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under section 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the explanation to section 64 worded as it is and made no provision for the continuance of the attachment in Order XXI in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the legislature.

I agree with the view expressed by SESHAGIRI AYYAR, J. and would answer this reference in the negative.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Sadasiva Ayyar and Mr. Justice Kumaraswami Sastriyar,

1917, September, 18 and 19 and November, 14 and 21.

PRATIVADI BHAYANKARAM PICHAMMA *alias* MANGAMMA (COUNTER-PETITIONER, PLAINTIFF), PETITIONER,

v.

KAMISETTI SREERAMULU AND TWO OTHERS (PETITIONERS—DEFENDANTS NOS. 2, 3 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Order XVII, rules 2 and 3, scope of—Decree ex parte—*Defendant absent at adjourned hearing after taking adjournment for letting evidence.*

Where, at the close of the plaintiff's case, an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing, and the Court proceeded to pass a decree against him.

Held by the Full Bench, that the case came within Order XVII, rule 2, and the decree could be set aside under Order IX, rule 13.

Per SADASIVA AYYAR and KUMARASWAMI SASTRIYAR, JJ.—Rules 2 and 3 of Order XVII, Civil Procedure Code, are mutually exclusive: rule 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in rule 3 of the Order, while rule 3 applies only to cases where parties are present and commit default of the kind mentioned in the rule.

Per WALLIS, C.J.—Rules 2 and 3 of Order XVII are not mutually exclusive. Rule 3 *may* be applied even in the absence of the defendant, but the decree will none the less be *ex parte* and liable to be set aside.

Chandramathi Ammal v. *Narayanasami Aiyar* (1910) I.L.R., 33 Mad., 241, followed.

Naganada Aiyar v. *Krishnamurti Aiyar* (1911) I.L.R., 34 Mad., 97, overruled.

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* Civil Revision Petition No. 1248 of 1916 (F.B.).

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v.
SREERAMULU.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the decree of V. R. KUPPUSWAMI AYYAR, the Subordinate Judge of Kistna at Ellore, in Miscellaneous Appeal No. 233 of 1916, preferred against the order of T. M. GOPALA ACHARYA, the Additional District Munsif of Kovvur at Ellore, in Civil Miscellaneous Petition No. 154 of 1916 in Original Suit No. 49 of 1915.

In this case, after the plaintiff's witnesses were examined and cross-examined, the defendant's pleader applied for an adjournment to enable him to produce evidence, and time was granted. Neither the defendant nor his pleader was present at the adjourned hearing. Thereupon the Court made a decree in favour of the plaintiff. Defendant applied to set aside the decree under Order IX, rule 13, Civil Procedure Code, but the Court refused the same, holding that the decree was not one passed *ex parte* and that Order XVII, rule 3, was applicable, relying on *Enatulla Basunia* v. *Jiban Mohan Roy*(1). On appeal by defendant, the Subordinate Judge held that the decree was, according to *Chandramathi Ammal* v. *Narayanasami Aiyar*(2), one passed *ex parte* and finding that there was sufficient cause for non-appearance of the defendant and his vakil, reversed the decree and remanded the suit for disposal according to law. Plaintiff preferred a revision petition to the High Court under section 115, Civil Procedure Code, against the said order of the Subordinate Judge.

K. V. L. Narasimham for the petitioner.

P. Somasundaram for the respondents Nos. 1 and 2.

The third respondent did not appear.

This petition came on for hearing in the first instance before ABDUR RAHIM and OLDFIELD, JJ., who made the following ORDERS OF REFERENCE to a Full Bench.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—The question in this appeal relates to the interpretation of rules 2 and 3 of Order XVII of the Code of Civil Procedure. What happened in this case is shortly stated in the judgment of the Subordinate Judge. The suit was instituted first in the Court of the District Munsif of Kovvur and afterwards transferred to that of the Additional District Munsif. In the latter Court, the plaintiff examined most of his witnesses and on the application of the defendants, the suit was adjourned

(1) (1914) I.L.R., 41 Calc., 956. (2) (1910) I.L.R., 33 Mad., 241.

