APPELLATE CIVIL—FULL BENCH.

Before Sir Abdur Rahim, Kt., Offg. Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, October, 1.

NEELAVENI (PETITIONER), PLAINTIFF,

v.

NARAYANA REDDI (RESPONDENT), DEFENDANT.*

Civil Procedure Code (V of 1908), O. IX, r. 13—Ex parte decree, power of Court to set aside.

A Court has no power, apart from the provisions of Order IX, rule 13, Civil Procedure Code, to set aside an ex parte decree passed by itself.

Somayya v. *Subbamma*, (1903) I.L.R., 26 Mad., 599, overruled.

CIVIL REVISION PETITION filed under section 115, Civil Procedure Code, and section 107 of the Government of India Act, against the order of S. SUBBAYYA SASTRI, District Munsif of Tirupati, in Civil Miscellaneous Petition No. 244 of 1918 in Original Suit No. 623 of 1917.

One Neelaveni (the petitioner) filed a suit against one Narayana Reddi (the respondent) for the recovery of about Rs. 1,400 due on a promissory note and obtained a decree ex parte. The defendant filed an application under Order IX, rule 13, Civil Procedure Code, to set aside the ex parte decree and in support thereof filed an affidavit stating that he himself, his vakil, and his witnesses were present on the morning of the day of hearing, that the Court having then adjourned the case all of them left the Court, and that when the Court suddenly took up the case for hearing on the evening of the same day all of them were absent. On this petition the Court passed the following order " . . . There is no truth in the allegations of the petitioner that he was ready on 18th April (the day of hearing) with his witnesses; the allegations in the petition are even rash, hasty and ill-advised. Looking however to the heaviness of the amount involved and the relationship subsisting between the parties and looking to the unwillingness of the present surety to continue his

* Civil Revision Petition No. 1212 of 1918.

obligation (i.e., of the person who stood surety for any decree that might be passed), I shall allow the petition as a special case and give him a chance of contest . . . ."

Against this order setting aside the ex parte decree, the plaintiff preferred this Revision Petition to the High Court.

N. Chandrasekhara Ayyar for petitioner.

V. Ramadas and *T. Kumaraswamayya* for respondent.

This petition came on for hearing in the first instance before SESHAGIRI AYYAR and ODGERS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The facts are not in dispute. An ex parte decree was passed in the suit. The defendant applied to have it set aside under Order IX, rule 13, Civil Procedure Code. The District Munsif found that the allegations in the affidavit were not true. In effect, his finding would not have enabled him to set aside the decree under rule 13. He, however, held that as the amount involved was heavy and as a person who stood surety for the defendant on a previous occasion refused to continue to be surety, the decree should be set aside.

Against this order a Civil Revision Petition under section 115, Civil Procedure Code, has been preferred to this Court. Mr. Chandrasekhara Ayyar contended that a Court has no power, apart from the provisions of rule 13, to set aside an ex parte decree. Mr. Ramadas, on the other hand, argued that the conditions mentioned in the rule are not exhaustive and do not restrict the inherent power of the Court to set aside ex parte decrees.

In this Court, the view contended for by the learned vakil for the respondent is supported by *Somayya* v. *Subbamma*(1) and *Adyapadi Ramanna Udpa* v. *Krishna Udpa*(2). There are observations in *Murugappa Chetty* v. *Rajasami*(3) and in *Gopala Row* v. *Maria Susaya Pillai*(4), which support the view taken in *Somayya* v. *Subbamma*(1). On the other hand there is a considered judgment of this Court by two Judges in *Venkatarama Aiyar* v. *Nataraja Aiyar*(5), which dissents from *Somayya*

(1) (1903) I.L.R., 26 Mad., 599. (2) (1914) 27 M.L.J., 167.
(3) (1912) 22 M.L.J.,284, at p. 294. (4) (1907) I.L.R., 30 Mad., 274, at p. 277.
(5) (1913) 24 M.L.J., 235.

