CIVIL REVISION.

Before Mukerji J.

1931

Aug. 17, 25.

SARDARMAL SERAOGI

v.

JAHARMAL CHIRANJILAL.*

"Appear," meaning of—Code of Civil Procedure (Act V of 1908), s. 115; O. IX, rr. 6, 8, 9.

The word "appear" in rule 8 of Order IX of the Code of Civil Procedure apparently means appearing in the suit. A party may be present in the precincts of the court or he may be found present in the court-room, but if he does not take part in the suit, it cannot be said that he has "appeared."

If a plaintiff comes to court and files an application for adjournment and when the application is refused retires from the suit, though he may not have physically retired from the court, he is not to be considered any longer to be present in the suit. Any order passed in such circumstances must be taken to be an order passed *ex parte*.

Shikandar Ali v. *Kushalchandra Sarma* (1) followed.

Soonderlal v. *Goorprasad* (2) and *Esmail Ebrahim* v. *Jan Mahomed Haji Mahomed* (3) disapproved.

Gopala Row v. *Maria Susaya Pillai* (4), *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (5), *T. Kaliyappa Mudaliar* v. *Kumaraswami Mudali* (6), *Lalji Sahu* v. *Lachmi Narain Singh* (7), *Muhammad Bakar Ali* v. *Chulhai Mahto* (8) and *Damodar Das* v. *Raj Kumar Das* (9) referred to.

CIVIL RULE under section 115 of the Code of Civil Procedure obtained by the plaintiff.

The facts of the case and relevant portions of arguments of counsel appear fully in the judgment.

Manmathanath Ray (junior) for the petitioner.

Nirmalchandra Chakrabarti for the opposite party.

Cur adv. vult.

*Civil Revision, No. 638 of 1931, against the order of I. P. Baruah, Subordinate Judge of Assam Valley Districts, dated Feb. 9, 1931.

(1) (1931) C. R. 790 of 1931, decided by Suhrawardy and Graham JJ. on 3rd Aug.
(2) (1898) I. L. R. 23 Bom. 414.
(3) (1908) I. L. R. 33 Bom. 475.
(4) 1906) I. L. R. 30 Mad. 274.
(5) (1907) I. L. R. 34 Calc. 403.
(6) (1926) 51 Mad. L. J. 290.
(7) (1918) 3 Pat. L. J. 355.
(8) (1919) 4 Pat. L. J. 712.
(9) (1921) I. L. R. 1 Pat. 188.

1931

Sardarmal Seruogi v. Jaharmal Chiranjilal.

MUKERJI J. On a date fixed for the hearing of a suit which the petitioner had instituted, the petitioner, who was present with his witnesses intimated to the court that a pleader, whom he had engaged for conducting the suit on his behalf, was actually engaged in another court and prayed for a short adjournment. The Munsif passed over the case and asked the petitioner to engage another pleader. He took the case up again about an hour after, as appears on the order sheet, but the pleader had not yet arrived. The petitioner had in the meantime sent his son to call his pleader, who was in another court. It does not appear what the distance between the two courts was. The Munsif refused to wait any further, and called upon the petitioner to proceed with the case. The petitioner informed the court that he had sent his son to call the pleader whom he had already engaged, and said that it was not possible for him to engage another pleader and that he was unable to examine himself or his witnesses. The Munsif thereupon dismissed the suit with costs. Shortly after, on the same day, the petitioner's pleader appeared and filed a petition for the restoration of the suit. Reliefs were asked for under Order IX, rule 9, Civil Procedure Code and section 151, Civil Procedure Code. The Munsif issued notice to the other side, and on a date fixed for the purpose, examined the petitioner and dismissed the application, holding that in giving certain answers in the course of his deposition he had perjured himself. These answers related to the question whether the petitioner had not been called upon by the court to go on with the case, the petitioner's answers suggesting that he had not been specifically asked to do so and trying to make out that he did not fully understand the proceedings.

The petitioner preferred an appeal from the order refusing to restore the suit. The Subordinate Judge observed in his order,—"I may, however, remark "that the lower court's order operated with great

1931

Sardarmal Seraogi v. Jaharmal Chiranjilal.

Mukerji J.

"hardship against the plaintiff, who was victimized "for circumstances beyond his control. I have gone "through the plaintiff's deposition but cannot agree "with the learned lower court that he was guilty of "deliberate perjury. I have carefully gone through "the lower court's record and find that the "plaintiff's allegations were well-founded." Having examined in detail all the facts and circumstances of the case and referred to the conduct of the respective parties in the course of this litigation the Subordinate Judge eventually observed,—"Under such "circumstances the learned lower court should have "either waited for some time or adjourned the suit "to the next day after awarding some adjournment "costs to the opposite party. The order of dismissal, "in my opinion, was unjustified and unduly harsh." I have perused the papers of the case and I have no hesitation in agreeing with these conclusions of the Subordinate Judge.

