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came to Court and represented that the matter in dispute between them had been adjusted. The Court set forth in its order that both the parties before it expressed a wish that the suit should be struck off *(kharij)*, and proceeded to strike off the case in accordance with this wish. The Court in passing such an order acted wrongly. It should have acted in accordance with section 375 of the Code of Civil Procedure. It did not do so, and it is probably due to this mistake that the present litigation has taken place. Still it was the duty of the present plaintiff to have got a proper order recorded. Instead of seeing to this he remained satisfied with action which practically amounted to withdrawal of his suit without permission asked to sue again. We can easily understand that under the circumstances the parties never contemplated that such permission would be needed. After some ineffectual efforts made to enforce the compromise, the plaintiff has brought the present suit, the nature of which has been explained above. We are compelled reluctantly to hold the suit is barred by the second clause of section 373 of the Code of Civil Procedure.

The result is that this appeal must be and is decreed. The judgment and decree of the lower appellate Court is set aside, and the plaintiff's suit is dismissed with costs in all Courts.

Appeal decreed.

PRIVY COUNCIL.

P. C.
J. C.
1900
November 14
December 8.

RADHA KISHAN, PLAINTIFF, APPELLANT *v.* THE COLLECTOR OF JAUNPUR, DEFENDANT, RESPONDENT.

On appeal from the High Court for the North-Western Provinces.

Ex parte *decree against an absent defendant—Civil Procedure Code, section* 108—*Remand under section* 562—*Such order not appealable—Civil Procedure Code, section* 595*(a)*.

A defendant, not present in person at the hearing on evidence, had appointed a pleader who had acted in the suit until that occasion, when he stated to the Court that he was not instructed for the defence. The Court proceeded without him to a decree for the plaintiff.

An application by the defendant under section 108, Civil Procedure Code, for an order setting that decree aside, was disallowed without the Court's being

Present:—LORDS HOBHOUSE, DAVEY and ROBERTSON, and SIR RICHARD COUCH.

satisfied by any investigation as to whether or not the defendant had been prevented by any sufficient cause from appearing when the suit was called on for hearing.

The High Court on an appeal reversed that order, holding that the decree was an *ex parte* one within the meaning of section 108, and by an order of remand under section 562 remanded the case to be disposed of on the merits.

Held, that the intent and effect of the High Court's order was not to set aside the decree made against the defendant, but to direct an inquiry under section 108 as to the cause of the defendant's absence, the decree having been *ex parte*.

Held, also, that the High Court's order of remand was not appealable, being interlocutory and not being final within section 595*(a)*, and that the present appeal ought not to have been admitted.

APPEAL from an order (23rd December, 1897) (1) of the High Court, setting aside an order (25th November, 1896) of the Subordinate Judge of Benares, and remanding the case under section 562 of the Code of Civil Procedure, to be disposed of on the merits.

This suit was brought by the plaintiff, appellant, on two hypothecation bonds for Rs. 65,426, principal and interest, executed by Raja Harihar Dat Dube, deceased, against Shankar Dat Dube, his legal representative. The latter having died pending this appeal, the respondent now was the Collector of Jaunpur as agent of the Court of Wards managing the estate of the late Rani Gumani Kuar.

There were the principal facts—that the pleader, who had appeared in the case on previous occasions as representing the defendant stated to the Court when the case was called on for hearing on evidence on the day appointed, the 19th March, 1896, that he had not been instructed, and that the proceedings were continued without him and in the absence of the defendant, Shankar Dat Dube, to their conclusion.

The main question on this appeal was whether the decree which followed was an *ex parte* one within the meaning of section 108 of the Code of Civil Procedure Code so as to afford ground for the application of that section.

On the 9th April, 1896, the defendant applied to the Subordinate Judge (who had succeeded the Judge who made the decree above mentioned) to set aside that decree under section 108 of

(1) (1897) I. L. R., 20 All., 195, *Shankar Dat Dube* v. *Radha Krishna*.

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the Code of Civil Procedure. The petition stated that the pleader had given no notice to the defendant of the date fixed for the hearing. The petition was disallowed on the ground that the decree was not *ex parte*, and that therefore section 108 was inapplicable. The view taken was that the defendant had in fact appeared. The case was thus stated by the Subordinate Judge :—

"The 19th March, 1896, on which the decree in question was "passed, was fixed to the knowledge of the pleaders for both "parties for the purpose of the production of evidence on the "issues framed. These issues had been framed with reference to "the plaint and the written statement filed on defendant's behalf "on the 17th May, 1895 and 19th March, 1896; but the case was "postponed before the 19th March from time to time, either by "reason of the application of defendant's pleader praying for the "postponement on account of his being busy elsewhere, or by "reason of the record of the suit not having come back from "Jaunpur, where it had been sent on requisition. The post-"ponement took place on the 1st January, 1896, on which an "order was passed that the case should come on for decision on "the 19th March, 1896, and that the parties with their witnesses "should appear on that date. Due notice thereof was admittedly "given to pleaders. That day having arrived the pleader for the "applicant stated that he could not conduct the case, and he had "received no instructions from his client. Thereupon the Court "proceeded to try the case, and tried and decided the issues on "the evidence adduced on plaintiff's behalf and decreed the suit "against the applicant."

