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respectively. According to the khewat, mahal Mustaqil is divided into several bahris, each bahri being subdivided into pattis and each patti into several khewats. Khewat No. 1 is in patti Sukhnandan. Khewats Nos. 2 and 3 are in patti Sheo Din. The areas of the two pattis are totalled separately and then the two are added together to make up bahri Gur Bakhsh Singh. The same process is followed as regards other bahris. It is clear to us therefore that bahri is a sub-division of the mahal very much like a thok, which is found in eastern districts. The plaintiff is undoubtedly a co-sharer in bahri Gur Bakhsh in which khewat No. 1 is situated. The defendants are not co-sharers in this bahri. The plaintiff accordingly has preference under section 12, sub-clause (3).

As regards khewat No. 7 which is situated in patti Kalu, we find that it is a part of another bahri called bahri Sheo Shankar and khewat No. 10 in which the defendants had become co-sharers is situated in the same bahri. As regards this khewat therefore the plaintiff cannot have preference as against the defendants. The learned Subordinate Judge has accordingly dismissed the claim with regard to this last-mentioned khewat.

In our opinion the view taken by the court below was correct and the decrees are right. Both the appeals are accordingly dismissed with costs.

### REVISIONAL CIVIL.

*Before Mr. Justice Dalal.*

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 January, 29. AWADH BIHARI AND ANOTHER (DECREE-HOLDERS) v. FAHIMAN AND OTHERS (JUDGEMENT-DEBTORS).\*

*Civil Procedure Code, order IX, rule 13 and order XXXIV, rule 3—Final decree for foreclosure passed ex parte—Setting aside ex parte decree—Jurisdiction.*

Although order XXXIV, rule 3, of the Civil Procedure Code does not require notice to be given to the defendant

before the passing of a final decree for foreclosure, yet if on account of the want of such notice the defendant is absent and the final decree is passed in his absence, such decree is an *ex parte* decree and the provisions of order IX, rule 13, are applicable to it. The court has jurisdiction to set it aside if there was sufficient cause for the non-appearance of the defendant; and want of knowledge of the plaintiff's application for a final decree is a sufficient cause.

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*Mahadeo Pande v. Somnath Pande* (1), *Ramji Lal v. Karan Singh* (2), *Sital Singh v. Baijnath Prasad* (3) and *Bibi Tasliman v. Harihar Mahto* (4), referred to.

Munshi *Shiva Prasad Sinha*, for the applicants.

Pandit *Misri Lal Chaturvedi*, for the opposite parties.

DALAL, J. :—This Court had the advantage of having all the law on the subject placed before it with great care by Mr. *Sinha* and by Mr. *Pande*.

The applicants are decree-holders and they complained that the final foreclosure decree passed under order XXXIV, rule 3, of the Code of Civil Procedure for foreclosure in favour of the plaintiff has been set aside by the trial court without jurisdiction. This was their main ground of attack. Mr. *Sinha*, however, developed his argument and submitted that even if the trial court had jurisdiction it was not properly exercised. The suit on the mortgage resulted in a preliminary decree for foreclosure in pursuance of a compromise between the parties, according to which the plaintiff was held entitled to recover a certain amount of money from the defendants. The conditions were that the amount should be paid within nine months; that on such payment the property would be held to have been redeemed, and on non-payment the property was to be foreclosed. There could not be any foreclosure without a final decree of the court under rule 3. As required by law the plaintiff applied under clause (2) of that rule. That rule is to the effect

(1) (1926) I. L. R., 48 All., 825.

(2) (1917) I. L. R., 39 All., 532.

(3) (1922) I. L. R., 44 All., 668.

(4) (1905) I. L. R., 32 Cal., 253.

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that "where such payment is not so made the court shall on application made in that behalf by the plaintiff pass a decree that the defendant and all persons claiming through or under him be debarred from all rights to redeem the mortgaged property, and also, if necessary, ordering the defendant to put the plaintiff in possession of the property." There is, however, a proviso modifying the mandatory nature of the injunction to the effect that "the court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the date fixed for such payment." I have quoted the rule fully in order to show that the defendant had an interest in making the payment when the plaintiff applied for the passing of the final decree, even though he was not prepared at that very time to pay the money decreed in the preliminary decree at once.

On application by the plaintiff the court ordered a notice to issue to the defendant. It was not served on the defendant personally. On the date fixed for hearing the defendant did not appear, and a final decree for foreclosure was passed. In terms of that decree the property was foreclosed, and the plaintiff became owner of the property.

