

MASILAMANI
MUDALIAR
v.
SETHUSWAMI
AYYAR.
—
KUMARA-
SWAMI
SASTRIYAR, J.

can be ignored as not certified if they were as a matter of fact made. I agree with the order proposed by my learned brother. In compliance with the above order, the temporary Subordinate Judge of Tanjore submitted a finding that the payment set up was not true and did not operate to save limitation under section 20 of the Indian Limitation Act.

This appeal coming on for final hearing the Court delivered the following

JUDGMENT.— We accept the findings and as a result set aside the order of the Subordinate Judge, and direct that the petition be dismissed with costs throughout.

AYLING AND
KUMARA-
SWAMI
SASTRIYAR, JJ.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Bakewell.

1917,
May, 1.

VAIGUNTATHAMMAL AND ANOTHER (DEFENDANTS Nos. 3 AND 4),
APPELLANT,

v.

VALLIAMMAN AMMAL AND ANOTHER (PLAINTIFF AND SECOND
DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. III, r. 1 and O. IX, r. 12—Order of Court directing a party to appear in person—Refusal of the party to comply with the order—Order of Court declaring him ex parte, legality of.

A Court is empowered, under Order III, rule 1, of the Civil Procedure Code, to direct the appearance in Court of a party in person and if the party so directed refuses to appear, the Court may declare him *ex parte* even though he has engaged a pleader who is prepared to appear for him in the case.

Satu v. Hanmant rao (1899) L.L.R., 23 Bom., 318, dissented from.

SECOND APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Subordinate Judge of Tuticorin, in Appeal No. 44 of 1915, preferred against the decree of M. ANANTHAGIRI RAO, the

* Second Appeal No. 78 of 1916.

Temporary Additional District Munsif of Tinnevelly, in Original Suit No. 37 of 1914.

VAIGUNTA-
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v.

The necessary facts appear from the judgment of SADASIVA VALLIAMMAN, AYYAR, J.

K. R. Guruswami Ayyar and *A. Subrahmanya Ayyar* for the appellants.

T. R. Venkatarama Sastriyar for the respondents.

SADASIVA AYYAR, J.—Defendants Nos. 3 and 4 are the appellants in the second appeal. After the issues were settled, which was on the 27th June 1913, the District Munsif on the 15th August 1914 directed the defendants Nos. 3 and 4 to make their appearance in person on the 29th August 1914 to which date the hearing was adjourned. On the said 29th August 1914 defendants Nos. 3 and 4 failed to appear and represented through their vakil that they would refuse to appear even if they were granted time. The learned Munsif, thereupon, on the 29th August 1914, declared them *ex parte* and decided the suit, on the evidence of the plaintiff's husband, in plaintiff's favour. The Subordinate Judge, on appeal, confirmed this decree. Hence this second appeal.

It is to be regretted that the District Munsif did not mention the provision of law under which he acted in calling upon defendants Nos. 3 and 4 to appear in person, nor the provision of law under which, on their failure to do so, he declared them *ex parte*. The learned Subordinate Judge has also failed to state the provision of law under which, according to him, the Munsif acted in calling upon defendants Nos. 3 and 4 to appear in person, though he considered that the decree *ex parte* was granted under Order XVII, rule 3, Civil Procedure Code. I do not see how Order XVII, rule 3, has any application to the circumstances of this case. As my learned brother pointed out during the course of the argument, I think the direction to defendants Nos. 3 and 4 to appear in person must be deemed to have been made under Order III, rule 1, Civil Procedure Code. That rule empowers the Court to make an order that

“any appearance required or authorized by law to be made by a party shall be made by the party in person.”

Now, the appearance for 29th August 1914 was one which was authorized by law to be made by the party and such appearance for that particular date could be directed by the Court under this

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provision to be made in person. Then, we came to Order IX, rule 12, which provides that if a party who has been ordered to appear in person does not appear in person, or show sufficient cause to the satisfaction of the Court for failing to appear in person, he might be treated as not appearing even though (I take it), he had engaged a pleader who had appeared and was then prepared to appear for him in the case. In this view, it is unnecessary to resort to the principle indicated by me (sitting as a single Judge) in *Anni Ammal v. Muthukumara Chettiar* (1) namely that, even if not empowered by any specific provision found in the Civil Procedure Code, the Court has inherent power to order a party to appear in person if it considers it necessary to do so in the interests of justice. That Order IX, rule 12, applies to all cases where a party has been ordered to appear in person is clear from the fact that the words "under the provisions of section 66" (corresponding to Order V, rule 3) "or section 436" (correspondent to Order XXIX, rules 2 and 3) appearing in the corresponding section 107 of the old Civil Procedure Code have been deliberately omitted from Order IX, rule 12. Cases decided under section 107 of the old Code [for example, *Satu v. Hanmant-rao*(2)] are, therefore, no authorities on the construction of Order IX, rule 12, so far as this point is concerned. The other contentions put forward on behalf of the appellants need not be dealt with in detail, there being nothing in them. I would, therefore, dismiss this second appeal with costs.

BAKEWELL, J.

BAKEWELL, J.—A party is bound to attend the Court whenever so required, and although ordinarily he may fulfil this obligation by means of an agent, if the Court so directs he is bound to attend in person. (Order III, rule 1, Civil Procedure Code.) If the evidence of the party is required, a summons can be issued in the same manner as to a stranger to the suit; but when the parties are before the Court either personally or by their pleader, it is competent for the Court to direct them orally to attend without a summons. The provisions of Order IX, rule 12, are perfectly general and are evidently framed for the purpose of dealing with obstructive tactics and of enabling the Court to proceed against any party who does not attend. The diary in the present case shows that there were numerous adjournments

(1) (1912) 28 M.L.J., 676.

(2) (1899) I.L.R., 23 Bom., 318.

for the purpose of settlement and for other reasons and it may well have been that the District Munsif thought that he should put a stop to these tactics and have the parties before him personally. I think that he was perfectly right in proceeding undert his rule. With regard to the provisions of Order X on which the learned vakil for the appellants relied, It hink that they relate primarily to the ascertainment of points in dispute and may point out that they do not refer to the administration of an oath or provide for the examination or cross-examination of parties. I must respectfully dissent from the decision in *Satu v. Hanmantrao*(1). With regard to the merits of the case, the plaintiff set up a possessory title under which she and all the defendants claimed the property as owners in common, and I think the evidence was sufficient to support the plaintiff's claim. I agree that this second appeal should be dismissed with costs.

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S.V.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and
Mr. Justice Kumaraswami Sastriyar.*

MARTURU SUBBAMMA (DEFENDANT), APPELLANT,

v.

GADDE NARAYYA (PLAINTIFF), RESPONDENT.*

*Transfer of Property Act (IV of 1882), ss. 58 (a) and (d), 67 and 68 (c)—
Usufructuary mortgage—Failure of mortgagor to deliver possession—Right of
mortgagee to sue for sale.*

Held, by the Full Bench :—Where a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary mortgage within the meaning of section 58 (d) of the Transfer of Property Act, and the mortgagee is entitled to bring a suit for sale of the mortgaged property.

Sections 58 (a) and (d), 67 and 68 (c) of the Transfer of Property Act referred to.

Ram Narayan Singh v. Adhindra Nath Mukherji (1917) I.L.R., 44 Calc., 388 (P.C.), followed.

Arunachalam Chetti v. Ayyavayyan (1898) I.L.R., 21 Mad., 476 (F.B.), overruled.

1917,
April,
4 and 11
and
October,
8, 9 and 12

(1) (1899) I.L.R., 23 Bom., 318.

Second Appeal No. 1672 of 1915 (F.B.).