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another by the act of the party a transfer of possession is not necessary.

The fact that possession was reserved for the husband does in no way show that the ownership of the property did not pass to the wife. The award was sufficient to transfer ownership to Salim-un-nissa; see *Ram Bakhsh* v. *Mughlani Khanam* (1). Mutation alone creates no title, but in the case before us the award made the wife absolute owner of the property; and mutation showed that effect was given to the award.

For the above reasons I would set aside the decree of the lower appellate court and restore that of the court of first instance with costs.

CHAMIER, J.—I concur.

BY THE COURT.—The appeal is decreed with costs. The decree of the lower appellate court is set aside and the decree of the court of first instance restored.

Appeal allowed.

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May, 22.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

RAM NARAIN DUBE AND ANOTHER (DEFENDANTS) *v.* JAGDEO AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), *order XVII, rule 3 ; order XLI, rule 27—Procedure—Order for parties to appear with witnesses at adjourned hearing—Default of plaintiff's witnesses—Dismissal of suit.*

On the date fixed for the hearing of a suit the parties and their witnesses were present, but, as there was some prospect of a compromise, the hearing was adjourned. On the adjourned date the plaintiffs were present, but their witnesses, though summoned, did not appear. The plaintiffs did not apply for an adjournment, nor did they ask the court to enforce the attendance of their witnesses under order XVI, rule 10, of the Code of Civil Procedure, 1908, and the court, acting apparently under order XVII, rule 3, of the Code, dismissed the suit. The plaintiffs appealed, and the District Judge, dealing with the case as if the plaintiffs had made default in appearing, remitted the case to the first court to be disposed of according to law. *Held* that the procedure of the District Judge was erroneous: he should have proceeded under order XLI, rule 27, to direct the admission of fresh evidence, and under order XLI, rule 25, to refer the issues for trial to the Court of first instance.

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* First Appeal No. 17 of 1911 from an order of J. H. Cuming, District Judge of Jaunpur, dated the 15th of December, 1910.

(1) (1903) I. L. R., 26 All., 266.

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THE facts of this case were as follows :—

A suit was fixed for hearing on the 24th of April, 1910. The parties and their witnesses were present on that date ; but as the parties were negotiating for a compromise, they made a joint application for two weeks' adjournment. The Court made an order granting the application and directing the parties to file the compromise within two weeks and failing that, to be present with their witnesses on the 27th of May, 1910. The compromise was not effected and the parties summoned their witnesses for the said date. On that date the parties and their pleaders were present when the case was called on, but the plaintiffs' witnesses had not come, although summoned. The plaintiffs' pleader stated to the Court that the witnesses would be coming shortly ; but no application was made for adjournment or for enforcing the appearance of the witnesses by issue of warrant or attachment. The Court proceeded to decide the suit under order XVII, rule 3, of the Code of Civil Procedure, 1908, and dismissed it. On appeal, the District Judge treated the case as if it had been dismissed for default of appearance, and setting aside the order of dismissal, remanded the suit under order XLI, rule 23.

The defendants appealed.

Maulvi *Ghulam Mujtaba*, for the appellants :—

The District Judge was wrong in his opinion that the dismissal was for default of appearance. There was no failure of appearance, as the plaintiffs, and their pleaders also, were present. The failure was in production of evidence, for which time had been granted by the court by its order of the 24th of April, 1910. Under these circumstances the action of the court under order XVII, rule 3, was the right action. It would have been wrong to have dismissed the suit for default, which could be done only when neither the plaintiff nor his pleader was present; *Badam* v. *Nathu Singh* (1), *Sitara Begam* v. *Tulshi Singh* (2). The difference between order XVII, rule 2, and order XVII, rule 3, is well pointed out in *Chandramathi Ammal* v. *Narayanasami Aiyar* (3). The ruling in *Dulhin Sonraj Kuari* v. *Audhan Singh* (4), which is relied on by the lower appellate court, is not in point, as the circumstances were entirely different.

(1) (1902) I. L. R., 25 All., 194.
(2) (1901) I. L. R., 23 All., 462.
(3) (1909) I. L. R., 33 Mad., 241.
(4) Weekly Notes, 1891, p. 112.

