

The plaintiff appealed to the High Court.

Mr *T. Conlan* for the appellant.

The respondent was not represented.

EDGE, C. J., and AIKMAN, J.—The only question in this appeal is:—Is the plaintiff entitled to have interest upon the rent decreed to him? The defendant being a *thekadār*, clause (a) of section 34 of Act No. XII of 1881 did not apply. The non-application of clause (a) of section 34 did not exempt the *thekadār* from his liability under section 73 of the Indian Contract Act of 1872. Illustration (n) of section 73 shows that where a person breaks his contract to pay another a sum of money on a day certain or specified, he is liable for the principal sum due together with interest up to the day of payment. We decree the appeal with costs, and restore the decree of the first Court with costs in all the Courts.

Appeal decreed.

Before Mr. Justice Knox and Mr. Justice Blair.

CHAUDHRI RAJ KUMAR (APPLICANT) v. JUGAL KISHORE AND ANOTHER
(OPPOSITE PARTIES).*

Civil Procedure Code, sections 100, 108—Ex parte decree—"Appearance," what constitutes—

A summons was issued to a defendant in a civil suit. The serving officer, being unable to find either the defendant or any person empowered to accept service for him at the address given, affixed a copy of the summons to the outer door of the defendant's house and returned the original to Court. On the day notified in the summons the case was called on, and upon its being called on a pleader presented himself in Court with a power of attorney, executed not by the defendant himself but by a third person on his behalf, and stated that the defendant had no notice of the time fixed for the hearing of the case, and prayed for an adjournment to a date upon which a proper answer to the claim could be filed. The application was refused, but the case was adjourned to the day following. On that date no one appeared for the defendant and a decree was passed against him.

Held that there was no appearance on behalf of the defendant within the meaning of section 100 of the Code of Civil Procedure, and that the decree passed on the adjourned date was therefore an *ex parte* decree. *Hira Dai v. Hira Lal* (1) and *Ram Tahal Ram v. Bameshar Ram* (2) referred to. *Fazal Ahmad v.*

* First Appeal No. 83 of 1895, from an order of Babu Jai Lal, Officiating Subordinate Judge of Farakhabad, dated the 27th of April 1895.

(1) I. L. R., 7 All., 538.

(2) I. L. R., 8 All., 140.

1896

GHANSHYAM

SINGH

v.

DAULAT

SINGH.

1896

February 15.

1896

CHAUDHRI
RAJ KUMAR

v.

JUGAL
KISHORE.

Bahadur Singh (1) *Ganga Das v. Indarman* (2) and *Sahibzada Zainulabidin Khan v. Sahibzada Ahmed Raza Khan* (3) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal* for the appellant.

The Hon'ble Mr. *Colvin* and Mr. *T. Conlan* for the respondents.

KNOX and BLAIR, JJ.—Chaudhri Raj Kumar appeals against an order passed by the Subordinate Judge of Farakhabad. In the order appealed against the Subordinate Judge rejected an application presented by the appellant praying that a decree which had been passed *ex parte* against him might be set aside. The Subordinate Judge held that the decree in question had not in fact been passed *ex parte*, and the contention raised in this appeal is that the decree was indeed an *ex parte* decree, there having been no appearance in the suit by or on behalf of the appellant.

It appears from the record that a summons was issued in the original suit for service on Chaudhri Raj Kumar; that the serving officer went to the place indicated in the summons, and made a return setting out that he could not find the defendant; that there was no agent empowered to accept the service of the summons and no person on whom service could be made. He therefore affixed a copy of the summons on the outer door of the house in which Raj Kumar ordinarily resided. On the day notified in the summons the case was called on, and upon its being called on a pleader presented himself in Court with a power of attorney and stated that Chaudhri Raj Kumar had no notice of the time fixed for the hearing of this case and prayed for an adjournment to a date upon which a proper answer to the claim could be filed. The application was refused, but the case was adjourned to the day following. On that date no one presented himself in Court on behalf of Raj Kumar and a decree styled an *ex parte* decree was passed in the suit. There is one fact further which might be stated here, and that is that in the return made by the serving officer mention is made by him of a

1) Weekly Notes, 1893, p. 25.

(2) Weekly Notes, 1893, p. 208

(3) L. R., 5, A., 233.

statement made to him to the effect that Chaudhri Raj Kumar was ill and had gone to Cawnpore for medical treatment. It is upon these facts that it is contended before us that there has never been any appearance in the proper sense of the word by or on behalf of Raj Kumar, and that the decree passed in the suit has therefore been properly styled an *ex parte* decree.