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to 7th February 1916. On that date neither the defendants' guardian nor the vakils were present. The District Munsif closed the case and delivered judgment in favour of the plaintiff on the 8th February 1916. There is, in my opinion, a conflict of rulings in this Court as to whether rule 2 or rule 3 of Order XVII applies to facts like these. In *Naganada Aiyar* v. *Krishnamurti Aiyar*(1), which was a judgment of MUNRO, J., and myself, it was held that section 158 of the old Code empowers the Court in circumstances such as those in this case to decide the suit on the merits whether the party at whose instance the adjournment was granted was present or not at the date fixed for hearing. If the parties or any of them fail to appear on the fixed date, it is open to the Court to proceed either under section 157 or 158. If there are no materials before the Court on which to come to a proper decision on the merits, it would ordinarily deal with the case under rule 2, otherwise under rule 3. In *Naganada Aiyar* v. *Krishnamurti Aiyar*(1), an earlier decision of this Court in *Chandramathi Ammal* v. *Narayanasami Aiyar*(2), to which the present learned Chief Justice and KRISHNASWAMI AYYAR, J., were parties, was not noticed. There it was held that section 158 of the old Civil Procedure Code which corresponds to rule 3 of Order XVII of the new Code would only apply if the parties are in attendance and there is failure to do what a party is given time to do. If the parties are not in attendance, then according to that ruling section 157 of the old Code corresponding to rule 2, Order XVII of the present Code, would alone apply and that these two rules are mutually exclusive. This view seems to have been approved in *Chenroyan* v. *Rama Chetti*(3), while the view propounded in *Naganada Aiyar* v. *Krishnamurti Aiyar*(1) appears to be the same as that taken in *Enatulla Basunia* v. *Jiban Mohan Roy*(4).

The question is one of importance and frequently arises and I think that it ought to be settled by a Full Bench. The question therefore referred to the Full Bench is:

Whether the view taken in Chandramathi Ammal v. *Naranayasami Aiyar*(2), *or in Naganda Aiyar* v. *Krishnamurti Aiyar*(1)

(1) (1911) I.L.R., 34 Mad., 97. (2) (1910) I.L.R., 33 Mad., 241.
(3) (1916) 3 L.W., 524. (4) (1914) I.L.R., 41 Calc., 956 at p. 962.

as to the proper scope and meaning of Order XVII, rule 2 and rule 3, is correct.

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OLDFIELD, J.—I agree to the reference proposed by my learned brother.

OLDFIELD, J.

ON THIS REFERENCE—

B. Narasimha Rao (with *K. V. L. Narasimham*) for the petitioner.—The decree that was passed was not an *ex parte* one. Order XVII, rule 3, Civil Procedure Code, and not rule 2, applies to the case as time was granted to the defendant at his request to let in his evidence at the adjourned hearing and the District Munsif in his order refusing to restore says that he acted under Order XVII, rule 3, Civil Procedure Code. Reference was made to the following cases: *Naganada Aiyar* v. *Krishnamurti Aiyar*(1), *Enatulla Basunia* v. *Jiban Mohan Roy*(2), *Kader Khan* v. *Juggeswar Prasad Singh*(3), *Droupadi Ammal* v. *South Indian Railway Co., Ltd.*(4), *Ningappa* v. *Gowdappa*(5), *Subramania Othuwar* v. *Munusamiya Pillai*(6), *Anandaraju* v. *Venkataraju*(7), *Badam* v. *Nathu Singh*(8) and *Gaura Bibi* v. *Ghasita*(9).

P. Somasundaram for the respondents Nos. 1 and 2, contended that the proper rule applicable is rule 2 and not rule 3 in all cases of absence whether time was granted or not. Reference was made to *Chandramathi Ammal* v. *Narayanasami Aiyar*(10), *Maharaja of Vijayanagaram* v. *Lingam Krishna Bupati*(11), *Majeti Nagaratnam* v. *Pachigolla Ramayya*(12) and *Chenroyan* v. *Rama Chetti*(13). The decree is one passed *ex parte*.

The third respondent did not appear.