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Mr. *Muhammad Ishaq Khan*, for the respondents :—

Order XVII, rule 3, was not applicable to this case. The suit was not adjourned on the 24th of April, 1910, on the application of the plaintiffs alone. Both parties had jointly applied for time; and order XVII, rule 3, does not apply to such a case. The dismissal, therefore, could not be under that rule; it was for default. The mere presence of the pleader where he did nothing more than praying for time would not be sufficient appearance, and the dismissal was, properly, one for default. The latest authority on this point is the case of *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (1). There was an oral application for adjournment; no written application could be made, as the court at once proceeded to write the judgement. In the absence of witnesses the plaintiff is in the same position as his pleader; so that the presence of the plaintiff personally would not alter the case. The appellate court can allow further evidence to be taken under order XLI, rule 27. This is a case in which there is substantial cause within the meaning of clause (*b*) of that rule. The plaintiff exercised all due diligence in summoning his witnesses; they were served, but did not turn up in time. It was not the fault of the plaintiff at all.

Maulvi *Ghulam Mujtaba*, in reply :—

It is for a party to move the court to take action under order XVI, rule 10, and not for the court to proceed *suo motu* to further the production of the witnesses of that party; *J. G. Bachman* v. *Lall Beharee Pandey* (2). The plaintiffs did not move the court to take any steps. They should have used the utmost diligence. When a plaintiff does not exhaust all means provided by the law for the production of evidence, the court may rightly proceed to dispose of the case on the materials present before it; and the case should not be remanded for taking further evidence; *Luchmun Singh* v. *Chokowree Singh* (3). In that case a remand for further evidence was not allowed, although the plaintiff had exercised much greater diligence than in the present case. The language of order XVI, rule 10, is stronger than that of the law in force at the time when these rulings were laid down, and

(1) (1907) I. L. R., 34 Calc., 403. (2) (1870) 13 W.R., C.R., 324.
(3) (1876) 25 W.R., C.R., 154.

the requirements of the rule should be strictly complied with. The court should be satisfied that the evidence is material. It would be casting too great a burden on courts to lay down that in every case in which witnesses do not attend, the court is, of its own motion, and without any initiative or help from the party who summoned those witnesses to decide which of the witnesses are material and to act under order XVI, rule 10. The plaintiffs could easily have taken the initiative if they were in earnest about the attendance of their witnesses. There was ample time to put in an application for adjournment.

KNOX and PIGGOTT, JJ.:—We find ourselves unable to support the order passed by the learned District Judge in this case on the grounds taken by him. The ruling which the learned Judge professes to follow namely, *Dulhin Sonraj Kuari* v. *Audhan Singh* (1), differs in circumstances materially from the case before us. In the present case the parties to the suit were present in court on the 24th of April, 1910, the day fixed for the first hearing. The witnesses, too, were in attendance on that day, so far as we gather from the order sheet. On that day the parties expressed a desire to compromise the matter in dispute between them and the Court very properly granted time for this purpose. It, however, directed the parties, if they found themselves unable to come to terms, to present themselves again in court with evidence on the 27th of May, 1910. They were unable to agree. On the 27th of May, 1910, the parties were present in court, but the witnesses for the plaintiffs, although summoned to appear on that date had not appeared in court, although the time fixed for the opening of the court and for their attendance had passed by a considerable interval. The plaintiffs' pleader appears to have stated to the Court that the witnesses were coming, but neither then nor afterwards was any application for adjournment put in on the part of the plaintiffs, nor did the plaintiffs apply to enforce the attendance of the witnesses. The Court went on to deal with the case under order XVII, rule 3, and proceeded to decide the suit forthwith against the plaintiffs. The plaintiffs appealed to the District Judge. The District Judge dealt with the case as though the plaintiffs had made a default in appearing, and setting aside

(1) Weekly Notes, 1891, p. 112.