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v. *Subbamma*(1). *Karupayee* v. *Chinnammal*(2) is also inconsistent with *Somayya* v. *Subbamma*(1). We have refrained from discussing decisions of the other Courts, as, in our opinion, it is desirable that there should be consistency on a question of procedure in the same Court. In these circumstances and with a view to enunciate for the benefit of the mufassal Courts a clear and consistent view on the question, we think it desirable that the following question should be referred for the opinion of the Full Bench.

"Has a Court power, apart from the provisions of rule 13, Order IX, Civil Procedure Code, to set aside an ex parte decree passed by itself?"

ON THIS REFERENCE—

N. Chandrasekhara Ayyar for petitioner.—A Court can set aside an ex parte decree only on the grounds mentioned in Order IX, rule 13, Civil Procedure Code. There is no inherent power to set aside a decree on any other ground. The decisions in *Somayya* v. *Subbammal*(1) and *Murugappa Chetty* v. *Rajasami*(3) and the *obiter dictum* in *Gopala Row* v. *Maria Susaya Pillai*(4) are wrong. The decisions of this Court in support of my view are, *Venkatarama Aiyar* v. *Nataraja Aiyar*(5), *Adyapadi Ramanna Udpa* v. *Krishna Udpa*(6) and *Karuppayee* v. *Chinnammal*(2). Non-appearance for sufficient cause is within Order IX, rule 13. Section 151, Civil Procedure Code, cannot be invoked where other remedies such as review, revision or appeal are available; see *Muthia Chettiar* v. *Bava Sahib*(7). The essence of a Code is to be exhaustive on the subjects it deals with; *Gokul Mandar* v. *Pudmanund Singh*(8). The case of *Hukum Chand Boid* v. *Kamalanand Singh*(9) gives a list of what inherent powers a Court generally has. In *Anantaraju Shetty* v. *Appu Hegade*(10) it was held that there is no inherent power

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(1) (1903) I.L.R., 26 Mad., 599. (2) (1914) 16 M.L.T., 101.
(3) (1912) 22 M.L.J., 284. (4) (1907) I.L.R., 30 Mad., 274, at p. 277.
(5) (1913) 24 M.L.J., 235. (6) (1914) 27 M.L.J., 167.
(7) (1914) 27 M.L.J., 605, at p. 609.
(8) (1902) I.L.R., 29 Calc., 707, at p. 715 (P.C.).
(9) (1906) I.L.R., 33 Calc., 927. (10) (1919) 37 M.L.J., 162.

of review in cases coming under the Religious Endowments Act. As to want of inherent power, see *Esmail Ebrahim* v. *Haji Jan Mahomed*(1). *Manilal Dhunji* v. *Gulam Hussein Vazeer*(2), *Tyeb Beg Mahomed* v. *Allibhai*(3) hold that if the Code does not apply there is inherent power to set aside an ex parte decree. *Lalta Prasad* v. *Ram Karan*(4) and *Nalladaroo* v. *Hari Kissen Rathi*(5) hold that there is an inherent power; *Lalta Prasad* v. *Nand Kishore*(6) holds the contrary view.

V. Ramadoss (with *T. Kumaraswamayya*) for respondent.—Order IX, rule 13, deals in its first part both with an inherent power to set aside an ex parte decree and a power to set aside an application on the grounds mentioned later on in that rule. Even if that rule does not expressly deal with inherent power, there is an inherent power otherwise; see section 151, Civil Procedure Code. The second part of the rule only says that the Court *shall* set aside under certain circumstances. It does not say that in other circumstances the Court cannot; see *Somayya* v. *Subbamma*(7), *Murugappa Chetty* v. *Rajasami*(8), *Gopala Row* v. *Maria Susaya Pillai*(9). Compare Order XLI, rules 19 and 21 of the present Code which are exactly similar in wording to Order IX, rule 13; cf. Order XLIII, clauses (*c*) and (*d*).

