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They do not consider that it takes sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of section 47 involve that questions relating to such terms may fall to be determined by the executing court."

It appears to us, therefore, that there is no bar in law to the recording of the alleged compromise under order XXI, rule 2.

Accordingly we allow the appeal, set aside the order of the court below, and remand this case to the court below to hear the evidence for the parties and dispose of the application on the merits and according to law. Costs hitherto incurred in the court below and here will abide the result.

Before Justice Sir Edward Bennet and Mr. Justice Verma

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JHANDOO MAL & SONS (PLAINTIFF) *v.* KHALSA SINGH SAHI (DEFENDANT)*

Civil Procedure Code, order XVII, rule 2, *explanation—Defendant absent but counsel present who only applies for adjournment—Application rejected—Evidence heard* ex parte *and suit decreed—Decree not* ex parte *decree—Application for setting aside does not lie—Remedy by appeal from decree—Order rejecting the application for adjournment can be challenged in the appeal from the decree—Civil Procedure Code, section* 105(1).

No remedy under order IX, rule 13 of the Civil Procedure Code, by way of an application for setting aside an *ex parte* decree, is open to the defendant against whom a suit has been decreed in circumstances to which the explanation, added by the High Court, to order XVII, rule 2 is applicable, i.e. where on the adjourned date of hearing the defendant did not appear but his counsel appeared and only applied for another ad-

*First Appeal No. 177 of 1937, from an order of A. Hamilton, District Judge of Saharanpur, dated the 12th of July, 1937.

journment, which was refused, and the court heard the plaintiff's evidence *ex parte* and decreed the suit.

In such a case it is open to the defendant, under section 105 (1) of the Civil Procedure Code, in his memorandum of appeal from the decree, to question the correctness of the order refusing the adjournment, and the appellate court may thereupon set aside the order and the decree and remand the suit for rehearing.

Mr. *Mushtaq Ahmad,* for the appellant.

Mr. *B. S. Darbari,* for the respondent.

BENNET and VERMA, JJ.:—This is a first appeal from order by a plaintiff, Messrs. Jhandoo Mal & Sons of Dehra Dun. The first appeal is directed against an order of the District Judge of Saharanpur setting aside an *ex parte* decree and remanding the case for rehearing. The facts are that the plaintiff filed his suit on the 6th of August, 1936, in the court of the Subordinate Judge of Dehra Dun and the date fixed for final disposal was the 11th of June, 1936. The sole defendant was Sardar Khalsa Singh Sahi described as the Town Engineer of Motihari in Bihar province. On the date fixed the defendant appeared by pleader but not in person and the pleader made an application to the effect that summons had been served on the defendant by registered post without any copy of the plaint, that defendant had never bought any goods from the plaintiff, that the defendant could not get leave and could not attend the court and that time was asked for filing a written statement. On this the Subordinate Judge passed the following order: "I do not believe this story that the defendant got no copy of the plaint. I have issued very strict orders that no summons to a defendant is to go out without a copy of the plaint. He need not have been here in person, so the question of leave does not arise, but his written statement should have been here." The court further ordered on the same date: "Defendant has not filed his written statement. He says he did not get a copy of the plaint, but I do not believe this. I therefore

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order the defendant to pay Rs.5 adjournment costs. I will frame issues on the 30th of June, 1936." On the 30th of June, 1936, the defendant made a written application through his counsel asking for adjournment to a further date on the ground that he was ill. The court passed the following order on the application: "Today was fixed for framing issues; defendant need not have come personally but he was bound to send a written statement. I have already given him one postponement. Rejected." The judgment then followed on the same date: "*Ex parte* evidence heard. I decree the suit for Rs.1,118 with costs and *pendente lite* and future interest at 6 per cent. on Rs.707-4-6."

