

would allow the appeal and set aside the order of the court below.

RYVES, J.—I agree with the learned Chief Justice in thinking that the decision in I. L. R., 28 All., 35, was right. I do not think the Legislature, by substituting the word “agree” in paragraph 1 of the second schedule of the new Code, for “desire” in section 506 of the old Code, intended that order XXXII, rule 7, should control proceedings under the second schedule, paragraph 1. But in any event I also agree with both my colleagues in thinking that no appeal lay to the lower appellate court on the ground that the award was invalid, no such ground having been taken before the court which made the reference within the period of limitation allowed. I also think that the appeal should be allowed.

By THE COURT:—The order of the Court is that the appeal be allowed, the order of the court below be set aside and the decree of the court of first instance restored with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Piggott.

JAGARNATH SAHI (PETITIONER) v. KAMTA PRASAD UPADHYA
(OPPOSITE PARTY).*

Civil Procedure Code (1908), section 148; order IX, rule 13—Decree ex parte—Conditional order setting aside decree—Condition not fulfilled—Court competent either to extend time for compliance with condition or to pass a fresh conditional order.

On an application to set aside an *ex parte* decree the court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages. This condition was not fulfilled, and the court—holding that it had no jurisdiction to receive the prescribed payment after the date fixed—disallowed the defendants' application to set aside the decree.

Held (1) that an appeal lay from this order, and (2) that the court below had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms, the original order having become inoperative. *Suranjan Singh v. Ram Bahal Lal* (1) distinguished.

IN this case certain defendants, against whom a decree had been passed *ex parte* on the 12th of August, 1911, applied under

* First Appeal No. 127 of 1913 from an order of V. N. Mehta, Subordinate Judge of Jaunpur, dated the 12th of April, 1913.

(1) (1913) I.L.R., 35 All., 582.

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order IX, rule 13, of the Code of Civil Procedure to have the decree set aside. An order was passed on the 31st of March, 1913, restoring the case, but this order was conditional on the applicant's paying to the plaintiff within three days a sum of 15 rupees as damages. The money was not paid in time; and the court, holding that it had no power to extend the time limited, passed an order, on the 12th of April, 1913, disallowing the defendants' application to have the *ex parte* decree set aside. From this order the defendants appeal to the High Court.

The Hon'ble Munshi Gokul Prasad and Babu Piari Lal Banerji, for the appellant,

Dr. S. M. Sulaiman, for the respondent.

RYVES and PIGGOTT, JJ.—The appellants before us were defendants in a suit in which an *ex parte* decree was passed on the 12th of August, 1911. They applied in due course under order IX, rule 13, Civil Procedure Code, to have the *ex parte* decree set aside. Under circumstances with which we are not now concerned this application only came up for disposal before the Subordinate Judge of Jaunpur on the 31st of March, 1913. After evidence had been taken the learned Subordinate Judge expressed himself as satisfied that the applicants had shown sufficient cause for having the *ex parte* decree set aside. He then passed an order the first portion of which formally allows the application, sets aside the *ex parte* decree and directs the suit to be restored to its original number for re-trial. To this, however, the following direction was appended, "but the order of restoration will be subject to the payment of Rs. 15 as damages by the applicant within three days to the plaintiff." The learned Subordinate Judge who passed this order happened to be transferred almost immediately afterwards, and on the 4th of April, 1913, the matter came before his successor. It appears that the applicants had neither made nor tendered any payment to the plaintiffs before the 4th of April, 1913, on which date the money was tendered in court and the plaintiff refused to accept it. The question then arose whether the learned Subordinate Judge had jurisdiction to extend the time fixed by the order of the 31st of March, 1913, for payment of this money, and in any case what orders should now be passed on the application to set aside the *ex parte* decree.

The learned Judge of the court below has recorded a detailed order in which he concludes by expressing his opinion that he has no jurisdiction to entertain the application for extending the time and also that the order decreeing the suit *ex parte* must now stand. In accordance with this judgement a formal order was drawn up definitely dismissing the application to have the *ex parte* decree of the 12th of August, 1911, set aside. Hence the appeal now before us. It was contended at the outset on behalf of the respondents that no appeal lay, as the order under appeal was merely an order refusing to extend time, for which no appeal is provided. It is admitted that an appeal lies from an order rejecting, though not from an order allowing, an application under order IX, rule 13; but it was contended on behalf of the respondent that the only order passed under the provisions of order IX, rule 13, was the order conditionally granting the application. It seems to us that the appeal before us is in substance and reality an appeal against the formal order which followed on the judgement of the 12th of April, 1913, by which formal order the application for setting aside the *ex parte* decree was finally disallowed. We are, therefore, satisfied that an appeal does lie.

The next question is as to the jurisdiction of the learned Subordinate Judge when, on the 4th of April, 1913, the money directed to be paid as damages was tendered by the applicants, one day after the prescribed time. It seems to us that the provisions of order IX, rule 13, do not contemplate the passing of a conditional order such as to have an effect analogous to that of a preliminary decree in a suit for pre-emption or on a mortgage. The proper order for the learned Subordinate Judge to have passed on the 31st of March, 1913, if he desired to put the applicants to terms in the manner in which he did, would have been an order directing that the applicants should deposit in court a sum of Rs. 15 on or before the 3rd of April, 1913, and that their application should then be put up for final disposal. In our opinion the order actually passed can only be dealt with as one having substantially the effect stated above. On the order as passed, the application to have the *ex parte* decree set aside was not finally disposed of, and a further formal order of some sort or kind remained necessary to be passed after the expiry of the time fixed by the court.

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The case is in our opinion in no way analogous to such a case as that of *Suranjan Singh v. Ram Bahal Lal* (1) in which it was held that section 148 of the Civil Procedure Code does not authorize the court to extend the time fixed by the decree for payment of purchase money in pre-emption cases.

We are unable to treat the order of the 31st of March, 1913, as having the effect of such a decree. In our opinion the learned Subordinate Judge on the 4th of April, 1913, was still seised of the original application under order IX, rule 13, of the Civil Procedure Code, and had power to pass suitable orders in respect of the same. He could extend the time fixed for the payment of the prescribed damages, provided good cause were shown, under the powers recognised by section 148 of the Civil Procedure Code, or he could proceed to pass a fresh conditional order, setting aside the decree upon terms, in place of the order of the 31st of March, 1913, which had become ineffectual through the failure of the applicants to comply strictly with the prescribed conditions.

We are, therefore, clearly of opinion that the order in appeal before us, that is, the order disallowing the application to have the *ex parte* decree set aside, dated the 22nd of April, 1913, should not be allowed to stand. We order accordingly, and we return the case to the court below, directing the learned Subordinate Judge to re-admit the application under order IX, rule 13, on to his file of pending applications, and to consider on its merits, which he has not yet done, the application of the 4th of April, 1913, made on behalf of the present appellants to pay into court on that date the sum ordered to be paid as damages. He should then proceed to pass such orders as he may deem proper.

Appeal decreed and cause remanded.

(1) (1913) I.L.R., 35 All. 582.