1915

RAM AUTAR TEWARI v. DEOKI TEWARI.

decisions of this Court beginning with the Full Bench decision in *Nanak Chand* v. *Ram Narain* (1) and ending with the decision of KNOX and GRIFFIN, JJ., in *Ram Jiwan* v. *Nawal Singh* (2), with the decision of the Bombay High Court in *Damodar Trimbak Dharap* v. *Raghunath Hari* (3), and with a long string of cases in the Madras High Court ending with *Achuthayya* v. *Thimmayya* (4). It seems to us that an order of a court setting aside the award of an arbitrator and deciding that the case shall be tried by the court is an order affecting the decision of the case within the meaning of section 105 of the Code. It has been held that the words "affecting the decision of the case" in section 105, mean "affecting the decision of the case on the merits," but even so we think that the order of the Munsif setting aside the award was liable to be challenged in appeal against the decree. As long ago as 1870 SIR R. COUCH, C. J. and KEMP, J., held that such an order affected the decision on the merits, see *Mathooranath Tewaree* v. *Brindaban Tewaree* (5). The weight of authority is clearly against the applicant and we are of opinion also that the order of the Munsif was liable to be challenged in the appeal against the decree. It is not suggested that there is any other ground upon which we could in revision interfere with the order of the learned Additional Judge. This application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL

1915
May, 13.

Before Sir Henry Richards, Knight, Chief Justice and Justice Sir Pramada Charan Banerji.

PHUL KUAR (PLAINTIFF) v. HASHMATULLAH KHAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908,) *order IX, rules* 8 *and* 9.

When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the court does not intend to give them another opportunity of appearing it ought not to decide the suit on the merits but should dismiss it for default of appearance.

*First Appeal No. 12 of 1915, from an order of Banke Bihari Lal, Subordinate Judge of Aligarh, dated the 24th of October, 1914.

(1) (1879) I. L. R., 2 All., 181. (3) (1902) I. L. R., 26 Bom., 551.
(2) (1908) 5 A. L. J. R., 644. (4) (1908) I. L. R., 31 Mad., 345 XIII 84 R.
(5) (1870) 14 W. R., 327.

1915

PHUL KUAR v. HASHMAT-ULLAH KHAN.

THE facts of this case were as follows :—

The plaintiff brought this suit to recover a sum of money due to her on foot of two mortgage deeds. One of the pleas raised in defence was that the plaintiff had not obtained a succession certificate to collect the debts. The court, after hearing the witnesses produced, adjourned the case to enable the plaintiff to obtain a succession certificate. The case had to be adjourned a number of times as there had been some unavoidable delay in obtaining the certificate.

Finally the 17th of July, 1914, was fixed. On that day neither the plaintiff nor the plaintiff's pleader appeared. The court proceeded to decide the case on the merits. It found that the bond was duly executed that the amount was due, but that the succession certificate, not having been obtained, the plaintiff was not entitled to succeed. The court made a decree dismissing the suit with costs. The plaintiff then made an application under order IX, rule 9. The learned Subordinate Judge was of opinion that order IX, rule 9, did not apply and dismissed the application with costs. It was from this order that the plaintiff appealed to the High Court.

Pandit *Lakshman Rao Dube*, for the appellants.

Babu *Girdhari Lal Agarwala*, for the respondents.

RICHARDS, C. J., and BANERJI, J. :—This is an appeal against an order refusing to entertain an application under order IX, rule 9 of the Code of Civil Procedure. The facts are as follows: The suit was a suit to recover a large sum of money alleged to be due on foot of two mortgages. One of the pleas raised by the defendant was that the plaintiff had not obtained a succession certificate to collect the debts. There seems to have been some unavoidable delay in obtaining the certificate for which the plaintiff was not responsible and the court after hearing witnesses had allowed the plaintiff time to obtain a certificate on a number of occasions. Finally the 17th of July, 1914, was fixed. On that day neither the plaintiff nor the plaintiff's pleader appeared. The court proceeded to decide the case on the merits. It found that the bond was duly executed that the amount was due, but that the succession certificate, not having been obtained, the plaintiff was not entitled to succeed. The court made a decree dismissing the suit with costs. The plaintiff then

1915

PHUL KUAR v. HASUMAT-ULLAH KHAN.

made an application under order IX, rule 9. The learned Subordinate Judge was of opinion that order IX, rule 9, did not apply and dismissed the application with costs. It is from this order that the plaintiff appeals to the High Court.

