

1885

SHEO NARAIN
v.
HIRA.

whilst the purchaser at such later sale was a stranger liable] to be excluded from the coparcenary by the pre-emptive claim of any co-sharer for the time being. And it follows naturally that the suit of the purchaser in the earlier sale would be maintainable in respect of the later sale, and the later purchaser would have no right of pre-emption in respect of the earlier sale. To allow the later purchaser to maintain a pre-emptive suit in respect of the earlier sale would be to reverse the course which the rule of pre-emption contemplates.

For these reasons I am of opinion that the plaintiff in this case never had any right of pre-emption on the ground of the sale of 5th August, 1881, and my answer to the question referred is therefore in the negative.

APPELLATE CIVIL.

1885
January 29.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HIRA DAI (DEFENDANT) v. HIRA LAL AND OTHERS (PLAINTIFFS)*.

Ex-parte decree—“Appearance” of defendant under Civil Procedure Code, s. 101—
Civil Procedure Code, ss. 64, 100, 108, 157.

The first hearing of a suit was fixed for the 12th December, 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not then appear, a decree was passed in favour of the plaintiff. A *vakalat-nama* had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment.

Held that these acts on the defendant's part did not constitute an “appearance” by him within the meaning of s. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64; that the decree was therefore *ex-parte* within the meaning of ss. 100 and 108, and an appeal consequently lay to the High Court under s. 588, clause (9), from an order rejecting an application to set the decree aside. *Zain-ul-abdin Khan v. Ahmad Raza Khan* (1) distinguished. *The Administrator-General of Bengal v. Dyaram Das* (2), *Bhimacharya v. Fakirappa* (3), and *Bibee Huloo v. Atwaro* (4) referred to.

Per MAHMOOD, J.—That the Court on the 18th December seemed to have acted under s. 157 of the Civil Procedure Code, and, choosing the first of the alterna-

* First Appeal No. 69 of 1884, from an order of *Maulvi Zain-ul-abdin*, Subordinate Judge of Agra, dated the 14th April, 1884.

(1) I. L. R., 2 All. 67; L. R., 5 Ind. Ap., 233. (3) 4 Bom. H. C. Rep. 206.

(2) 6 B. L. R., 688. (4) 7 W. R., 81.

tive courses allowed by that section, acted under Chapter VII of the Code, and passed an *ex-parte* decree under the provisions of s. 100 of that Chapter.

1885

 HIRA DAI
 v.
 HIRA LAL.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Pandit *Nand Lal*, for the appellant.

Mr. *W. M. Colvin*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and *Munshi Hanuman Prasad*, for the respondents.

OLDFIELD, J.—This is an appeal from an order refusing an application to set aside an *ex-parte* decree under s. 108 of the Civil Procedure Code. A preliminary objection has been made by the respondents' pleader, that although the Court below has dealt with the application under s. 108, there was in fact no *ex-parte* decree in the case within the meaning of ss. 100 and 108, as the defendant appeared in the suit, and in consequence there was no jurisdiction to entertain the application under s. 108, and the remedy for the appellant was by appeal from the decree.

It appears that the first hearing of the suit was fixed for December 12th, 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not appear, a decree was made in favour of the plaintiff. A *vakalat-nama*, however, had been filed on the defendant's part previously, and the plaintiff had filed an application for the attachment of the defendant's property before judgment, to which the defendant had objected, and it is contended that these acts on the defendant's part amount to an appearance, so that the decree cannot be considered an *ex-parte* decree, and the decision of the Privy Council in *Zain-ul-abdin Khan v. Ahmad Raza Khan* (1) is relied on.

That was a case decided under Act VIII of 1859, and all their Lordships decided was, that where the defendant had appeared on the day fixed for the first hearing, and had failed to appear at any date subsequent thereto to which the hearing of the suit may have been adjourned, he could not be held not to have appeared within the meaning of s. 111 of the Act, so as to make the hearing of the

(1) I. L. R., 2 All. 67; L. R., 5 Ind. Ap., 233.

1885

suit an *ex-parte* hearing, and the judgment an *ex-parte* judgment within the meaning of s. 119.

HIRA DAI
v.
HIRA LAL.

