

into their hands. It was not asserted on behalf of the defendants that they had not received any assets. It was admitted, as is indeed the fact, that they were the legal representatives of Thakur Dayal Singh. The existence of the arrears is also not denied. The plaintiff was therefore entitled to a decree against the defendants, their liability being limited to the extent of the assets of Thakur Dayal which have come into their hands. I make such a decree in favour of the appellant, and vary the decree of the lower appellate Court to that extent with costs here and in the Courts below.

1897

THE MAHA-
RAJA OF
BENARES
v.
DALJIT
SINGH.

Decree modified.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

BHAGWAN DAI AND ANOTHER (OPPOSITE PARTIES) v. HIRA
(APPLICANT)*

1897
April 8.

Civil Procedure Code, sections 108, 157—Order setting aside ex parte decree

—Appeal.

No appeal will lie from an order made under section 157 read with section 108 of the Code of Civil Procedure setting aside a decree passed *ex parte* in default of appearance of the defendant on a day to which the hearing of the suit had been adjourned. *Jonardan Dobe v. Ramdhone Singh* (1) referred to.

MUSAMMAT Bhagwan Dai and another brought a suit in the Court of the Subordinate Judge of Meerut against one Hira, a minor under the guardianship of his mother, Musammat Lado. The case was partly heard, when, on a day to which the hearing of the suit had been adjourned, the defendant's pleader did not appear, and the Court proceeded with the case and made a decree *ex parte* in favour of the plaintiffs. Thereupon the defendant presented to the Court an application purporting to be an application under section 623 of the Code of Civil Procedure for review of judgment, the application being mainly based on the allegation that the defendant's pleader was ill and unable to appear at the

* First Appeal No. 121 of 1896, from an order of Baba Prag Das, Subordinate Judge of Meerut, dated the 12th September 1896.

(1) I. L. R., 23 Cal., 738.

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time when the *ex parte* decree was passed, and that the defendant's guardian was not aware of that fact and therefore had made no arrangement to retain another pleader. The Subordinate Judge, characterizing the application as one under section 108 of the Code, accepted the applicant's plea, and, setting aside his *ex parte* decree, appointed a fresh date for proceeding with the suit. From this order the plaintiffs appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

EDGE, C. J. and BLAIR, J. — The Subordinate Judge proceeded *ex parte* and made a decree. His procedure really was under section 157 of the Code of Civil Procedure. An application was made to him under section 108 of the Code to set aside the decree on the ground that there was "sufficient cause" which prevented the defendant from appearing when the suit was called on for hearing after an adjournment. The Subordinate Judge set aside the decree in compliance with the application. This appeal has been brought from that order. The appellants contend that section 108 did not apply, and that the defendant's remedy (if any) was by way of appeal. On the other hand the defendant-respondent contends that section 108 did apply, and this appeal did not lie.

When a Court acts under section 157 of the Code it has to apply the procedure of Chapter VII. Part of the procedure pertinent to such a case is the procedure of section 108. In our opinion section 108 applied, and, as no appeal is given from an order allowing an application under section 108, this appeal does not lie. We are supported in this view by a decision of the Full Bench of the Calcutta Court in *Jonardan Dobej v. Ramdhone Singh* (1). We dismiss this appeal with costs.

Appeal dismissed.

(1) I. L. R., 23 Calc., 738.