The Subordinate Judge, however, felt compelled to dismiss the appeal, as in his opinion the dismissal of the suit was not under Order IX, Civil Procedure Code and so no application under rule 9 of that Order lay and consequently no appeal from the order was competent. He also held, and rightly enough, that so far as the application was under section 151, Civil Procedure Code, the Munsif's order of rejection was final, not being open to revision, at least by the Subordinate Judge.

The Subordinate Judge proceeded upon the view, which has obtained in Bombay, that a plaintiff will be deemed to have "appeared" on the date fixed for the hearing of the suit, if he appears in person, that the mere presence of a party in court at the hearing is sufficient to constitute appearance within the meaning of Order IX, and it does not matter for what purpose he appears or what action he takes on his appearance, and that in such cases the plaintiff cannot avail himself of the provisions of rule IX of

1931

Sardarmal Seraogi v. Jaharmal Chiranjilal.

Mukerji J.

that order [*Soonderlal* v. *Goorprasad* (1), *Esmail Ebrahim* v. *Jan Mahomed Haji Mahomed* (2)]. A decision of the Madras High Court [*Gopala Row* v. *Maria Susaya Pillai* (3)] appears to have been shown to him, but he declined to follow it, saying that "the "modified view laid down in that case was not "approved in any subsequent ruling."

On the question involved there is a conflict of views amongst the different courts in this country. The case of *Soonderlal* v. *Goorprasad* (1) was disapprovingly noticed in the referring order in *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (4). In Madras it is settled that where counsel appears on behalf of a party and presents an application for adjournment which being refused he retires from the case, the party should be taken as not having appeared in the suit [*Gopala Row* v. *Maria Susaya Pillai* (3), *T. Kaliyappa Mudaliar* v. *Kumaraswami Mudali* (5)]. So also in Patna [See *Lalji Sahu* v. *Lachmi Narain Singh* (6), *Muhammad Bakar Ali* v. *Chulhai Mahto* (7), *Damodar Das* v. *Raj Kumar Das* (8)]. In a recent case of this Court [*Shikandar Ali* v. *Kushalchandra Sarma* (9)], a Division Bench of this Court has held thus :—

"Turning to the Code itself Order IX, rule 8 says "that where the defendant appears and the plaintiff "does not appear when the suit is called on for hearing ".........The word 'appear' in this rule apparently "means appearing in the suit. A party may be "present in the precincts of the court or he may be "found present in the court-room but, if he does not "take part in the suit, it cannot be said that he has " 'appeared.' This is what is meant by Order IX, "rules 6 and 8. If a plaintiff comes to court and files "an application for adjournment and when the

(1) (1898) I. L. R. 23 Bom. 414.
(2) (1908) I. L. R. 33 Bom. 475.
(3) (1906) I. L. R. 30 Mad. 274.
(4) (1907) I. L. R. 34 Calc. 403.
(5) (1926) 51 Mad. L. J. 290.
(6) (1918) 3 Pat. L. J. 355.
(7) (1919) 4 Pat. L. J. 712.
(8) (1921) I. L. R. 1 Pat. 188.
(9) (1931) C. R. 790 of 1931, decided by Suhrawardy and Graham JJ. on 3rd Aug.

1931

Sardarmal Seraogi v. Jaharmal Chiranjilal.

Mukerji J.

"application is refused he retires from the suit, "though he may not have physically retired from the "court, he is not to be considered any longer to be "present in the suit and any order passed in such "circumstances must be taken to be an order passed "*ex parte*. That was the view taken by the learned "Subordinate Judge when he dismissed the plaintiff's "suit. The order he passed was 'that the suit be " 'dismissed *for default*.' By 'default,' I understand, "he meant for the absence of the plaintiff, because no "evidence was recorded in the case. The fact that "the learned Subordinate Judge sent for the plaintiff "and put him certain questions regarding the *bona* "*fides* of his application would not be tantamount to "his presence in the suit."

I am bound by and agree with the ruling just cited.

I hold, therefore, that the dismissal of the suit rightly formed the subject matter of the application under Order IX, rule 9, Civil Procedure Code and that the learned Subordinate Judge was fully competent to deal with it in the exercise of his appellate powers.

The rule is made absolute. The order of the Subordinate Judge and of the Munsif being reversed, the decree passed by the latter is set aside and the suit itself is restored.

There will be no order for costs.

Rule made absolute : suit remanded.

G. S.