Order XVII, rule 2, provides as follows: "Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX or make such other order as it thinks fit." In our opinion if a court intends to dispose of a case where neither the plaintiff, nor his pleader, appears on a day to which the hearing of the suit has been adjourned, it must make an order under order IX, rule 8. It is not entitled to proceed to decide the suit on the merits. It is contended that the concluding words of the rule "or make such order as it thinks fit" entitle the court to decide the case. We do not think that this is the true construction of these words. In the very next rule where it is intended that the court should decide the suit the words used are different. The court is directed to "proceed to decide the suit forthwith." In our opinion, therefore, the court below ought not to have decided the suit on the merits, but ought, if it did not intend to give the plaintiff or her pleader any other opportunity of appearing, to have dismissed the suit for "default of appearance." Had it done so, the plaintiff would have had a right to make an application under order IX, rule 9, and that application would have been decided on its merits. It is contended on behalf of the respondents that the court, rightly or wrongly, having made a decree the proper remedy was to appeal from the decree. There is considerable force in this argument. We find, however, that when the application was made to the court below, the applicant asked that the application should be treated as an application for a review of judgement. We think under the peculiar circumstances of this case and having regard to the fact that the decree of the court below was not justified by law, it ought to have treated the application as one for a review of judgement, particularly when the plaintiff's pleader asked that, that should be done. We think the justice of the present case will be met by sending back the case to the court below with directions to treat the application as one for review of judgement. It is stated

1915

PHUL KUAR v. HASHMAT-ULLAH KHAN.

that there is already pending an application for a review of judgement in the court below. If this be the case the court can put up both matters and dispose of them at the same time. We accordingly allow the appeal, set aside the order appealed from and remand the case with directions to the court below to re-admit the application and treat it as one for review of judgement. We make no order as to costs.

Appeal decreed.

Before Mr. Justice Tudball and Mr. Justice Chamier.

1915
May 17.

EAST INDIAN RAILWAY COMPANY (DEFENDANTS) *v.* N. K. ROY (PLAINTIFF).*

Act No. IX of 1890 *(Indian Railways Act) section* 75*—Articles of special value lost in transit—Liability of Railway Company for the loss thereof.*

The plaintiff who was a passenger on the defendant railway booked three packages from Howrah to Khurja. One of them contained silver and silk articles of the description mentioned in the second schedule to the Indian Railways Act as articles which must be declared, but the plaintiff did not do so. The package was lost and the plaintiff brought this suit for damages. *Held*, that section 75 of Act IX of 1890 is one of general applicability to all classes of goods; and inasmuch as the plaintiff did not declare the contents of his trunk that was lost in transit the Railway Administration was freed from all liability for the loss thereof, both as regards scheduled and non-scheduled articles contained therein.

THE facts of this case were as follows :—

The plaintiff travelled on the 3rd of July, 1912, as a passenger from Howrah to Khurja by the up Umballa express train on the East Indian Railway. He had three parcels of luggage: two bundles and a steel trunk. These were weighed and delivered by him to the Railway administration and placed in the luggage van. Only two bundles were delivered at the end of his journey. The steel trunk was lost. It contained some silk and silver articles. But at the time the luggage was booked he had not declared the nature of the contents. He brought this suit to recover Rs. 416-8-0 the value of the box and its contents plus Rs. 40 by way of damage from the Railway Company. Both the courts below decreed the plaintiff's suit. The defendant company appealed to the High Court.

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* Second Appeal No. 469 of 1914, from a decree of A. W. R. Cole, First Additional Judge of Aligarh, dated the 20th of March, 1914, confirming a decree of Prem Behari, Munsif of Khurja, dated the 29th of November, 1913.