1878

PALAK DHARI R v. RADHA P SAD SING

tion presented to that Court may be disposed of. When it is disposed of the decision may be appealed, and the superior Court which finally determines the application may have power to grant leave of appeal from its decision to Her Majesty in Council. The question of the competency of the Shahabad Court to entertain the application may then be raised. The order before us is in our judgment in the nature of an interlocutory order and not an order from which we can or ought to give a certificate for appeal to the Privy Council. The learned counsel's argument, based on the provisions of s. 594 of Act X of 1877, that the word "decree" embraces judgment and order, does not support the contention that the Court can or ought to give leave to appeal from any order. The certificate is refused with costs.

Application refused.

PRIVY COUNCIL.

P. C.* 1878 *November* & 22.

ZAIN-UL-ABDIN KHAN (DEFENDANT) *v.* AHMAD RAZA KHAN AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.]

Act VIII of 1859, *ss.* 109, 110, 111, 119, 147—Ex-parte *Judgment—Appeal.*

The provision in s. 119 of Act VIII of 1859, that "no appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared," must be understood to apply to the case of a defendant who has not appeared at all, and not to the case of a defendant who, having once appeared, fails to appear on a subsequent day to which the hearing of the cause has been adjourned.

THIS was an appeal from a decision of a Division Bench of the Allahabad High Court, dated the 26th August, 1875, dismissing an appeal from an order of the Subordinate Judge of Zila Moradabad, dated the 8th April, 1874.

The judgment of the High Court was as follows:

"The suit was instituted on the 14th September, 1872, and after much delay, owing to the residence of both parties in foreign territory, the hearing was, at the request of the pleaders of both parties,

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

1878

AIN-UL-ABDIN KHAN. v. IAD RAZA KHAN

adjourned for the 5th January, 1873. Issues were framed, and the 28th October fixed for the hearing; the suit was not called on that date, but on the 7th November, 1873. It was again adjourned at the like request to the 2nd February, and subsequently to the 8th April, 1874. On 6th April the defendant appellant submitted a petition praying for a further adjournment on the plea that his pleader had gone to Calcutta to consult the Advocate-General and could not return in time. This petition was not presented by a pleader, nor by any duly authorised agent, and was rejected. On the 7th April the defendant's pleader telegraphed to the Subordinate Judge requesting him to postpone the hearing. The Subordinate Judge refused to consider this irregular application, and on the 8th April the case was called on in due course. Although the defendant had an agent in Moradabad, no other pleader than Ganesh Parshad, who was absent in Calcutta, was appointed, and the defendant appearing neither in person nor by pleader, on the 8th April the case was heard and decided *ex-parte* under the provisions of ss. 147 and 111. The appellant subsequently took the proper step of applying to the Subordinate Judge, under s. 119, for an order to set aside the judgment, but unfortunately he did not proceed with that application, and it was struck off for default, the appellant being advised by his late counsel to proceed by way of appeal. He is met by the objection that the appeal does not lie, as the judgment was passed *ex-parte*. The appellant's counsel urges that the case was not heard by the Subordinate Judge *ex-parte* under s. 111; that the default of the appellant was such a default as is contemplated in s. 145, and not such a default as is contemplated in s. 147. It appears clear to us that the former section applies where the parties appear, but either of them fails to proceed with the case; while s. 147 applies to cases like the present, in which at an adjourned hearing a party failed to appear. If the Judge heard the suit at all in the absence of the appellant, he could only do so under the provisions of s. 111. Having the option of proceeding with the hearing or again adjourning the case, he proceeded to hear and determine it.

"Then it is contended that the appellant was entitled to proceed either by way of appeal or by an application under s. 119, and *Kalee Churn Dutt* v. *Modhoo Soodun Ghose*, 6 W. R. 86, is relied on; but

that ruling has not apparently been followed in *Administrator-General of Bengal* v. *Lala Dyaram Das*, 6. B. L. R. 688, and in *Purus Ram* v. *Jyunti Parshad*, H. C. R., N.-W. P., 1869, decided on the 21st May of that year, it has been held that no appeal lies.

"The omission to follow the procedure required by s. 119 has deprived the appellant of all remedy. The appeal must therefore be dismissed with costs."