Even in a case where both the pleader and the defendant are unable to account for their absence satisfactorily, the Court can set aside the ex parte decree; see *Adhyapádi Ramanna Udpa* v. *Krishna Udpa*(10). The other High Courts hold that there is an inherent power—*Lalta Prasad* v. *Ram Karan*(4), *Nalladaroo* v. *Hari Kissen Rathi*(5), *Bibi Tasliman* v. *Harihar Mahto*(11) (a case arising under the Transfer of Property Act) *Madhavanand Ram* v. *Madhu Mahto*(12) *Sudevi Devi* v. *Sovaram Agarwallah*(13), *Tyeb Beg Mahomed* v. *Allibhai*(3), *Abdool*

(1) (1908) 10 Bom. L.R., 904. (2) (1889) I.L.R., 13 Bom., 12.
(3) (1907) I.L.R., 31 Bom., 45. (4) (1912) I.L.R., 34 All., 426, at p. 428.
(5) (1918) 48 I.C., 951 (Calc.). (6) (1900) I.L.R., 22 All., 66 (F.B.).
(7) (1903) I.L.R., 26 Mad., 599. (8) (1912) 22 M.L.J., 284, at p. 295.
(9) (1907) I.L.R., 30 Mad., 274, at 277.
(10) (1914) 27 M.L.J., 167. (11) (1905) I.L.R., 32 Calc., 253, at p. 256 (F.B.).
(12) (1914) 27 I.C., 812 (Calc.). (13) (1906) 10 C.W.N., 306.

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Hoosein v. *Esmailji*(1). Compare *Ghuznavi* v. *The Allahabad Bank, Ltd.*(2). I submit that *Venkatarama Aiyar* v. *Nataraja Aiyar*(3) is wrong. *Radha Raman Shaha* v. *Pran Nath Roy*(4) and *Khagendra Nath Mahata* v. *Pran Nath Roy*(5) do not really touch this question of inherent power. If at all, they are in my favour as they approve of *Pran Nath Roy* v. *Mohesh Chandra Moitra*(6). In 18 Halsbury, page 215, it is laid down that Courts have an inherent power to set aside ex parte decrees.

N. Chandrasekhara Ayyar in reply.—No analogy can be drawn from the English practice as the English rule is clearly wider.

OPINION.

ABDUR RAHIM, OFFG. C.J.

ABDUR RAHIM, OFFG. C.J.—The question referred to us in this case which is in these words: "Has a Court power, apart from the provisions of rule 13, Order IX, Civil Procedure Code, to set aside an ex parte decree passed by itself?" has been fully discussed before us and I shall shortly express my opinion. Upon an application made to him under Order IX, rule 13, Civil Procedure Code, the District Munsif, while holding that it was not proved that the summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, set aside the ex parte decree passed against the respondent, observing

> "looking, however, to the heaviness of the amount involved and the relationship subsisting between the parties and looking at the unwillingness of the present surety to continue his obligation, I shall allow the petition as a special case and give him a chance of contest."

I should say that, even if the Court had inherent jurisdiction to set aside an ex parte decree on grounds other than those mentioned in rule 12, it could have no jurisdiction to do so arbitrarily and on fanciful grounds, such as those mentioned in the District Munsif's judgment. Section 151 says:

(1) (1910) 12 Bom., L.R., 462.
(2) (1917) I.L.R., 44 Calc., 929 (F.B.).
(3) (1913) 24 M.L.J., 235.
(4) (1901) I.L.R., 28 Calc., 475 (P.C.).
(5) (1902) I.L.R., 29 Calc., 395 (P.C.)
(6) (1897) I.L.R., 24 Calc., 546 (P.C.).

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

An order, such as in this case, could not, by any stretch of language, be described as being

"necessary for the ends of justice or to prevent abuse of the process of the Court."

This section, as is well known, was inserted in the Code of 1908 in accordance with a number of decisions in which the inherent power of the Court *ex debito justitiae* was recognized.

Order IX, rule 13, provides a special summary remedy for a particular class of cases mentioned therein, i.e., those in which summons was not duly served on the defendant or in which he was prevented for any sufficient cause from appearing when the suit was called on for hearing and the jurisdiction is limited to the Court by which the decree was passed. To hold that such a remedy can be extended to cases other than those mentioned would be going against the clear intention of the legislature and cannot be brought within the scope of any inherent power recognized by section 151 or the rulings on the subject.

