX are to be applied on the footing that they are directly applicable under the rules of the Original Side and that they are exhaustive. It has been the general practice

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on the Original Side to follow the analogy of r. 13 of O. IX on general principles of justice. As a rule, the case will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case came before the Court. But on the Original Side, at all events, the terms of r. 13 do not prevent the Court, where there is an element of negligence, from restoring the suit upon proper terms. My own view is that the main purpose of r. 13, O. IX is to give a right to a party who could show sufficient cause to get a restoration on certain terms independently of having to make a plea to the mercy of the Court. The words are "the Court shall make an order setting "aside the decree as against him upon such terms as "to costs, payment into Court or otherwise as it "thinks fit". I am not prepared to hold that the Court is deprived by this rule of its discretion in a case like the present. If the matter is a question of discretion to be exercised on terms, I have a clear opinion that this would be a proper case in which to set aside the decree as against the printer. It is quite clear that there is an absurdity if this judgment should go against the printer, and the editor should be held not liable in respect of the same publication. Moreover, in the case of the printer of a newspaper, it does not seem to be unreasonable that, in a question of this kind, he should go to the manager and request the manager to undertake the whole of the defence. It is true that when he does so, he is in some sense responsible as having entrusted the manager on his behalf to look after the case. But it may be a great hardship to a printer in a case of this kind who honestly relies upon the manager doing his duty as, indeed, he has promised to do, to find a judgment of Rs. 7,500 against him on the ground that this case does not amount to "sufficient cause"

and that the Court is powerless to rescind the decree. Nothing that I have said is to be regarded in any way as pronouncing an opinion to the effect that in cases coming from the mofussil from Courts to which r. 13 of O. IX, C P. C., in its terms applies—. the 13th rule is not to be regarded as exhaustive. Nor do I propose to define "sufficient cause". These questions may be left open for the purposes of the present case. Nor am I saying that what the learned Judge has said about section 151, C. P. C., is not well-founded. It may be that, as a rule, section 151 is wrongly invoked in cases which are covered by special legislation. I confine myself to the application of the principle of this rule to the very different practice that prevails on the Original Side of this High Court. I am not satisfied that the traditional view that the Court has a discretion, independently of O. IX, r. 13 is wrong and, in my judgment, this is a case in which the appeal should be allowed. At the same time, the reason of default is a reason which must be attributed to the appellant and, in my judgment, he ought to pay the costs both before Mr. Justice Buckland and before this Court.

MITTER J. I agree.

Appeal allowed.

Attorney for the appellant: *S. C. Mitter.*

Attorney for the respondent: *Sanderson & Co.*

S. M.