The Court expressed the following OPINIONS :—

WALLIS, C.J.—I am of opinion that *Chandramathi Ammal* v. *Narayanasami Aiyar*(10), to which I was a party, was rightly decided. As the question is very fully dealt with in the opinion of my learned brother, I shall merely state the conclusions at which I have arrived on further consideration. Under the Code,

WALLIS, C.J.

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(1) (1911) I.L.R., 34 Mad., 97. (2) (1914) I.L.R., 41 Calc., 956 at p. 962.
(3) (1905) I.L.R., 35 Calc., 1023. (4) (1914) 24 I.C., 353.
(5) (1905) 7 Bom., L.R., 261. (6) (1915) 31 I.C., 869.
(7) (1914) 1 L.W., 428. (8) (1903) I.L.R., 25 All., 194.
(9) (1912) I.L.R., 34 All., 123. (10) (1910) I.L.R., 33 Mad., 241.
(11) (1902) 12 M.L.J., 473. (12) (1915) 2 L.W., 105.
(13) (1916) 3 L.W., 524.

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where the plaintiff appears and the defendant does not appear either on the day fixed for the first hearing [Order IX, rule 6½] or on any day to which the hearing of the suit is adjourned [Order XVII, rule 2, read with Order IX, rule 6½], the Court, if it is proved that the summons was duly served, may proceed *ex parte*. In either case, where the Court has disposed of the case *ex parte* and passed a decree against the absent defendant, he may, under Order IX, rule 13, move to set aside the decree on the ground that he was prevented by any sufficient cause from appearing when the suit was called on. When a case is called on and the defendant is absent, and the Court resolves to proceed against him *ex parte*, there is nothing, I am now of opinion, to prevent the Court from applying the provisions of Order XVII, rule 3, and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal will be none the less both in fact and in law *ex parte*, and the decree will be liable to be set aside by the defendant under Order IX, rule 13. If the *ex parte* decree is set aside and the case restored and the defendant appears, it will still be open to the Court to apply the provisions of Order XVII, rule 3, after hearing what the defendant has to say in explanation of his failure to do what he had been given time to do. There is, I think, no conflict at all between the two rules, and each may be fully applied on this construction at the proper stage of the case. In so far as we laid down in *Chandramathi Ammal* v. *Narayanasami Ayyar*(1) that the two rules must be read as mutually exclusive, I think we went too far.

With great respect I am unable to agree with any of the rulings or observations in the cases cited that take a different view.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I have nothing to add to the judgment which my learned brother KUMARASWAMI SASTRIYAR, J., is about to pronounce and I entirely concur in it.

KUMARASWAMI SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—The question raised by this reference relates to the scope of rules 2 and 3 of Order XVII of the Civil Procedure Code. Rule 1 empowers the Court on proper cause being shown to grant time to the parties at their

(1) (1910) I.L.R., 33 Mad., 241.

instance and to adjourn the suit on such terms as to costs as it thinks fit. Rule 2 provides that, if the parties or any of them failed to appear on the adjourned date, the Court may dispose of the suit in one of the modes directed in that behalf in Order IX or make such other order as it thinks fit. Order IX relates to the procedure to be followed on the date fixed in the summons for the parties to appear and provides for the consequence of non-appearance. Rule 3 provides that the Court may dismiss the suit if both parties fail to appear. Where the plaintiff appears and not the defendant, rule 6 empowers the Court to decide the suit *ex parte* if the summons has been duly served on the defendant in time to enable him to appear. Where the defendant appears and not the plaintiff, rule 8 directs that the Court should dismiss the suit wholly or partially if the claim or any part is not admitted. Rule 9 entitles the plaintiff to have the dismissal set aside if he satisfies the Court that he had sufficient cause for non-appearance. Rules 7 and 13 enable the defendant who failed to appear to set aside the *ex parte* order or decree against him on showing proper cause for his non-appearance. Rule 3 of Order XVII empowers the Court to decide the suit forthwith notwithstanding the failure of either party to whom time is granted to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary for the progress of the suit. It will thus be seen that rule 2 of Order XVII empowers the Court to apply to adjourned hearings the same procedure to be followed in case of failure of the parties to attend at the first hearing. It however expressly empowers the Court instead of proceeding under Order IX to pass such other order as it thinks fit. There is therefore nothing to prevent the Court from adjourning the case to another day if the parties fail to appear and the Court thinks that in the interests of justice it should not dismiss the suit or decree it *ex parte.* This should be borne in mind as it has been strenuously argued before us on the strength of some of the observations in some of the decisions referred to in the course of argument that the view taken in *Chandramathi Ammal* v. *Narayanasami Aiyar*(1), is likely to entail great hardship on the defaulting party. Where the Judge thinks that a defaulting party has proved his case, he is not