The opposite view was propounded, so far as it appears, for the first time by BHASHYAM AYYANGAR, J., in *Somayya* v. *Subbamma*(1), approved by SUNDARA AYYAR, J., in *Murugappa Chetty* v. *Rajasami*(2), and also to some extent supported by what appears to be a casual dictum of WHITE, C.J., in *Gopala Row* v. *Maria Susaya Pillai*(3). On the other hand a Division Bench of this Court in *Venkatarama Aiyar* v. *Nataraja Aiyar*(4), consisting of SANKARAN NAYAR, J., and myself dissented from the ruling of BHASHYAM AYYANGAR, J., and there is really nothing useful to be added to the reasons given in SANKARAN NAYAR, J.'s judgment in which I concurred.

So far as there was any attempt made in *Somayya* v. *Subbamma*(1) to construe the provision of the Civil Procedure Code, it seems to me that to read the first part of the rule that the defendant against whom an ex parte decree is passed may

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(1) (1903) I.L.R., 26 Mad., 599.
(2) (1912) 22 M.L.J., 284.
(3) (1907) I.L.R., 30 Mad., 274.
(4) (1913) 24 M.L.J., 235.

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apply to the Court by which the decree was passed for an order to set it aside as conferring a jurisdiction to pass such an order in cases other than those mentioned in the rest of the section is apparently fallacious and unsound. The main argument of BHASHYAM AYYANGAR, J., is based upon grounds of hardship in certain class of cases mentioned in the judgment and which in his opinion would not be covered by Order IX, rule 13. It has been pointed out in *Venkatarama Aiyar* v. *Nataraja Aiyar*(1) that in all those cases remedy could be obtained either by appeal or by review.

The question of inherent jurisdiction of the Court was elaborately discussed in *Hukum Chand Boid* v. *Kamalanand Singh*(2). There WOODROFFE, J., has collected a number of cases in which the Court's inherent power has been exercised. He says:

"It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiae* to consolidate; postpone pending the decision of a selected action; and to advance the hearing of suits; to stay on the ground of convenience cross suits; to ascertain whether the proper parties are before it; to inquire whether a plaintiff is entitled to sue as an adult; to entertain the application of a third person to be made a party; to add (section 32 not being exhaustive) a party; to allow a defence in *forma pauperis;* to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorize a Judge to do what in this matter was justice and for the advantage of the parties; to remand a suit in a case to which neither section 562 nor section 566 applies; to stay the drawing up of the Courts' own orders or to suspend their operation, if the necessities of justice so require; to stay, apart from the question whether the case falls within the section 545, the carrying out of a preliminary order pending appeal; to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay; to apply the principles of *res judicata* to cases not falling within sections 13 and 14 of the Code and so forth."

There is no instance, so far as I am aware, of an ex parte decree being set aside upon an application made for that purpose in cases other than those coming under rule 13 of Order IX.

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(1) (1913) 24 M.L.J., 235. (2) (1906) I.L.R., 33 Calc., 927 at p. 932.

I do not say that it is a conclusive argument against the existence of such a power, but it is certainly significant to show that this does not stand on the same footing as the cases mentioned. Most of the cases where the Court exercised its inherent power related to orders of an incidental or ancillary character. I do not, however, wish to suggest that the inherent power of the Court mentioned in section 151 is to be limited to cases in which it can be shown to have been already exercised, for that would be unduly limiting the scope of section 151. But I have no hesitation in holding that there is no inherent power in a Court to set aside an ex parte decree by summary procedure, but that the power of the Court in such connexion is limited to the circumstances mentioned in Order IX, rule 13. I am therefore of opinion that the ruling in *Somayya* v. *Subbamma*(1) is wrong as held in *Venkatarama Aiyar* v. *Nataraja Aiyar*(2) and the answer to the question referred to the Full Bench must be returned in the negative.

OLDFIELD, J.