Mr. *Leith*, Q. C., (Mr. *C. W. Arathoon* with him) for the appellant, contended that under the circumstances of the case the Judges of the High Court were wrong in holding that no appeal lay to them. In *Gòluckbur* v. *Bishonath Geeree* (1) it was held by the Calcutta High Court that, where a defendant had appeared on the day fixed in the summons, although he put in no answer or written statement, a judgment afterwards pronounced against him was open to appeal as not being an *ex-parte* judgment within the meaning of s. 119 of Act VIII of 1859. The present was a stronger case, since the defendant had appeared and put in his defence, and issues had been fixed. In *Gorachand Goswami* v. *Raghu Mandal* (2) it was held that the provision in s. 119 refers only to the case of a defendant who has never appeared, not to the case of a defendant who is only absent on an adjourned hearing. *Kalee Churn Dutt* v. *Modhoo Soodun Ghose* (3), noticed by the High Court, is to the same effect. See also *Amritnath Jha* v. *Roy Dhunpat Singh* (4), in which the case of *Bhimacharya* v. *Fakirappa* (5), decided by the Bombay High Court, is distinguished. In *The Administrator-General of Bengal* v. *Lala Dyaram Das* (6), cited by the Court below, the point decided was different, there having in fact been no appearance of the defendant. The only decision which supported the view taken by the High Court was that in *Purus Ram* v. *Jyunti Parshad* (7), which was a decision of the same Court and itself erroneous.

The respondents did not appear.

Their Lordships' judgment was delivered by

(1) Marsh. 32.
(2) 3 B. L. R. Ap. 121.
(3) 6 W. R. 86.
(4) 8 B. L. R. 44.
(5) 4 Bom. H. C. Rep. A. C. J. 206.
(6) 6 B L. R. 688.
(7) H. C. R., N.-W. P., 1869, decided on the 21st May of that year.

1878

ZAIN-UL-ABDIN KHAN v. IMAD RAZA KHAN.

SIR BARNES PEACOCK.—The question in this case is whether the first part of s. 119 of Act VIII of 1859 applies to a case which has been decided under the provisions of s. 147 of the same Act. That part of s. 119 is in the following words: "No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared." S. 119 must be read together with ss. 109, 110, and 111. S. 109 says: "On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court." S. 110 says: "If on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear, either in person or by a pleader, when duly called upon by the Court, the suit may be dismissed." There the words are: "If on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned." Then comes s. 111, which says: "If the plaintiff shall appear in person"—it does not say "on the day fixed, or on any subsequent day," but simply "if the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex-parte*." Ss. 109 and 111, taken by themselves, clearly relate to the appearance of parties and to their non-appearance, at the first hearing of the suit. The 146th and 147th sections are enactments relating to adjournments. S. 147 enacts that "if on any day to which the hearing of the suit may be adjourned, the parties, or either of them, shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in s. 110, s. 111, or s. 114, as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case." There is no enactment in that section that, in case the Court disposes of the suit in the manner specified in s. 111 (the section which applies to the present case), the first part of s. 119 shall apply to such a judgment. Under Act VIII of 1859 the general rule is that an appeal lies to the High Court from a decision of a Civil or Subordinate Judge, and a defendant ought not

ved of the right of appeal, except by express words or implication. Looking at all the sections together, their ips are of opinion that the words "who has not appeared" used in s. 119, mean "who has not appeared at all," and do not pply to the case of a defendant who has once appeared, but who ails to appear on a day to which the cause has been adjourned.

There are several cases to that effect decided by the High Court in Calcutta: Marshall's Reports, page 32; 3rd Bengal Law Reports, Appendix, 121, and 6th Weekly Reporter, page 86.

Two cases were refered to by the learned Judges who decided this case,—a case in 6th Bengal Law Reports, 688, and one from the North-Western Provinces Reports of 1869, decided the 21st May of that year. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th Bengal Law Reports, 688, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, decided the 21st May of that year, is certainly in conflict with the several decisions in the High Court at Calcutta to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the appeal. The respondents must pay the costs of this appeal.

Agent for the appellant: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

HAMID ALI (PLAINTIFF) *v* IMTIAZAN AND OTHERS (DEFENDANTS).*

Muhammadan Law—Husband and Wife—Divorce—Repudiation by Ambiguous Expression—Custody of Minor Children.

Where a Muhammadan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his

* Second Appeal, No. 1211 of 1877, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 15th August, 1877, affirming a decree of Maulvi Nasar-ul-la Khan, Munsif of Mainpuri, dated the 31st March, 1877.