In support of this contention we were referred to the case of *Hira Dai v. Hira Lal* (1). In that case, though it is not exactly on all-fours with the present case, it was held that by the appearance referred to in section 100 of the Code of Civil Procedure of 1882 is meant appearance in answer to a summons to appear and answer the claim on a day therein specified. The fact that the defendant had appeared by a pleader in the case on a previous occasion to contest an application for attachment before judgment was not considered a sufficient ground for holding that there had been such an appearance in the suit itself as would prevent the decree which followed in the suit on the day fixed for hearing when the defendant did not appear from being an *ex parte* decree. We were also referred to the case of *Ram Tahal Ram v. Rameshar Ram* (2), in which it was decided that appearance by a pleader who had been instructed by the two principal defendants at the beginning of the case and who had filed a *vakalat-namah*, but who had no instructions as to the facts of the case or as to the evidence to be adduced, and who was not provided with any of the means of conducting the defence, did not amount to an appearance by the defendants as contemplated in section 108. There is also the case of *Fazal Ahmad v. Bahadur Singh* (3) in which this Court, following the ruling of the Bombay High Court in *Ram Chandra Pandurang Naik v. Madhav Purushottam Naik* (4) held that where the only appearance was by a pleader who had instructions from his client, but was unable to support the plaintiff's case because of the absence of the plaintiff's witnesses, and the suit was dismissed, that the dismissal was not a dismissal for default of appearance. In the present case it is true that the Subordinate

1896

CHAUDHRI
RAJ KUMAR
v.
JUGAL
KISHORE.

(1) I. L. R., 7 All., 538.

(3) Weekly Notes, 1893, p. 25.

(2) I. L. R., 8 All., 140.

(4) I. L. R., 16 Bom., 23.

1896

CHAUDHRI
RAJ KUMAR
v.
JUGAL
KISHORE.

Judge in his judgment says that the pleader who put in appearance acted upon the power of attorney apparently granted by Chaudhri Raj Kumar, but we do not find on the record warrant for this holding. The power of attorney was signed in the name of Raj Kumar, but by one Sant Kumar, on behalf of Raj Kumar. The very fact that immediate mention was made that Sant Kumar's appearance was due to his having to answer another case is in our opinion sufficient ground for an inference that Sant Kumar did act upon this occasion without any instructions from Raj Kumar, and that he put forward the pleader, not to enter an appearance in the case, but solely to obtain an adjournment to a date upon which such appearance could be made. It is this fact which distinguishes the present case from that of *Fazal Ahmad v. Bahadur Singh* (1) and that of *Ganga Das v. Indarman* (2).

The only case relied upon by the other side was that of *Sahibzada Zainulabdin Khan v. Sahibzada Ahmed Raza Khan* (3). That case was a case decided under section 119 of Act VIII of 1859, when the procedure was different from that which now prevails under the present Code.

We are of opinion that the appearance in the present case cannot be deemed to be an appearance by the defendant, and that the decree passed was an *ex parte* decree. Before, however, the Subordinate Judge could set aside the decree *ex parte* he had to be satisfied that the summons was not duly served or that the defendant was prevented by sufficient cause from appearing, and stress was laid by the respondent upon this point of the case. The contention was that the summons had been duly served, and that the allegation of illness was not supported by any evidence; was never made at any prior stage of this case, and was now put forward at the last moment upon the bare statement said to have been made to the serving officer. The appellant, on the other hand, strenuously urged that there had been no due service of summons, and referred us to the case of *Cohen v. Nursing Das Auddy* (4)

(1) Weekly Notes, 1893, p. 25.

(3) L. R., 5 L. A., 233.

(2) Weekly Notes, 1893, p. 208.

(4) I. L. R., 19 Calc., 201.

and also to the case of *Nusur Mahomed v. Kuzbai* (1). We are not prepared to hold that it was the duty of the serving officer, who was a peon attached to the District Court of Farakhabad, either to follow the defendant out of the jurisdiction of Farakhabad upon the mere allegation that he was to be found in Cawnpore, or to refrain from affixing the copy of the summons on the outer door of Chaudhri Raj Kumar's ordinary residence. We have no means to say how far effort was made by the serving officer to find Chaudhri Raj Kumar. Under the Code of Civil Procedure it is the duty of the Court which makes the return to a summons to declare that the summons has been duly served or to order such service as it thinks fit. This most important provision of the law was entirely overlooked in the present case by the Subordinate Judge of Farakhabad, the Court which had issued the summons. There is a certificate by the Munsif of Chibramau, but the summons did not issue from the Court of the Munsif of Chibramau, and the jurisdiction of the Subordinate Judge of Farakhabad extended over the village in which Chaudhri Raj Kumar resided and to which the summons was issued for service. In the absence of the declaration which the Subordinate Judge of Farakhabad should have made, there is no room for presumption that the summons was duly served.

For these reasons we decree this appeal and set aside the order of the Subordinate Judge of Farakhabad. We also set aside the decree *ex parte* and direct that Court to grant a re-hearing of the original suit. Costs hitherto will be costs in the cause.

Appeal decreed.

1896

CHAUDHRI
RAJ KUMAR

v.
JUGAL
KISHORE.

(1) I. L. R., 10 Bcm., 202.