

Court and restore that of the lower appellate court. We direct that the costs of all these proceedings shall be costs in the cause.

Appeal allowed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

GULAB CHAND (DEFENDANT) v. SHANKAR LAL, (PLAINTIFF)

AND OTHERS (DEFENDANTS.)*

Civil Procedure Code (1908), order V, rules 1 and 2; order IX, rule 13—Ex parte decree—Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint.

Held that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant, did not absolve the court from the necessity of serving such defendant, when the suit was admitted, with a copy of the plaint and notice of the date fixed for hearing.

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

Babu *Lalit Mohan Bamerji*, for the appellant.

Mr. *B. E. O'Connor* and Pandit *Mohan Lal Sandal*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, J.J.:—The appellant in this case was the defendant in a suit, in the court below, which was decreed *ex parte* against him. He applied under order IX, rule 13, of the Code of Civil Procedure to have the *ex parte* decree set aside on the ground that summons had not been served on him and therefore he was unable to appear and defend the suit. The suit was against the appellant and his minor brother Har Bilas as owners of the firm Gulab Chand Har Bilas. Har Bilas was a minor, and when the plaint was filed there was an application by the plaintiff asking the court to appoint Gulab Chand as guardian of the minor. Notice of this application was issued to Gulab Chand. On the 27th of July, 1911, he filed a vakalatnama and objected to his appointment as guardian of the minor. His objection was allowed, and finally on the 1st of September, one Musamat Champo was appointed guardian. On the same day the suit was registered and summons was ordered to issue. Summons was issued to Gulab Chand, but it was returned unserved. Therefore the court passed an order that as there was a vakalatnama on the

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* First Appeal No. 66 of 1912 from an order of Baijnath Das, Subordinate

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record it was unnecessary to take any further step. The suit was decided *ex parte* against Gulab Chand. His application was rejected by the court below on the ground that a vakalatnama, dated the 27th of July, 1911, had been filed and showed that a vakil was appointed to defend the action filed and therefore service of summons was unnecessary after that. It is quite clear that on the 27th of July, 1911, the only matter pending was the miscellaneous matter relating to the appointment of a guardian. The suit was not registered and the pleader was appointed for that miscellaneous matter. It was the duty of the court to serve the summons after the suit had been registered. It is true that Gulab Chand knew that a suit had been instituted, but he was entitled to receive a copy of the plaint and be informed of the date fixed in order that he might be able to protect his rights. Therefore the order of the court below is wrong. We allow the appeal; set aside the *ex parte* decree as against the present appellant, and direct the court below to restore the suit to its original number and proceed to hear and determine it according to law. The costs of this appeal will abide the event.

Appeal allowed and cause remanded.

FULL BENCH.

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January, 21.

Before Sir Henry Richards, Knight, Chief Justice, Mr Justice Banerji,
and Mr. Justice Tudball.

COLLECTOR OF MIRZAPUR (PLAINTIFF) v. BHAGWAN PRASAD
AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), sections 59, 100—Mortgage—
Charge—Attestation—Document attested by one witness only.

Held that a document which purported to be a mortgage, but which was attested by only one witness could not operate either as a mortgage or as creating a charge on immovable property within the meaning of section 100 of the Transfer of Property Act, 1882. *Shamu Patter v. Abdul Kadir Bavuthan* (1) referred to.

THE plaintiff in this case brought a suit for sale of immovable property on the basis of a document, alleged to be a mortgage, dated the 11th of July, 1900. The document purported to have

* First Appeal No. 52 of 1911 from a decree of Keshab Deb, Subordinate Judge of Jaunpur, dated the 26th of September, 1910.

(1) (1912) I. L. R., 185 Mad., 607.