CIVIL REVISION.

Before R. C. Mitter J.

DULALCHANDRA CHAUDHURI

v.

ATULKRISHNA RAY.*

1935

Feb. 4, 6.

Ex parte *Decree—Particulars necessary to be given in application for order to set it aside—Time-limit for adding party—Effect of confirmation of conditional order after death of decree-holder and before substitution of his heirs—Code of Civil Procedure (Act V of 1908), O. IX, r. 13; O. XXII, r. 6.*

In an application by the judgment-debtor for an order to set aside an *ex parte* decree under Order IX, rule 13 of the Code of Civil Procedure, it is not necessary that all the decree-holders should be named or specifically impleaded. All that is necessary is that an indication should be given in the application of the particulars of the suit in which the *ex parte* decree has been passed. It would be then the duty of the court to direct the issue of notice on such persons as are to be found on the record and the duty of the applicant would only be to deposit the process fees and to cause service of the notices.

Addition of the name of a decree-holder as opposite party after thirty days from the date of the *ex parte* decree does not affect the maintainability of the application to set aside the *ex parte* decree.

When a conditional order, which is self-contained and otherwise complete, is passed in the presence of all the parties, it is not subsequently vitiated by the fact that the formal and consequential order on fulfilment of the condition is passed after the death of a party and before his heirs are brought on the record. Such an order is covered by the principles underlying Order XXII, rule 6 of the Civil Procedure Code.

Dip Chand v. *Sheo Prasad* (1), *Nitai Dutta* v. *Bishun Lal Sao* (2) and *Radhakishan Mahesri* v. *Tansukh Mahesri* (3) referred to.

CIVIL RULE obtained by the plaintiff, decree-holder.

The facts of the case and the points raised in the arguments in the Rule are sufficiently stated in the judgment.

*Civil Revision, No. 47 of 1935, against the orders of Keshabchandra Sen, First Munsif of Hooghly, dated Sep. 19 and 29, 1934.

(1) (1929) I. L. R. 51 All. 910. (2) (1932) I. L. R. 11 Pat. 504.
(3) (1934) I. L. R. 62 Calc. 286.

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Nandagopal Banerji for the petitioner.

Bijanbihari Gupta for the opposite party.

Cur. adv. vult.

MITTER J. This Rule has been obtained by plaintiff No. 2 in a suit for damages for malicious prosecution instituted against the opposite party No. 1. It appears that opposite party No. 1 launched unsuccessfully a criminal prosecution against the petitioner and his father, Upendranath Chaudhuri. On the termination of the criminal proceedings, Upendranath Chaudhuri, as plaintiff No. 1, and the petitioner, as plaintiff No. 2, instituted the said suit for damages. Opposite party No. 1 filed his written statement, but on the date fixed for hearing (22nd May, 1934) he failed to appear, with the result that an *ex parte* decree was passed against him on the same date. On the 26th May, 1934, opposite party No. 1 made an application under Order IX, rule 13 of the Code of Civil Procedure to set aside the *ex parte* decree. He mentioned in his application the number of the suit, but, in naming his opponents, he mentioned the name of Upendranath Chaudhuri only and omitted to put in the petitioner's name. Notice of the application was served on Upendranath Chaudhuri alone, who appeared and contested the said application. On the 11th August, 1934, it was discovered that the notice of the application had not been issued to the petitioner. On the said fact being pointed out to the court, the court directed the notice of the application under Order IX, rule 13, to be served upon the petitioner. The application under Order IX, rule 13, was allowed to stand in its original form. On the said notice being served on the petitioner, the court took up the hearing of the application and allowed it by an order, dated the 19th September, 1934. The court held that, on the 22nd May, 1934, the date of the *ex parte* decree, the opposite party No. 1 was very

ill and that there was sufficient cause for his non-appearance on that date, but, inasmuch as he failed to inform his pleader about the fact and nature of his illness, the court made an order vacating the *ex parte* decree on terms. It directed the opposite party No. 1 to put in court within ten days a sum of Rs. 15 as compensation to the plaintiffs. On the date of the order, Upendranath was alive, but he died between that date and the 29th September, 1934, when the said sum of Rs. 15 was deposited in court by the opposite party No. 1. On the 29th September, before the heirs of Upendranath were brought on the record, the court recorded the final order setting aside the *ex parte* decree.

The petitioner has taken before me two points, namely:—

(*i*) That the application to set aside the *ex parte* decree as made on the 26th May, 1934, was defective, inasmuch as the petitioner had not been named therein as an opposite party, and, assuming that he was made an opposite party on the 11th August, 1934, when the court directed the issue of the notice of the application to him, the bar of limitation was then an insurmountable bar, and

(*ii*) that the order of the 29th September, 1934, is bad, as it was passed in the absence of the legal representatives of Upendranath who was dead shortly before that date.

I do not see any substance whatsoever in the second point. Evidence had been led, arguments heard and judgment was pronounced on the 19th September, 1934, when Upendra was alive. The order was then passed in a conditional form, requiring the opposite party No. 1 to put in Rs. 15 within ten days. The order stated that if the money was put in within the said time, the *ex parte* decree would be set aside, otherwise it will stand. The order of the 19th September was a self-contained and complete order. In these circumstances, the fact that Upendranath

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died just before the formal and consequential order of the 29th September and his legal representatives were not brought on the record at that time would not, in my judgment, derogate from the force of the said order. The matter is covered, in my judgment, by the principles underlying Order XXII, rule 6 of the Code. I accordingly overrule the said point.

Regarding the first point also, I do not think that there is much substance in it, although the case seems to be of first impression. Order IX, rule 13 requires an application for setting aside an *ex parte* decree and rule 14 provides that no such application is to be granted without notice of the application being given to the opposite party, that is, to the person or persons in whose favour the *ex parte* decree has been passed. The necessity of making such persons as parties to an appeal against the order refusing to set aside the *ex parte* decree stands on a different footing. They must be named as respondents in the memorandum of appeal; but, so far as the first court is concerned, there is no provision in the code for naming them as parties in the application. All that is necessary is that an indication should be given in the application of the particulars of the suit in which the *ex parte* decree has been passed. If the suit is so indicated, there is no difficulty in finding out from the records of the suit on whom the notice of the application has to be given. It would be then the duty of the court to direct the issue of notice on such person and the duty of the applicant would only be to deposit the process fees and to cause service of the notices. In this respect the cases dealing with this point in connection with applications made for setting aside court sales under Order XXI, rules 89 and 90 are helpful. The proviso to Order XXI, rule 92 is *pari materia* with the provisions of Order IX, rule 9 and Order IX, rule 14. It has been held that the parties, who would be affected by an eventual order under Order XXI, rule 92, need not be named as parties in the application to set aside the sale, and,

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as there is no time-limit for the issue and service of the notice of the application, except that it must be before the final order is passed, the application would be regarded as a good application even if no persons are named in the application as opposite parties, and the order passed would be a good order even if the notice is served beyond thirty days of the date of the sale: *Dip Chand* v. *Sheo Prasad* (1), *Nitai Dutta* v. *Bishun Lal Sao* (2) and *Radhakishan Mahesri* v. *Tansukh Mahesri* (3). I accordingly overrule the first point also and discharge the Rule with costs; hearing fee one gold mohur.

Rule discharged.

A. A.

(1) (1929) I. L. R. 51 All. 910.
(2) (1932) I. L. R. 11 Pat. 504.
(3) (1934) I. L. R. 62 Calc. 286.