OLDFIELD, J.—That our Courts possess inherent power is recognized in section 151, Civil Procedure Code. But the exercise of the power in the particular form in which it is invoked must be justified in each case in the manner authorized by authority. To justify it directly by reference to a previous course of actual instances of its exercise with or without the endorsement of appellate tribunals will seldom be possible, when it is disputed; and generally the legitimacy of its exercise must be tested with reference to the principles, which authority has prescribed. Those principles have been laid down in judgments, which have so far met with no criticism and which I respectfully follow, by WOODROFFE and MOOKERJEE, JJ., in *Hukum Chand Boid* v. *Kamalanand Singh*(3) and *Nanda Kishore Singh* v. *Ram Golam Sahu*(4) as being that the inherent power shall be exercised, not capriciously or arbitrarily, but *ex debito justitiae* on sound general principles and not in conflict with the intentions of the legislature. I may refer also at this point to my judgment in *Muthiah Chetty* v. *Bava Sahib*(5).

To apply this to the present reference, I look in vain for any mention of general principle in the authorities relied on by

(1) (1903) I.L.R., 26 Mad., 599. (2) (1913) 24 M.L.J., 235.
(3) (1906) I.L.R., 33 Calc., 927 at p. 932. (4) (1913) I.L.R., 40 Calc., 955.
(5) (1914) 27 M.L.J., 605.

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respondent; and necessarily so, when the whole argument in them is directed towards supporting the exercise of the Court's power by reference to the special hardship of the circumstances in the particular case before it. In one of the three cases relied on by respondent, in which the matter was considered fully, *Lalta Prasad* v. *Ram Karan*(1), the Court in exercising its inherent power to pass orders necessary for the ends of justice, attempted no further definition of any general principle as covering its action. In the others, *Somayya* v. *Subbamma*(2), and *Adyapadi Ramanna Udpa* v. *Krishna Udpa*(3), the hardship to the party and the merits of the case he was debarred from advancing were statedly the only tests applied.

The second condition above referred to for the exercise of the inherent power, the absence of conflict between such exercise and the statute law, was no doubt considered at length in *Somayya* v. *Subbamma*(2), the conclusion being against the importation into sections 103 and 108 of the Code then in force, corresponding with the present Order IX, rules 8 and 13, of negative words to the effect that the Court shall not set aside a decree passed ex parte, except in cases in which the party or his vakil was prevented by sufficient cause from appearing. The principle relied on is that, although statutory enactments expressed in affirmative language may sometimes be construed as having a negative implication, such implication must be a necessary and reasonable one. But as regards necessity it must be remembered that *per* WOODROFFE, J., in *Hukum Chand Boid* v. *Kamalanand Singh*(4),

> "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and on any matters specifically dealt with by it the law must be ascertained by interpretation of the language used by the legislature."

It is in my opinion impossible to presume that the rules under consideration contain an imperfect statement of the law on the very definite topic, with which they deal, the provision of a summary procedure for the re-opening of ex parte proceedings.

And in fact, with all respect for the opinion of the learned Judges responsible for the decisions of this Court last referred

(1) (1912) I.L.R., 34, All., 426.
(2) (1903) I.L.R., 26, Mad., 599.
(3) (1914) 27 M.L.J., 167.
(4) (1906) I.L.R., 33 Calc., 927.

to, there is nothing unreasonable or inconvenient in this conclusion. BHASHYAM AYYANGAR, J., attached weight to the absence of any means of displacing an unjust ex parte decision, if the inherent power could not be utilized for the purpose. But I think that he overestimated the frequency with which review proceedings would be barred by Order XLVII, rule 2; he certainly overlooked the possibility of a suit by the aggrieved party, when his absence was due to the fraud of his opponent [vide *Khagendra Nath Mahata* v. *Pran Nath Roy*(1)], and he must have been misled by the decisions in *Gilkinson* v. *Subramania Ayyar*(2), and *Caussanel* v. *Soures*(3), which were afterwards overruled by *Krishna Ayyar* v. *Kuppan Ayyangar*(4), into making the erroneous statement that the circumstances in which the ex parte decree was obtained could not be considered in an appeal against it. As regards hardship, resort to the Court's inherent power is unnecessary, when, as it seems to me, the wording of rules 9 and 13 is wide enough to cover all ordinary cases of default, including those instanced by BASHYAM AYYANGAR, J., in which the circumstances of a failure to appear are in question; and it may be suggested that in them the matters referred to by him, the merits of the defaulter's case (if indeed they can safely be assumed at that stage in the proceedings) and the grave consequences of an ex parte disposal, can in fact be considered in order to estimate the honesty of the allegations as to the existence of sufficient cause. But in cases, in which the existence of a sufficient cause for the default is not alleged or is disproved and those matters alone are in question, I do not see how they can justify interference, if uniformity and certainty are to remain the foundations of our procedure.

