will stand. On the other hand, if nothing has been done, I modify the order by cancelling the provision for a surety by the boy himself, and direct that he be delivered to such person as the Magistrate finds to come within the description of clause (b) of sub-section (1) of section 31 of Act No. VIII of 1897, on the condition that such person shall execute a bond for the sum of Rs. 50 with one additional surety of Rs. 50, to be responsible for his good behaviour for twelve months.

Order modified.

APPELLATE CIVIL.

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

1916
October, 20.

HUMMI AND ANOTHER (DEFENDANTS) *v.* AZIZ-UD-DIN (PLAINTIFF).*

Civil Procedure Code, 1908, order IX, rule 13; order XVII, rule 3—Procedure—Non-appearance of defendant—Decree passed on merits in absence of defendant—Appeal—Application for re-hearing.

On a date to which the hearing of a suit before a Munsif had been adjourned the plaintiff and his witnesses were present, but the defendants were not. The Munsif heard the plaintiff's witnesses and decreed his claim. The defendants filed an application for a rehearing before the Munsif, who, however, rejected it. They then appealed against the decree to the District Judge, who dismissed the appeal.

Held, on second appeal by the defendants against the District Judge's decree that the defendants might and should have appealed against the rejection by the Munsif of their application for a re-hearing; but they had no right in their appeal from the decree to raise any question as to their non-appearance in the court of first instance.

THE facts of this case are fully set out in the following order referring the appeal to a Division Bench:—

KNOX, J.—In the suit out of which this second appeal arises the plaintiff sued the defendants for possession of a house. The first date fixed for hearing the suit was the 3rd of December, 1914. Apparently both parties were present on that date, but for some reason the court was not able to take up the case on that date and postponed it to the 19th of January, 1915. On the 19th of January, 1915, the case was taken up. The defendants failed

* Second Appeal No. 1050 of 1915, from a decree of D. R. Lyle, District Judge of Agra, dated the 12th of April, 1915, confirming a decree of P. K. Roy, Munsif of Agra, dated the 19th of January, 1915.

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to appear. The plaintiff produced three witnesses, whom the learned Munsif examined, whose evidence he considered, and then proceeded to deliver his judgement on the same day. Turning to that judgement, it will be seen that he decided every issue which arose in the case and he decreed the suit with costs against the defendants. In appeal, the learned District Judge dismissed the appeal, and the defendants have now come to this Court and the first plea they raise is that as the defendants made no appearance the learned Munsif could only pass an *ex parte* decree and has erred in deciding the case on the merits.

There are other pleas, but these relate only to an order passed by the Munsif later in the day. That order is not here, and the pleas relating to it cannot be heard in this appeal. In support of the first plea the learned vakil relies upon the case of *Phul Kuar* v. *Hashmat-ullah Khan* (1). It will be seen on looking at the judgement that the learned Judges were considering a case in which neither the plaintiff nor his pleader had appeared.

The question is an important question of procedure, and I think it advisable that at least a Bench of two Judges should decide this point.

I direct that the case be laid before the Hon'ble the Chief Justice for deciding before what Bench this appeal should go.

Pandit *Shiam Krishna Dar*, for the appellants.

The Hon'ble Munshi *Narayan Prasad Ashthana*, for the respondent.

RICHARDS, C. J.—The facts out of which this appeal arises are shortly as follows. The suit was one for possession of a house. The 15th of September, 1914, was fixed for the hearing. On that day the case was adjourned for the convenience of the Court. The 3rd of December was fixed for the adjourned hearing. On that day the plaintiff was not ready and asked for an adjournment. This application was granted and the 19th of January, 1915, was fixed. Upon that day the plaintiff appeared with his witnesses. Some witnesses for the defence had been summoned, but neither the defendants nor their pleader attended. The court thereupon heard evidence on behalf of the plaintiff sufficient in his opinion

(1) (1915) I.L.R., 37 All., 460.