The Subordinate Judge added that the defendant's pleader was not without instructions; and that his appearance in Court, therefore, was an appearance of his client.

The High Court (EDGE, C.J. and BLAIR, J.) set aside that order, holding that the decree was *ex parte*. They remanded "the case," as their order stated, under section 562 "to be disposed of on the merits." Their judgment, in which they referred to *Bhagwan Dai* v. *Hira* (1), *Jonardan Dobey* v. *Ramdhone Singh* (2), and *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmed*

(1) (1897) I. L. R., 19 All., 355. (2) (1896) I. L. R., 23 Calc., 738.

Raza Khan (1), distinguished the last case as having no bearing on the present. They decided that this was a decree passed *ex parte* against a defendant within the meaning of section 108. For although the pleader was physically present in Court, he was not there representing the defendant. The judgment is reported in I. L. R., 20 All., 195, *Shankar Dat Dube* v. *Radha Krishna*.

Mr. *W. H. Apjohn* and Mr. *G. E. A. Ross*, for the appellant, argued that there was error in the judgment of the High Court. The decision on the 19th March, 1896, was not *ex parte*. Referring to the fact that the pleader, whose vakalatnamah had been filed and was not cancelled, was in Court, a postponement having been obtained on his application, and the date fixed for the hearing, the presence of the pleader was in his representative character. What took place was that the defendant ceased to appear in the course of the hearing of the case when the pleader said that he had no instructions. The procedure that was applicable was the procedure under section 157, Civil Procedure Code, which referred to Chapter VII.

The parties had appeared more than once; there was a non-appearance of the defendant at an adjourned hearing. The question was as to the meaning of section 157 in authorizing the Court to proceed to dispose of the suit in one of the modes directed by Chapter VII, or make such other order as it might think fit. The main contention was that the presence of the pleader, who had appeared for the defence, rendered section 108 inapplicable, although it was in Chapter VII. The case was not heard *ex parte*; and there was no need for inquiry as to sufficiency of cause (as expressed in that section) preventing the non-appearance of the defendant, for he had appeared by his pleader. The decree itself had not been appealed from. It was submitted that it could not be set aside under section 108.

Mr. *A. Phillips*, for the respondent, argued that the order of the High Court was right. That order was that "the case," meaning the application to set aside the decree, was to be heard on the merits. This involved inquiry as to whether the defendant had for sufficient cause or excuse failed to appear to the summons. The latter would have been the merits referred to. But no appeal

(1) (1878) L. R., 5 I. A. 233; I. L. R., 2 All., 67.

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could be heard in this case, for there was no final order or decision of an ultimate Court of appeal in India within the requirements of section 595(*a*), Civil Procedure Code.

Consequently the order of the High Court now appealed from must remain. There was, however, the additional reason that the application to have the judgment of the 19th March, 1896, set aside ought to have been heard on the merits, and ought not to have been disallowed. The order of remand, however, under section 562 was an order that was not appealable.

Mr. *G. E. A. Ross* replied.

Afterwards on the 8th December, 1900, their Lordships' judgment was delivered by LORD ROBERTSON.

To this appeal from the High Court of Judicature for the North-Western Provinces, Allahabad, it is objected by the respondent that no appeal to Her Majesty in Council lies against the order complained of. For the due understanding of the question thus raised it is necessary briefly to trace the procedure in the suit.

The suit was brought on the 10th March, 1892, before the Subordinate Judge of Benares, for the recovery of money alleged to be due under two bonds executed by a person of whom the defendant, Shankar Dat Dube, was the legal representative. That defendant is now deceased and is represented by the respondent. He appeared in the suit, and on the 17th May, 1895, filed a written statement with a list of documents. Into the nature of the questions raised by the plaint and the written statement it is unnecessary to enter, as the questions before their Lordships arise solely out of the part taken by the defendant at a certain stage of the procedure. It is sufficient to note that the issues settled between the appellant and Shankar Dat Dube were—1. Has the plaint been amended according to law? 2. Is defendant No. 1 (Shankar Dat Dube) the heir of Raja Harihar Dat? 3. Is the deed of mortgage legally valid? Could Harihar Dat Dube legally hypothecate the property? 4. Is the deed of mortgage genuine? A fifth issue was settled, but it did not affect Shankar Dat Dube but only certain other defendants.

Prior to the 19th March, 1896, the case had repeatedly been before the Court, but had from time to time been postponed;

and on the 31st January, 1896, an order was passed that the case should come on for decision on the 19th March, 1896. On each of these occasions the defendant, Shankar Dat Dube, was represented by a pleader. On the 19th March, 1896, it is recorded by the presiding Judge that "defendant No. 1 is to-day absent. "No one appears for him. His pleader informs the Court that "he has no instructions to proceed with the case." The Court proceeded, as in absence, heard evidence for the plaintiff and decided the issues, giving a decree for the claim with costs.