Subsequently, within the period of limitation, the defendant applied to have this *ex parte* decree set aside. An order setting aside the *ex parte* decree was passed by the Munsif of Cawnpore. This is an application in revision from that order.

The first argument on behalf of the plaintiff was that the final decree could not be termed *ex parte* because no notice to the defendant has been prescribed under rule 3 of order XXXIV, of the Code of Civil Procedure. It has been held by a Bench of two Judges in this Court

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that no notice is necessary : *Mahadeo Pande v. Somnath Pande* (1). So it is not necessary to pursue this matter further. It was not held, however, in that case that by reason of no notice being necessary a decree passed in the absence of the defendant would not be termed an *ex parte* decree. The proceedings between the preliminary and the final decree in a suit for foreclosure, that is, between the decree prescribed by rule 2 and the decree prescribed by rule 3, are held by this Court to be proceedings in suit : *Ramji Lal v. Karan Singh* (2) and *Sital Singh v. Baijnath Prasad* (3). For that reason my opinion is that the provisions of order IX will attach to those proceedings. Under rule 6 when the plaintiff alone appears and the defendant does not appear the court passes an *ex parte* decree. Such a decree can be set aside by the court under rule 13 of order IX. A Full Bench of the Calcutta High Court held in *Bibi Tasliman v. Harihar Mahto* (4) that a court had inherent jurisdiction to set aside an order passed in *ex parte* proceedings. This was a case where the provisions of the Transfer of Property Act applied to proceedings in mortgage suits, and an application was made to set aside an order absolute for sale. It was conceded in that case also that an order absolute for sale may be passed without any notice to the judgment-debtor. Proceedings subsequent to the preliminary decree for sale were treated prior to 1908 as proceedings in execution. No provision was made applicable to such proceedings for a rehearing. Even so, the inherent power of a court to set aside *ex parte* proceedings was recognized. In my opinion, after Act No. V of 1908 the case is much stronger because the proceedings subsequent to a preliminary decree are proceedings in suit and a decree passed in the absence of the defendant must be considered an *ex parte* decree, and

(1) (1926) I. L. R., 48 All., 828.

(2) (1917) I. L. R., 39 All., 532.

(3) (1922) I. L. R., 44 All., 668.

(4) (1905) I. L. R., 32 Cal., 253.

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there does not appear to be anything in the Code to prevent the provisions of rule 13 of order IX attaching to such a decree. The same view was taken by the Bombay High Court in a case tried by the Presidency Court of Small Causes where the proceedings under Chapter VII of the Presidency Small Cause Courts Act (No. XV of 1882) were admittedly not proceedings in a suit. The learned Judges who heard the reference were of opinion that the court of small causes had an inherent power to set aside an *ex parte* order. In the Allahabad case already cited in I. L. R., 48 All., the two learned Judges who delivered judgement found nothing in the case of *Bibi Tashman* inconsistent with the view they had taken that a notice was not necessary to be issued to the defendant under rule 3.

It cannot be denied, however, that the defendant was entitled to be present at the time of the passing of the decree. The trial court has rightly drawn attention to the form of the final decree for foreclosure where mention is specifically made of the court having heard the pleader for the defendant (Civil Procedure Code Appendix D, form No. 10). When the defendant was at liberty to be present I am of opinion that a decree passed in his absence was an *ex parte* decree. When the decree was an *ex parte* decree, the court had jurisdiction to set it aside.

The next argument of Mr. *Sinha* was that the court exercised its jurisdiction illegally and with material irregularity in setting aside the decree. Under rule 13 the court has power to set aside a decree if the court is satisfied that the defendant was not duly served with summons, or was prevented by any sufficient cause from appearing when the suit was called on for hearing. The argument was that when no notice was necessary there can be no question of his being prevented from appearing

when the suit was called on for hearing. What I think important to notice is that though no notice was necessary he had a right to appear and to be heard, and, therefore, he was entitled to show that he was prevented by a sufficient cause from appearing when the suit was called on for hearing. There are two distinct divisions of the rule, one dealing with summons and the other independent of summons, referring to a sufficient cause preventing appearance. In my opinion the trial court was right in holding that the defendant had sufficient cause to prevent him from appearing when the suit was called. He had engaged a pleader and in ordinary course would have thought that he would be informed of the date of hearing. There was no particular date of hearing fixed under the preliminary decree. It was open to the plaintiff to apply for the passing of a final decree at any time after nine months from the date of the preliminary decree. Under the circumstances the defendant was prevented from appearing on the date of the hearing of the final decree by want of knowledge of the plaintiff's proceedings. The trial court had jurisdiction to set aside the *ex parte* decree and has not exercised it irregularly. I dismiss this application with costs.

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