(1) (1910) I.L.R., 33 Mad., 241.

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bound to apply the provisions of Order IX but can adjourn the case to another day in case he fails to appear and I am sure no Judge with any sense of justice would dismiss a just claim which he considers proved *simply because a party fails to appear* on an adjourned date. On the other hand it seems to me to be pretty plain that the application of ule 3 will be the harder of the two courses as rule 3 empowers the Court to proceed to decide the suit forthwith on the materials before it. So far as the plaintiff is concerned the Court may dismiss the suit on the merits if the evidence on record does not prove plaintiff's case. It may pass a decree if the defendant is absent and there is formal proof of plaintiff's claim or the onus is on the defendant. The dismissal of the suit or the passing of a decree being on the merits, the only remedy of the party aggrieved will be by appeal or review. It is difficult to see what the use of an appeal will be if there was no application for adjournment which was refused. The case will have to be considered by the Appellate Court and decided on the materials before it and the Court cannot in very many cases say that the decision of the lower Court on the materials before it is erroneous. As regards review, the scope of Order XLVII is more restricted than that of Order IX. If the plaintiff's evidence is sufficient, then the defendant if he appears will be entitled to let in his evidence in the absence of the plaintiff and it will often be extremely difficult to determine how far reliance ought to be placed on evidence which has not been tested by cross-examination. The provisions of rule 3 are certainly more stringent than the provisions of rule 2 and except in cases where the case has been closed on both sides and the adjournment is only for argument, it is difficult to see how any decision on the materials before the Court can be satisfactory.

If a party is absent and the Judge proceeds to dispose of the case on the merits under rule 3, there can be no review if the Judge does not preside over the Court when the application is made, as rule 2 to Order XLVII limits the power of the successor to grant a review only in cases of discovery of such new and important matter or evidence as is referred to in rule I or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree. It cannot be said that a party who is given time to adduce evidence and who owing to absence is unable to do so has discovered new and important matter or

evidence. If owing to absence he is unable to do any other act necessary for the further progress of the suit for which time has been allowed, it is equally a case where no review can be applied for in case the Judge who decided a suit under Order XVII, rule 3, is not presiding over the Court. The Appellate Court in such cases cannot reverse the decree based on the material before it. It cannot say that the Court should have granted an adjournment where the party was absent and did not ask for one and it seems to me that the Appellate Court cannot interfere on the ground that sufficient cause was shown for absence unless it can apply the provisions of Order IX and it cannot do this if rule 3 is held to be the only rule applicable to cases where a decree is passed in the absence of a party to whom time has been given for the doing of an act and the Court in his absence proceeds to decide the suit "forthwith" on the materials before it. Leaving out of consideration the case of a party who is absent on an adjourned date without sufficient excuse (and who deserves no consideration either under rule 2 or 3) the application of rule 2 which would give the party the right to set aside the order of dismissal or *ex parte* decree on merely showing that he was prevented from sufficient cause from appearing and to have the whole case reheard on its merits after adducing all the evidence available is more beneficial and wider in scope than an application for review or an appeal which would be the only course available if rule 3 is held applicable to cases of absence.