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the order of the court of first instance, directed that court to restore the suit to its file to be disposed of anew, according to law. His procedure was in error. There had been no default on the part of the plaintiffs. At the same time the Court could by reference to its file, and no doubt did so refer, find that the plaintiffs used due diligence in causing their witnesses to be summoned. It might fairly have presumed from the fact that the witnesses had twice been summoned by the plaintiffs that the evidence of such witnesses was material; that the plaintiffs deemed it material and fully intended to have put it before the court, but were prevented by the non-appearance of the witnesses. It is contended by the defendants appellants that when this stage had been reached, the plaintiffs, if in earnest, ought to have applied to the court to enforce the power given to the court by order XVI, rule 10, clauses (2) and (3). But it is a matter of experience that parties who have cited witnesses, and who, when such witnesses do not appear, proceed to put them to the indignity of arrest or proclamation, often find such witnesses very unwilling to give evidence on behalf of the persons who have thus acted. We think that, under the circumstances, the court, which certainly had reason to believe that the evidence was material and that the witnesses were failing to attend, so far as it could then judge, without lawful excuse, would have exercised a sound discretion in putting in force the powers entrusted to it by order XVI, rule 10, clauses (2) and (3) of the Code of Civil Procedure. Our attention was called to certain rulings of the Calcutta High Court passed under the previous Code of Civil Procedure, namely, *J. G. Bachman* v. *Lall Beharee Pandey* (1) and *Luchmun Singh* v. *Chokowree Singh* (2). It was urged that there is considerable difference between the present Code and the previous Code so far as the duty cast on the court in this matter is concerned. As we read the present Code, we think that the present Code leaves the court a discretion to proceed at once when witnesses have failed to attend, if from any circumstance before it, it has reason to believe that the evidence of such defaulting witnesses is material, and that the witnesses are defaulting. It

(1) (1870) 13 W.R., C.R., 324. (2)(1876) 25 W.R., C.R., 154.

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would be for the witnesses to show that their absence rested on lawful excuse. It is urged before us that where a number of witnesses have been cited, it would be casting too great a burden on a court to proceed against all who might have defaulted. The probability is that in such a case the Court would of itself see that the evidence of all such witnesses is not material. The Court can generally make a shrewd guess where witnesses have been unnecessarily summoned. In any case a discretion is allowed by law. We think that the court should have proceeded under order XLI, rule 27, to direct the admission of fresh evidence and under order XLI, rule 25, to refer the issues, which in this case had never been really tried, for trial to the court of first instance, directing that court to return findings. We so far allow the appeal as to make the order just pointed out. Costs will abide the event.

Appeal allowed.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

1911

May 24.

IKRAM-ULLAH KHAN AND OTHERS (DEFENDANTS) *v.* MOTI CHAND, AND OTHERS (PLAINTIFFS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 10, 20, 83—*Sale of zamindari—Agreement to surrender ex-proprietary rights—Possession not delivered—Suit for damages for breach of contract—Void contract.*

Held that a transaction, one of the objects of which is that one party shall be divested of his ex-proprietary rights and that those rights shall vest in the other party, or a sale of zamindari property coupled with an agreement to relinquish the exproprietary rights of the vendor, is void so far as the relinquishment of exproprietary rights is concerned. *Bhikham Singh* v. *Har Prasad* (1), *Murlidhar* v. *Pem Raj* (2), *Kashi Prasad* v. *Kedar Nath Sahu* (3), *Raghubans Sahai* v. *Brijnandan Lal* (4), *Bharath Singh* v. *Debi Dayal Singh* (5) and *Khurshed Ali* v. *Wazir-un-nissa* (6) referred to.

The facts of this case are, briefly, as follows:—

The defendants sold certain zamindari property to the plaintiffs by a registered sale deed, dated the 2nd of May, 1903. The sale deed contained a stipulation that the defendants would relinquish their sir and khudkasht lands and give the

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* First Appeal No. 444 of 1909 from a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 13th of October 1909.

(1) (1896) I. L. R., 19 All., 35.
(2) (1899) I. L.R., 22 All., 205.
(3) (1897) I. L. R. 20 All., 219.
(4) (1909) 6 A. L. J., 477.
(5) (1909) 6 A. L. J., 555.
(6) (1910) 7 A. L. J., 778.