They had not before them nor did they decide the question now before us whether, where the defendant had not appeared at the first hearing or at any subsequent day to which the hearing had been postponed, but had taken some steps for other purposes, the proceedings would cease to be *ex-parte*. Indeed, their meaning seems to be otherwise, for they observe :—“ Ss. 109—111 taken by themselves clearly relate to the appearance of parties and to their non-appearance at the first hearing of the suit.” The latter section provides for disposal of the suit if the defendant does not appear, and placing on it the meaning placed by their Lordships, the inference is, that they meant to say that where the defendant does not appear at the first hearing, the proceedings will be taken *ex-parte*. Further on they observe :—“ Looking at all the sections together, their Lordships are of opinion that the words ‘ who has not appeared,’ as used in s. 111, mean who has not appeared at all, and do not apply to the case of a defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.” The words “ who has not appeared at all,” read with what immediately follows, and the other passage above quoted, seem to refer to appearance on the day fixed for hearing, or other day to which the hearing has been adjourned; that is, to a case where a defendant has not appeared at all on any day fixed for hearing, in answer to a summons to appear and answer the claim, and in that case the judgment will be *ex-parte*, although the defendant may have appeared for other purposes.

In *The Administrator-General of Bengal v. Dyaram Das* (1), where a defendant filed a written statement, and when the case was called on for final disposal, an application was made by counsel on his behalf for an adjournment, but the application was refused, and, no one appearing for him, the case was proceeded with and judgment obtained for the plaintiff, the decree was held to be *ex-parte*. It was pointed out that under Act VIII of 1859 there is no appearance other than that referred to in Schedule (B) of that Act, which is either for the first hearing of the suit

1885

HIRA DAI

HIRA DAI

where the issues are to be fixed, or for the final disposal of the suit.

So in *Bhimacharya v. Fakirappa* (1) it was held that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant, but not instructed to answer or instructed not to answer at all, was an *ex-parte* hearing. And it has been held that merely filing a *vakalat-nama*, and when the case comes on not appearing in person or by pleader, is not an appearance—*Bibee Haloo v. Atwaro* (2).

The appearance referred to in s. 100 of the present Code is, in my opinion, appearance in answer to a summons to appear and answer the claim on a day therein specified, issued under s. 64 of the Code. S. 100 is part of Chapter VII—"On the appearance of the parties, and consequence of non-appearance," and refers, as is shown by s. 96 and other sections in this chapter, to their appearance or non-appearance on the day fixed in the summons for the defendant to appear and answer.

In this case, there has been no appearance of the defendant in answer to the summons to appear and answer the claim, and in consequence the hearing was *ex-parte* under s. 100, and the objection on this score fails.

On the merits of this appeal, I am of opinion that the appellant has made out a case for setting aside the *ex-parte* decree under s. 108. Her husband was the principal defendant, and the one who would have defended the suit; he died not long before the day fixed for the hearing; and the non-appearance of his widow is attributable to the position in which she was placed by his death, and her difficulty on a short notice to take the necessary steps to defend the suit.

The appeal is allowed, and the order of the lower Court and the decree are set aside. The case will be retried. Costs to follow the result.

MAHMOOD, J.—I concur in the order proposed by my brother Oldfield, and I only wish to add that there having been no appearance of the defendant-appellant on the 12th December, 1883, the case appears to have been adjourned by the Court *suo motu* to

(1) 4 Bom. H. C. Rep., 206. (2) 7 W. R., 81.

1885

HIRA DAI
v.
HIRA LAL.

the 18th December, and that at the next hearing the Court seems to have acted under s. 157 of the Civil Procedure Code, which allows two alternative courses, the first of which is proceeding to dispose of the suit under Chapter VII of the Code, and the second, making such other order as the Court thinks fit. I am of opinion that the Court chose the first of these alternatives, and acted under Chapter VII, and passed an *ex-parte* decree under the provisions of s. 100 of that chapter. My brother Oldfield has explained the ground upon which the decree should be considered as passed *ex-parte*, and the application being made under s. 108, an appeal lay to this Court under cl. (9), s. 588, from the order rejecting the application to set the decree aside.

Appeal allowed.

1885
February 19

Before Mr. Justice Mahmood.

LAKIMI CHAND (PLAINTIFF) v. GATTO BAI (DEFENDANT).*

Practice—Appeal—Security for costs—Civil Procedure Code, s. 549—Application that appellant be required to give security—Order directing appellant to show cause—Absence of counsel to support application—Dismissal of application—Application to restore case to register—Civil Procedure Code, ss. 98, 99, 647.

A petition was made under s. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner praying that the case might be restored to the register, on the ground that counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause, the petition should have been granted, and the absence of petitioner's counsel was immaterial.

Held that the matter was dealt with by s. 98 of the Civil Procedure Code, and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided.

Held also that although no general rule could be laid down that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances, in the present case, taking the circumstances into consi-

* First Appeal No. 134 of 1884, from a decree of Maulvi Muhammad Sami-ul-lah Khan, subordinate Judge of Aligarh, dated the 27th June, 1884.