to justify a decree being granted. Later on in the afternoon an application was made on behalf of the defendants for restoration of the case. On the 6th of February this application was refused, the Munsif being of opinion that he had no jurisdiction to restore the case. The defendants preferred two appeals, one against the decree and one against the order rejecting the application for restoration. Both these appeals were heard at the same time. The learned District Judge dismissed the appeal against the order rejecting the application for restoration on the ground that the defendants had not sufficient cause for their absence. He also dismissed the appeal against the decree. The present second appeal is against the decree of the District Judge dismissing the appeal against the original decree. It is contended that the Munsif ought not to have disposed of the case in the absence of the defendants, and it is also contended that it was open to the defendants in the lower appellate court as also in this Court to prosecute his appeal upon this ground. In my opinion this contention is not correct. Order XVII, rule 2, provides as follows:—"Where on any day to which the hearing of a 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 order as it thinks fit." Order IX, rule 6, provides as follows:—"Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it be proved that the summons was duly served the court may proceed *ex parte*." Applying the provisions of these two Orders to the present case it seems to me that when the defendants failed to appear, it was the duty of the Munsif to hear sufficient evidence on the plaintiff's side to justify the granting of the relief claimed and pressed for. Order IX, rule 13, provides that "in any case in which a decree is passed *ex parte* against a defendant, he may apply to the court by which the decree was passed for an order setting it aside." In my opinion once the Munsif had made the decree in the absence of the defendants, he must be deemed to have passed his decree "*ex parte*" and if the defendants complained that the decree should not have been made in their absence their only remedy was to apply to have it set aside and the case restored. They could, no

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doubt, challenge the decree by way of appeal (section 96) upon the ground that the evidence which the plaintiff had adduced was not sufficient to justify the decree but they were not entitled in an appeal from the decree to go into any question connected with their non-appearance at the hearing. Section 96 must be read in conjunction with the rules. The Munsif, upon the application being made to set aside the decree, ought to have heard the application upon its merits and to have decided whether or not the defendants had sufficient reason for being absent. If the Munsif decided against restoring the case then an appeal lay to the District Judge. On the other hand, if he had restored the case, no appeal lay and the case would have been re-heard. It seems to me obvious that the proper way for the defendants to raise the question that their absence could be justified was by an application for restoration. If the Munsif decided against them they had an appeal. They ought not to have this remedy and at the same time to be able to raise the same question by appeal against the decree itself. In my opinion the present appeal is without force and should be dismissed with costs.

BANERJI, J.—I also am of opinion that this appeal should be dismissed. The appeal has been preferred against the decree of the court below dismissing the appeal which the appellants preferred to that court from the decree of the court of first instance. Assuming that that decree was a decree *ex parte*, an appeal lay to the District Judge from the *ex parte* decree under the provisions of section 96 of the Code of Civil Procedure. Such an appeal was preferred by the present appellants, and the learned Judge went into the merits and came to the conclusion that the decree of the court of first instance, upon the evidence before the court, was correct. The present appeal, which is a second appeal from that decree, is therefore without any merit. If it be said that the decree made by the Munsif was not a decree *ex parte* the same result follows, as on the merits the learned Judge of the court below found that the appellants had no case and the claim of the plaintiff was established. In this view I do not deem it necessary to decide whether the decree made in the suit was what is called a decree *ex parte*. Were I to express an opinion on the point I should have no hesitation in concurring with the learned

Chief Justice that under order XVII, rule 2, the procedure which the Munsif ought to have followed was that prescribed by order IX, rule 6, and the Munsif should have decided the case in the absence of the defendants upon such evidence as the plaintiff adduced. In that case the defendants would be entitled to apply for the setting aside of the *ex parte* decree under rule 13, order IX. As they made such an application, the Munsif ought to have entertained it and considered whether the defendants had sufficient reason for their absence at the hearing of the suit. However, that question does not arise in the present appeal. They also had the right to appeal on the merits from the *ex parte* decree and they preferred the appeal, with which we are concerned in this case. For the reasons I have already stated this appeal must fail.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

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

1916
October, 21.

RAMJAS (OPPOSITE PARTY) *v.* MAHADEO PRASAD (PETITIONER).*

Criminal Procedure Code, section 195—Sanction to prosecute—Appeal—Letters Patent, section 10.

Held that an order made by a single Judge of the High Court granting sanction for a prosecution under section 195 of the Code of Criminal Procedure, is not a "judgement" within the purview of section 10 of the Letters Patent and is not appealable under that section. Neither can such an order be called in question under sub-section (6) of section 195 of the Code of Criminal Procedure, inasmuch as a Judge of the High Court sitting singly is not subordinate to a Division Bench of the Court. *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (1) referred to.

THIS was an appeal under section 10 of the Letters Patent from an order of a single Judge of the Court. The facts necessary for the purposes of this report are stated in the order appealed from, which was as follows:—

"After hearing the arguments on both sides I think there is sufficient ground made out for an inquiry as to whether Ramjas has or has not committed perjury in the affidavit which he filed,

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*Appeal No. 45 of 1915, under section 10 of the Letters Patent.

(1) (1882) I. L. R., 9 Calc., 482.