Taking this view, I concur in the opinion proposed in the judgment just delivered.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The very full discussion which this case has received has made it clear to me that we must overrule *Somayya* v. *Subbamma*(5) and *Murugappa Chetty* v. *Rajasami*(6). In both these decisions the reasons given for holding that there

(1) (1902) I.L.R., 29 Calc., 395 (P.C.).
(2) (1899) I.L.R., 22 Mad., 221.
(3) (1900) I.L.R., 23 Mad., 260.
(4) (1907) I.L.R., 30 Mad., 54 (F.B.).
(5) (1903) I.L.R., 26 Mad., 599.
(6) (1912) 22 M.L.J., 284.

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must be a power outside Order IX, rule 13, *ex debito justitiae* are not convincing. For a defendant against whom a decree ex parte has been passed, the following remedies are open :—(*a*) He can bring a suit to set aside the decree if there has been any fraud in the obtaining of it [see *Radha Raman Shaha* v. *Pran Nath Roy*(1) and *Khagendra Nath Mahata* v. *Pran Nath Roy*(2)]. (*b*) He can prefer an appeal against the decree itself; there can be no doubt that the powers of the Appellate Court are large enough to enable it to set aside the ex parte decree if there has been a miscarriage of justice. The Appellate Court is not confined to the grounds mentioned in Order IX, rule 13, in dealing with the matter. (*c*) The aggrieved party can file an application for review ; and the grounds for such an application would be wider than those covered by rule 13. (*d*) He can also file an application as provided by rule 13 to set aside the ex parte decree. The second clause

> "or when he was prevented by any sufficient cause from appearing when the suit was called on for hearing,"

is comprehensive enough to cover most cases of default of appearance. A suggestion was made that the default of a guardian of a minor defendant will not be covered by this clause. There is no reason for limiting the language of the clause in that way. Further there is the authority of *Kesho Pershad* v. *Hirday Narain*(3) against this suggestion.

Analysing what has been said by the two learned Judges in *Somayya* v. *Subbamma*(4) and *Murugappa Chetty* v. *Rajasami*(5) it seems to me that nothing that they suggest as a possible grievance will not be covered by any of the four classes of remedies mentioned by me. I am therefore of opinion that there is no reason for invoking the inherent power of the Court in respect of this matter.

On the question of a Court possessing such a power I have great doubts. It was held by Lord MACNAUGHTEN in *Rangoon Botatoung Company, Limited*, v. *The Collector, Rangoon*(6), that a right of appeal must be given by the statute, and should not be inferred from the inherent power of an Appellate Court. In this Court and in other High Courts it has been held that a right of review is not inherent in the Court but must be given

(1) (1901) I.L.R., 28 Calc., 475.
(2) (1902) I.L.R., 29 Calc., 395 (P.C.).
(3) (1880) 6 C.L.R., 69.
(4) (1903) I.L.R., 26 Mad., 599.
(5) (1912) 22 M.L.J., 284.
(6) (1913) I.L.R., 40 Calc., 21.

