

## APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice  
Madhavan Nair.

YAGAMMAL (PLAINTIFF), PETITIONER,

1929,  
October 30.

v.

ARULAYEE AMMAL AND OTHERS (DEFENDANTS),  
RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), ss. 115, 151, O. IX, r. 9, and O. XLIII, r. 1 (c)—Preliminary decree in a mortgage suit—Default of plaintiff to appear on date of hearing after such decree—Jurisdiction of Court to dismiss suit for default—Application by plaintiff to set aside dismissal of suit, whether competent under O. IX, r. 9 or under sec. 151, Civil Procedure Code—Petition to set aside, purporting to be under O. IX, deemed to be under sec. 151—Order dismissing suit, and order dismissing petition, deemed to be under sec. 151—Latter order, if appealable under O. XLIII, r. 1 (c)—Revision, competency of.*

After a preliminary decree was passed in a suit for partition, the Court has no jurisdiction to dismiss the suit for default of appearance of the plaintiff on a date fixed for the further hearing of the case.

*Lachmi Narain Marwari v. Balmakund Marwari, (1924) I.L.R., 4 Pat., 61 (P.C.),* relied on.

The order dismissing the suit in such circumstances cannot be treated as one passed under Order IX of the Code of Civil Procedure; and an application for restoration of the suit cannot be made under Order IX, rule 9 of the Code; but an application, purporting to be made under Order IX, rule 9, must be deemed to be made under section 151 of the Code for the exercise of the Court's inherent powers.

The order dismissing the application for restoration of the suit, not being under Order IX, rule 9, is not appealable under

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\* Civil Revision Petition No. 663 of 1926.

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Order XLIII, rule 1 (c); consequently, a civil revision petition against the order dismissing the suit is maintainable.

PETITION under sections 115 and 151, Civil Procedure Code, to revise the order of the Court of the District Munsif of Paramakudi, dismissing Original Suit No. 744 of 1921.

In this case, the District Munsif dismissed a suit for partition after the preliminary decree had been passed on the ground of default of appearance of the plaintiff and the defendant on the date fixed for the further hearing of the suit. An application by the plaintiff to restore the suit was also dismissed. The plaintiff did not appeal against the latter order, but filed a civil revision petition to the High Court against the order dismissing the suit. The respondent took a preliminary objection that the revision petition was not competent, as the petitioner had not appealed against the order, dated 16th March 1926, dismissing the plaintiff's petition in the lower Court to restore the suit, as he should have appealed under Order XLIII, rule 1 (c), Civil Procedure Code.

*A. V. Narayanasamy Ayyar* for petitioner.—The order dismissing the suit for default was incompetent. The Court cannot dismiss a suit after preliminary decree, on the ground of default of appearance at the further hearing; Order IX, Civil Procedure Code, does not apply to such cases. The application to restore the suit is not under Order IX, rule 9, Civil Procedure Code. So there is no appeal under Order XLIII, rule 1 (c). The Civil Revision Petition is competent.

*R. Narasimhachari* (with *K. Muthuswami Chetti*) for respondent.—The order of dismissal of the suit was passed under Order IX; the petition to set aside dismissal of suit purports to have been under Order IX, rule 9. So an appeal lies under Order XLIII, rule 1 (c) against the latter order. Hence no revision petition lies against the first order.

The JUDGMENT of the Court was delivered by

VENKATA-  
SUBBA RAO, J.

VENKATASUBBA RAO, J.—The main question in the civil revision petition is, is a suit liable to be dismissed

for default after the passing of the preliminary decree? The plaintiff filed this suit for partition and in 1923 obtained a decree directing certain items to be partitioned. From this judgment, she filed an appeal and the Appellate Court varied the decree in her favour, by directing partition of some additional items. When the case went back to the trial Court, it fixed a date for the appearance of parties. Neither the plaintiff nor the defendant having appeared on the day fixed, the Court made an order, on the 9th of May 1925, dismissing the suit for default. It is this order that is impeached in the revision petition before us. On the merits, there can be no question that this order cannot be supported. As pointed out by the Privy Council,

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“After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree, acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside.” *Lachmi Narain Marwari v. Balmakund Marwari*(1).

A similar view was taken by the Allahabad High Court in an earlier case. See *Maseem-un-nissa v. Iatifan*(2).

But then a preliminary objection is raised that this revision petition does not lie. The argument may be thus stated. The plaintiff applied to the lower Court for the restoration of the suit under Order IX, rule 9, Civil Procedure Code. That application was dismissed by an order, dated 16th March 1926. The respondent contends that an appeal lies from the last mentioned order under Order XLIII, rule 1 (c), and that the High Court ought not to exercise its revisional powers when the party aggrieved has a remedy by way of appeal. The answer is simple. The order dismissing the suit cannot be treated as one made under the provisions of

(1) (1924) I.L.R., 4 Pat., 61.

(2) (1910) I.L.R., 32 All., 319.

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Order IX, Civil Procedure Code. That is the effect of the decision of the Privy Council to which we have referred. It follows necessarily that, although the plaintiff's application to restore the suit purports to have been made under Order IX, it is not in fact governed by the provisions of that order at all. It must be deemed to be an application under section 151 for the exercise of the Court's inherent powers. The preliminary objection thus fails.

In the result, we allow the civil revision petition and set aside the order of the lower Court, dated the 9th May 1925. The District Munsif will restore the case to his file and allow the plaintiff to take further proceedings in the suit.

In the circumstances, we direct each party to bear his costs.

K.R.

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### APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.*

1929,  
November 6.

NARAYANASWAMI MUDALI AND OTHERS (DEFENDANTS),  
APPELLANTS,

v.

THE PRESIDENT OF THE BOARD OF COMMISSIONERS  
FOR THE HINDU RELIGIOUS ENDOWMENTS  
AND ANOTHER (PLAINTIFF AND FOURTH DEFENDANT),  
RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Suit relating to public trust—Compromise of suit—Duty of the Court—Power and duty of Court to see that interest of public trust should not be sacrificed by the compromise.*

When a compromise in a suit relating to a public trust is submitted to a Court, it not only has the power, but is under

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\* Civil Miscellaneous Appeal No. 108 of 1929.