The scope of sections 157 and 158 of the old Code which correspond to rules 2 and 3 of Order XVII of the present Code has been the subject of conflicting decisions. The decision of WALLIS and KRISHNASWAMI AYYAR, JJ., in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1) which follows *Shrimant Sagajirao* v. *Smith*(2), is in accordance with the view taken in *Maharaja of Vijayanagaram* v. *Lingam Krishna Bhupati*(3). It has been followed by SESHAGIRI AYYAR, J., in *Majeti Nagaratnam* v. *Pachigolla Ramayya*(4) and by SADASIVA AYYAR and MOORE, JJ. in *Chenroyan* v. *Rama Chetti*(5). It supports the view that rules 2 and 3 of Order XVII are independent and mutually exclusive

(1) (1910) I.L.R., 33 Mad., 241.
(2) (1896) I.L.R., 20 Bom., 716.
(3) (1902) 12 M.L.J., 473.
(4) (1915) 2 L.W., 105.
(5) (1916) 3 L.W., 524.

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and that where the requisites of rule 2 are satisfied, that rule and not rule 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of rule 3.

On the other hand, a different view was taken by MUNRO and ABDUR RAHIM, JJ., in *Naganada Ayyar* v. *Krishnamurti Ayyar*(1), where it was held that absence of a party on the date of the adjourned hearing does not preclude the Court from dealing with the case under section 158 (Order XVII, rule 3). The earlier decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(2) has not been considered and the reasons given in that decision have not been met. In *Mariannissa* v. *Ramkalpa Gorain*(3) (MOOKERJEE and HOLMWOOD, JJ.) it was held that the scope of section 157 was distinct from that of section 158 but that the Court can act under section 158 even though the parties are absent if the requirements of section 158 are otherwise satisfied and the Judge thinks there are materials on record on which it can pronounce judgment. The learned Judges were however of opinion that there was no justification for applying section 158 to a case to which section 157 is more appropriately applicable, In *Enatulla Basunia* v. *Jiban Mohan Roy*(4), IMAM and CHAPMAN, JJ., held that where an adjournment was granted at the instance of a party for the purposes stated in rule 3 and there are materials enabling the Court to decide the suit, it must act under rule 3 and not rule 2. In *Ningappa* v. *Gowdappa*(5), a similar view was taken. The learned Judges thought that section 102 contemplates that on the record as it stands the plaintiff has not made a case which if unrebutted would entitle him to any relief and that application of section 158 would be less burdensome to the party but with all deference I think for the reasons already given that the balance of hardship is the other way in the very great majority of cases that are likely to arise under sections 157 and 158. Section 102 contains no such qualification as is indicated and compels the Court to dismiss the suit if plaintiff is absent and defendant does not admit the claim. This decision was followed by PHILLIPS, J., in *Subramania Othuvar* v. *Munusamiya Pillai*(6), but no reference is made to the decision in

(1) (1911) I.L.R., 34 Mad., 97.
(2) (1910) I.L.R., 33 Mad., 241.
(3) (1907) I.L.R., 34 Calc., 235.
(4) (1914) I.L.R., 41 Calc., 957.
(5) (1905) 7 Bom. L.R., 261.
(6) (1915) 31 I.C., 869.

Chandramathi Ammal v. *Narayanaswami Aiyar*(1), nor is there of any discussion of the authorities.

I am of opinion that the decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1), which if I may say so with respect is a well-considered judgment dealing fully with the matter, correctly sets out the principle to be applied to cases of absence of either party at the adjourned hearing.

The decision of the question must depend on the express language of Order XVII, rules 2 and 3. As pointed out in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1), section 157 (rule 2) deals with cases of absence of parties and section 158 (rule 3) with failure to do what was ordered. If the party fails to appear section 157 (rule 2) applies and there is no reason why the Court should assume (in the absence of any explanation) that he is guilty of default so as to apply the stringent provisions of section 158 (rule 3). I think the correct rule is to treat rule 3 as applying only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. I have already dealt with the matter from the point of view of hardship to the parties and my own experience is that the rule laid down in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1) has been a safe and uniform guide to Courts. The construction moreover is one that suggests itself on a consideration of the plain language of rules 2 and 3. I have no hesitation in coming to the conclusion that the decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar*(1) ought to be followed.

N.R.

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(1) (1910) I.L.R., 33 Mad., 241.