

1933

MUHAMMAD
MUSTAFA
ALI KHAN
v.
DISTRICT
BOARD,
BARFILLA

he has established that point, he is not entitled to the remedy of injunction or of specific performance. Accordingly I hold that he cannot get the temporary injunction for which he has asked in the present case. Therefore, I refuse this application.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice
Rachhpal Singh

1933
November, 15

MAN SINGH AND ANOTHER (DEFENDANTS) v. SANGHI DAL
CHAND (PLAINTIFF)*

Civil Procedure Code, order IX, rule 13—Ex parte decree—Persons entitled to apply for setting it aside—Decree “against a defendant”, meaning of—Decree not imposing any liability on a defendant but adversely affecting his rights as against the plaintiff—Rival claims of plaintiff and one defendant to money admittedly due from another defendant.

In a suit for money admittedly due from the defendant first party, the real controversy was whether the money was due to the plaintiff or to the defendants second party. On the date of hearing, the defendants second party were absent, and a decree was passed in favour of the plaintiff against the defendant first party. On an application by the defendants second party under order IX, rule 13 of the Civil Procedure Code for setting aside the *ex parte* decree, it was contended that they were not competent to make the application inasmuch as no relief had been granted against them by the decree: *Held* that they were entitled to make the application. Although the decree, on the face of it, did not in terms grant any relief against the defendants second party, it involved, and proceeded on, a finding adverse to them and in favour of the plaintiff on the question of their respective claims to the money. Inasmuch as it implied a determination of the rights of the parties on this question adversely to the defendants second party, the decree was one against them.

The words “decree is passed against a defendant” in order IX, rule 13 do not necessarily imply that only the defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside. They are comprehensive enough to

*First Appeal No. 32 of 1933, from an order of Muhammad Junaid Nomani, Second Subordinate Judge of Cawnpore, dated the 17th of December, 1932.

include a case in which the decree adversely affects the rights of a contesting defendant.

Miss *L. W. Clarke*, for the appellants.

Mr. *B. Mukerji*, for the respondent.

NIAMAT-ULLAH and RACHHPAL SINGH, JJ.:—This is a first appeal from an order passed by the Subordinate Judge of Cawnpore rejecting the application of the appellants for an order to set aside an *ex parte* decree passed in a suit brought by the plaintiff respondent against three defendants, including the appellants who were defendants 2 and 3. The first defendant was the Collector of Cawnpore. The suit was one for recovery of Rs.30,500 on foot of a receipt executed by Kailash Nath, whose estate was, on the date of the suit, represented by the Court of Wards. The defence put forward on behalf of the appellants, defendants Nos. 2 and 3, was that the money to which the claim related belonged to the defendants, who were entitled to recover the same from the debtor, namely the estate of Kailash Nath. The Collector did not deny the liability of Kailash Nath, but pleaded that the money due from the estate of Kailash Nath belonged to defendants 2 and 3. The pleadings clearly show that the real controversy was whether the sum admittedly due from the estate of Kailash Nath is recoverable by the plaintiff or by defendants Nos. 2 and 3.

The suit was fixed for hearing on the 17th of October, 1932, when defendants 2 and 3 were found to be absent. Their pleader stated that he had no instructions. The learned Subordinate Judge passed an *ex parte* decree against defendant No. 1. The appellants subsequently made an application under order IX, rule 13 of the Civil Procedure Code for an order to set aside the *ex parte* decree, alleging that they had been prevented by sufficient cause from appearing on the date fixed for hearing. One of them was alleged to have been at Sagar in the Central Provinces, where he fell ill. The other, who had come to Cawnpore to

1933

MAN SINGH
v. SANGHI
DAL CHAND

1933

MAN SINGH
v.
SANGHI
DAL CHAND

look after this case, got an attack of fever and could not attend the court on the date fixed for hearing. Affidavits were filed in support of the defendants' allegations, which were further supported by certificates of medical practitioners. The learned Subordinate Judge dismissed the application.

We feel constrained to say that the order of the learned Subordinate Judge proceeds on very superficial grounds. Referring to the medical certificates he observed: "We all know the real value of such medical certificates and I need not waste public time by making any serious comments." We do not think that the learned Subordinate Judge was justified in disbelieving the appellants' allegations contained in their affidavits and in totally discarding the medical certificates in the manner he has done. Though there is a counter-affidavit filed on behalf of the plaintiff swearing to the negative, namely that the appellants were not ill, we think that in the absence of any clear motive for the defendants to have deliberately absented themselves from the court on the day fixed for hearing of the case, we should, for all purposes of the case, hold that the appellants made out a sufficient cause for their non-appearance on the date fixed for hearing of the case.

