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 ABDUL AZIZ  
 v.  
 ABDUL RAHIM.

and of general application. As I agree in dismissing the appeal on another ground I need not examine the view in all its aspects and content myself by merely reserving my opinion on the question.

Before Sir Grimwood Mears, Knight, Chief Justice  
 and Mr. Justice Young.

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 February, 19.

NATHU AND ANOTHER (APPLICANTS) v. BABU RAM  
 (OPPOSITE PARTY).\*

*Civil Procedure Code, order XLI, rule 19—Appeal dismissed for default—Pleader engaged in another court—"Sufficient cause" for restoration.*

When an appeal was called on, the appellants were present in court but their pleader was arguing a case in another court near by, and one of the appellants went to call him. The pleader came up after 10 or 12 minutes, but the appeal had in the meantime been struck off in default. An application for restoration was disallowed. On appeal the case was restored and it was held that in these circumstances it would have been the proper course for the court to have stood the case over for a few minutes to enable the pleader to attend. Whilst courts of law have a right to insist that parties and their pleaders shall be ready when the case is called on, allowance must at times be made for an inevitable happening such as this case and some indulgence shown in order that the parties may have their cases decided on the merits.

Messrs. *Hyder Mehdi and Zafar Mehdi*, for the appellants.

Mr. *K. C. Mital*, for the respondent.

MEARS, C. J. and YOUNG, J.:—On the 22nd of July, 1927, Nathu and Sarju were appellants in a case fixed to come on before the Subordinate Judge, Muzaffarnagar. Nathu and Sarju were both present and they had

\* First Appeal No. 204 of 1927, from an order of Raj Rajeshwar Sahai, Subordinate Judge of Muzaffarnagar, dated the 27th of August, 1927.

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engaged a pleader, B. Mulchand. At the moment when the case was called on, B. Mulchand, in the ordinary course of his profession, was then arguing a case in the Munsif's court near by. According to the affidavit of the appellants, Sarju went across to the Munsif's court to call his pleader, and when the pleader returned after some 10 or 12 minutes the appeal had been struck off. An application to restore it was heard and disposed of adversely to Nathu and Sarju on the 27th of August, 1927, and the Judge's order is as follows:—"The appellants had gone to call their pleader when the appeal was called on for hearing on the 22nd of July, 1927. It was their duty to attend in time or to engage a pleader who could attend in time. This view is supported by 24 Indian Cases, 826." We think the Judge has taken much too narrow a view of this matter. The Judge must have been satisfied that Nathu and Sarju were in fact in court on the 22nd of July. He must also have been satisfied that they had duly engaged a pleader. He must have been aware that it is the practice of pleaders to earn their livings in other courts than his and that B. Mulchand was legitimately at that moment carrying on his profession in the adjacent court of the Munsif. When the case was called on the Judge should have asked whether Nathu and Sarju were present, and if they were, whether they had engaged counsel. Had he done this, we have no doubt that he would have learnt that B. Mulchand was their counsel but was at that moment engaged before the Munsif. Under these conditions it would have been the proper course to have stood the case over for a few minutes to enable B. Mulchand to attend. An application for restoration was in fact drafted on the afternoon of the very day, the 22nd of July, but there is nothing on the documents before us which indicates whether B. Mulchand made any oral application to the Judge. We are of opinion that he should have done so,

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and that immediately on returning from the Munsif's court he should have told the Judge what had happened and asked the Judge to restore the case to his list and proceed with it. Had that application been made we conceive that it would have been the duty of the Judge to have at once restored the case to the list and heard it on that day, if possible. Whilst courts of law have a right to insist that parties and their pleaders shall be ready when the case is called on, allowance must at times be made for an inevitable happening such as this and some indulgence shown in order that the parties may have their cases decided on the merits. We, therefore, set aside the order of Pandit Raj Rajeshwari Sahai and order that the appeal be restored to the court of the Subordinate Judge of Muzaffarnagar and be heard and disposed of according to law.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

PARAS RAM SINGH (PLAINTIFF) *v.* RAJ KUMAR SINGH  
AND OTHERS (DEFENDANTS).\*

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*Act (Local) No. II of 1901 (Agra Tenancy Act), section 10—  
Ex-proprietary rights, accrual of—“Transfer by sale in  
execution of a decree or order”—Foreclosure of mortgage  
by conditional sale is not such transfer.*

According to the language of section 10 of the Agra Tenancy Act of 1901 there must be either a sale in execution of a decree or order, or there must be a voluntary alienation, for the purpose of accrual of ex-proprietary rights. Foreclosure of a mortgage by conditional sale, though it is effected by a decree of court, is neither a sale in execution nor a voluntary alienation, and therefore no ex-proprietary rights can accrue upon the foreclosure.

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\* Second Appeal No. 1700 of 1926, from a decree of Muhammad Ali Ausat, District Judge of Ghazipur, dated the 25th of June, 1926, reversing a decree of Muhammad Junaid, Munsif of Saidpur, dated the 22nd of April, 1926.