On the 9th April, 1896, Shankar Dat Dube applied to the Court under section 108 of the Code of Civil Procedure to set aside this decree on the ground that neither the defendant applicant, nor his general attorney, had notice of the date fixed, and that for this reason he could not conduct the suit. The appellant filed a reply denying that the 108th section applied and asserting that the defendant had notice. The application came before a different Judge from Nil Madhab Roy, who had presided on the 19th March, 1896. The new Judge, notwithstanding that his predecessor had recorded that the defendant in question was absent, that no one appeared for him, and that his pleader informed the Court that he had no instructions to proceed with the case, forthwith disallowed the application with costs. No opportunity was given to the applicant to satisfy the Court in terms of section 108 that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the theory of the decision being that the applicant had in fact appeared and that the decree was therefore not *ex parte*.

Against this order an appeal was taken to the High Court at Allahabad, who allowed the appeal and pronounced the order now appealed against. The terms of the order are as follows:— "It is ordered that this appeal be allowed; that the order of the "Subordinate Judge of Benares be set aside; and that the case "be, and it hereby is, remanded under section 562 of the Code of "Civil Procedure to the Court of the said Subordinate Judge to "be disposed of on the merits."

The appellant represents that by this order the High Court have set aside the decree of the 19th March, 1896, and have remanded the original suit to be disposed of on the merits. The

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respondents disclaim for the order any such sweeping effect and hold that what is remanded is merely the application immediately before the Court, to wit the application to set aside the decree, and that it is this application which the Subordinate Judge will under the remand proceed to dispose of, by allowing the respondent to endeavour to satisfy him of the conditions specified in section 108, and then if this be done by setting aside the decree.

Their Lordships are clearly of opinion that the respondent's is the just construction of the order of the High Court. The application by the respondent to set aside the decree might be described as "the case" with at least as much accuracy as the original suit in which there was a standing decree; and unless and until that decree had been set aside, there was no means of remanding that suit. The form of the records is inconsistent with the appellant's view. The judgment of the High Court is headed "Case 2 of 1897. First appeal from the order of the "Subordinate Judge of Benares dated 8th October, 1896," which is the dismissal of the petition under section 108. And the decree is headed in similar fashion. That then was the "case" with which the High Court was dealing. But further, if there be any ambiguity, it is to be presumed that that was done which the law required; and it is allowed by both parties and is clear to their Lordships that, assuming the 108th section to apply at all, the proper course was to remand the application to the Subordinate Judge to dispose of that application with due regard to the conditions of the section. There is, however, a further consideration which is conclusive as to the true intendment of the order, for the learned Judges in their written judgment point out as the error of the Subordinate Judge that he had disposed of the case without considering whether the defendant was prevented by sufficient cause from appearing and maintaining his defence at the hearing on the 19th of March, 1896. Their Lordships would require very clear language in the order which was intended to effectuate this opinion to induce them to construe it in a sense which would stultify the Court pronouncing it.

Their Lordships having thus ascertained the true meaning of the order appealed against, the question is whether an appeal lies to Her Majesty in Council, and this depends on whether the order

is a final order in the sense of section 595(*a*) as modified by section 594 of the Code of Civil Procedure. The mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit cannot make appealable an order which does not fulfil the statutory conditions. Now it does not in their Lordships' judgment admit of doubt that, assuming the order to have the meaning which they ascribe to it, it is in no sense of the term a final order. It is a purely interlocutory order, directing procedure. Accordingly their duty is to advise Her Majesty to dismiss the appeal. Precluded as they would therefore be from proceeding to examine the merits of the order, their Lordships do not regret that in the course of ascertaining its true construction they have necessarily had to consider the law applicable to the case and to pronounce that no other order would have been appropriate save that which they find to have been made. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the respondent:—The *Solicitor, India Office.*

BANARSI PRASAD *v.* KASHI KRISHNA NARAIN AND ANOTHER.

On Appeal from the High Court for the North-Western Provinces.

Civil Procedure Code, sections 596, 600—*Appeal to Her Majesty in Council—Procedure.*

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In order that an appeal may lie according to section 596, of the Code of Civil Procedure, besides involving directly or indirectly the value of at least Rs 10,000, the appeal must raise a substantial question of law in those cases where the decree of the final appellate Court affirms the decree of the Court below it.

The assent of the respondent to the issue of a certificate under section 600 cannot give effect to it in the absence of the conditions required to give the right of appeal. Nor does the existence of a question of law of itself give rise to a right of appeal in the ordinary course of procedure under section 596, being in such a case a necessary condition when the higher Court affirms the decision of the lower.

Present:—LORDS HOBHOUSE, DAVEY, and ROBERTSON and SIR RICHARD COUCH.