The learned advocate for the plaintiff respondent strenuously contended that, in so far as the decree is against defendant No. 1 only, the appellants, against whom no relief has been granted, were not competent to make an application under order IX, rule 13. The contention is so far correct that the decree, on the face of it, does not, in terms, grant any relief against the appellants. It merely entitles the plaintiff to recover the sum claimed from defendant No. 1. But there can be no doubt that the decree proceeds on the assumption that the defence put forward by the appellants was incorrect. As already stated, the sole question in the case was whether the sum, which was payable by the

estate of Kailash Nath, is due to the plaintiff or the defendants. Inasmuch as the decree entitles the plaintiff to recover that sum, the defence of the appellants was overruled by the judgment, in pursuance of which the *ex parte* decree was drawn up.

“Decree” is defined in section 2(2) of the Civil Procedure Code as “the formal expression of an adjudication, which so far as regards the court expressing it conclusively *determines the rights of the parties* with regard to all or any of the matters in controversy in the suit.” There can be no doubt that among other questions the decree determines the right of the plaintiff to recover the sum claimed, as against defendants 2 and 3. It clearly implies an adjudication that the plaintiff, and not the defendants 2 and 3, is the real creditor in respect of the sum in question in the suit. 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 to set it aside.” The decree in the present case, in so far as it negatives the rights of defendants 2 and 3 in respect of the sum in suit, at any rate by implication, is against them. The words “against a defendant” do not necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside. They are comprehensive enough to include a case in which the decree adversely affects the rights of a contesting defendant. There can be no doubt in the present case that the appellants were contesting defendants. It is equally clear that the decree in favour of the plaintiff, in the circumstances of the case, adversely affects their rights. In this view, we are clearly of opinion that the appellants were competent to apply under order IX, rule 13 of the Civil Procedure Code.

The result of our findings is that this appeal succeeds. It is accordingly allowed. The order of the lower court

1933

MAN SINGH
v.
SANGHI
DAL CHAND

1933
 MAN SINGH v. SANGHI DAL CHAND refusing to set aside the *ex parte* decree is reversed and the *ex parte* decree is set aside.

Before Mr. Justice Niamat-ullah and Mr. Justice
 Rachhpal Singh

1933
 November, 16

FAZAL HUSAIN (DEFENDANT) v. MUHAMMAD KAZIM
 (PLAINTIFF)*

Transfer of Property Act (IV of 1882), section 41—Transfer by ostensible owner—Consent of real owner to the transfer itself not required by section—Degree of care and inquiry required of the transferee—Entries for 12 years in revenue papers not sufficient—Co-sharers—Exclusive user of common land by one co-sharer—Groves planted by one co-sharer—Right of the others regarding share—Trusts Act (II of 1882), section 90.

For the application of section 41 of the Transfer of Property Act it is essential that the consent of the true owner to the possession of the ostensible owner must continue up to the date of the transfer, but it is not necessary that the transfer itself should be with the consent of the true owner. Section 41 of the Transfer of Property Act enacts a rule which is a species of estoppel, but falling short of the requirements of section 115, Indian Evidence Act. If it is proved that the transfer was made with the consent of the rightful owner, the case would fall within the purview of section 115, Indian Evidence Act, and the other conditions of section 41 need not be satisfied. Such consent will estop the owner, even though the transferee made no inquiries to ascertain that the transferor had power to make the transfer,—a condition which is essential for the application of section 41. *Shafiq-Ullah Khan v. Sami-Ullah Khan* (1), discussed.

No hard and fast rule can be laid down as regards the extent to which a transferee from the ostensible owner should, as required by section 41, take reasonable care to ascertain that the transferor had power to make the transfer; each case must necessarily depend on its own circumstances. It cannot be laid down as a general rule that where the transferor was in sole possession for a considerable length of time and was the sole recorded owner, the transferee, who otherwise acts in good faith, is entitled to the protection of section 41, if he satisfied himself by inspecting the revenue records. The only test that can be laid down is that the transferee should show that he acted like a

*First Appeal No. 72 of 1929, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 30th of November, 1928.

(1) (1929) I.L.R., 52 All., 199.