by the statute. A right to set aside an ex parte decree belongs to the same category as an appeal or a review. Because in either case the effect of entertaining the proceeding is to vacate a decree which has been obtained by one of the parties to the suit. To interfere with such a substantial right, it is not enough to invoke the inherent power of a Court. It was argued that as it has been held in a case, to which I was a party, following *Ghuznavi* v. *The Allahabad Bank, Limited*(1), that there is an inherent power of remand, it must be logically held that there is an inherent power to set aside ex parte decrees. I do not think that the two positions are *pari materia*. A right of remand is implied in the right to hear the appeal. An Appellate Court which has got jurisdiction to reverse the judgment of the lower Court must have power to set it aside and to direct a new trial. It is because of the idea that this power of remand is implied in the right of appeal that the legislature in the Act of 1882 by section 564 put restrictions upon that inherent power. By the Act of 1908 that restriction was removed. Therefore the possession of an inherent power to remand does not argue that there is a power to set aside an ex parte decree on grounds other than those mentioned in Order IX. Moreover, I am clear that section 151 must be construed not as empowering a Court to exercise power which it never possessed, but as preserving to it those powers which it has been in the habit of exercising and which by an oversight or by failure to specify have not been particularized in the statute. Section 151 has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of Justice is competent to exercise: and the language of the section shows that it should be availed of only where a power which has been exercised has not been provided for in the Code. As was pointed out by the Judicial Committee in *Gokul Mandar* v. *Pudmanund Singh*(2) the essence of a Code is to be exhaustive upon the matters for which it provides. This language was employed no doubt with reference to section 13 of the Code of Civil Procedure. It is equally applicable to Order IX, rule 13. The Legislature has provided a mode by which ex parte decrees can be set aside. As I pointed out already there is no

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1) (1917) I.L.R., 44 Calc., 929 (F.B.). (2) (1902) I.L.R., 29 Calc., 707 (P.C.)

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SESHAGIRI AYYAR, J.

necessity for invoking the principle of the remedy *ex debito justitiae*, because in all conceivable cases excepting a case like the present in which the lower Court has made no attempt to conform itself to any rule or precedent, the party aggrieved can obtain justice by resorting to the proper procedure. As regards cases in the other High Courts, I do not propose to deal with them at any length. In *Tyeb Beg Mahomed* v. *Allibhai*(1) to which JENKINS, C.J., was a party, it was held that a Small Cause Court had inherent power in cases of eviction to set aside ex parte decrees. I do not think that decision covers the present case. On the other hand in *Manilal Dhunji* v. *Gulam Hussein Vazeer*(2) and in *Esmail Ebrahim* v. *Hajijan*(3) a different view was taken. *Fakhr-ud-din* v. *Ghafur-ud-din*(4) was a case of an appeal and not of an application. In *Lalta Prasad* v. *Ram Karan*(5) one would have thought that the application could be sustained on the grounds mentioned in rule 13. *Bibi Tasliman* v. *Harihar Mahato*(6) is another case in which it was not necessary to have appealed to the inherent power of the Court. But none of them are cases in which the question of setting aside an ex parte decree directly arose. In *Hukum Chand Boid* v. *Kamalanand Singh*(7) the learned Judges point out that there was by the practice of the Court an inherent power which should not be regarded as having been taken away by the Code of Civil Procedure. That is a typical instance of the application of section 151 of the Code. Speaking for myself, I am zealous of preserving the inherent power of the Court to render justice between party and party. But I am clear that where there is no proof that the power has been exercised by Courts, and where the Legislature has given that power with limitations, Courts are not at liberty to disregard the limitations. For these reasons I am of opinion that *Venkatarama Aiyar* v. *Nataraja Aiyar*(8) takes the right view of Order IX, rule 13, and that the answer to the question must be in the negative.

It is necessary however to state that the question relates only to applications for setting aside ex parte decrees and not to any other remedy which a party may have.

N.R.

(1) (1907) I.L.R., 31 Bom., 45.
(2) (1889) I.L.R., 13 Bom., 12. (3) (1908) 10 Bom. L.R., 904.
(4) (1901) I.L.R., 23 All., 99. (5) (1912) I.L.R., 34 All., 426.
(6) (1905) I.L.R., 32 Calc., 253. (7) (1906) I.L.R., 33 Calc., 927.
(8) (1913) 24 M.L.J., 235.