The defendant filed an appeal against this *ex parte* decree in the court of the District Judge and the District Judge recorded an order on the 16th of April, 1937, setting out the facts that the plaintiffs were a firm at Dehra Dun and the defendant appellant a Town Engineer of Motihari and that the defendant had made these applications and had denied making any purchase from the plaintiffs and as the sum involved was Rs.1,000 it was desirable to give the defendant another chance of defending the case if he compensated the plaintiff to the extent of Rs.55. Rs.55 was deposited later and the *ex parte* decree was set aside.

It is against this order of the District Judge that the present first appeal from order has been brought. The first ground of appeal is that the plaintiff should have applied to set aside the *ex parte* decree under order IX, rule 13, and as he did not do so the lower appellate court was wrong in considering whether the *ex parte* decree should or should not have been passed by the trial court.

The second ground is that the lower appellate court could only consider the evidence produced by the plaintiff. The third ground is that the procedure of the lower appellate court was procedure only open to the trial court under order IX, rule 13. The fourth

ground was on the merits and the fifth ground was not pressed. The points of law therefore depend on the assumption that the defendant could have applied to the trial court under order IX, rule 13 to set aside the *ex parte* decree. In order XVII this Court has added to rule 2 the following explanation: "No party shall be deemed to have failed to appear if he is either present or is represented in court by an agent or pleader, though engaged only for the purpose of making an application." It follows from the facts as stated that the defendant was represented on the date 30th June, 1936, on which the suit was decreed *ex parte*. According to this explanation the defendant could not claim to have failed to appear because he was represented on that date by his pleader and his pleader made an application. Order IX, rule 13 allows a defendant to apply to have a decree passed against him *ex parte* set aside "if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing." The defendant could not claim to come under this rule because summons was served on him and he was represented by pleader on both dates of hearing. Accordingly therefore it was not open to the defendant to make an application for the setting aside of the *ex parte* decree under order IX, rule 13. The only remedy therefore of the defendant was the remedy which he has taken, namely to appeal to the District Judge against the decree. Learned counsel for the respondent has cited various rulings in which it has been laid down that when a defendant is represented by a pleader then it cannot be said that the defendant has failed to appear and it is not open to such a defendant to apply under order IX, rule 13 to set aside an *ex parte* decree. This has been held in *Baldeo Singh* v. *Chhaju Singh* (1) and also in *Ram Saran Das*

(1) [1931] A.L.J. 646.

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v. *Mallu* (1) and in *Jafri Begam* v. *Asghar Ali Khan* (2).

In the case of a plaintiff being absent but represented by his pleader it has also been held that an application will not lie under order IX, rule 9 in the following rulings: *Manmohan Das* v. *Krishna Kant Malaviya* (3) and *Munna Lal* v. *Shiva Charan Lal* (4). No authority to the contrary has been shown. Learned counsel for the appellant relied on the following rulings: *Hummi* v. *Aziz-ud-din* (5). In that case the Munsif had a suit in which on the date fixed for disposal the plaintiff and his witnesses appeared, but the defendants and their pleader did not appear. The Munsif heard evidence on behalf of the plaintiff and granted an *ex parte* decree on the same day. An application for restoration was made by the defendants. This application was refused as the Munsif held that he had no jurisdiction to restore the case. At page 145 it is stated: "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 was under these circumstances that on page 146 RICHARDS, C.J., held: "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

(1) [1935] A.L.J. 377.
(2) [1936] A.L.J. 635.
(3) [1933] A.L.J. 4.
(4) A.I.R. 1933 All. 539.
(5) (1916) I.L.R. 39 All. 143.

against the decree itself. In my opinion the present appeal is without force and should be dismissed with costs." The other learned Judge, BANERJI, J., did not set out this line of reasoning but held: "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."

We are here faced with a different case. For one thing, as already pointed out, the defendant did not have the remedy to apply for setting aside the *ex parte* decree. In the ruling, the defendant had that remedy and the District Judge on the two appeals considered both aspects of the question and he dismissed both appeals. The appeal which was taken to the High Court was a second appeal against a decree and an appeal was not and could not be taken against the order of the District Judge dismissing the appeal against the application for setting aside the *ex parte* decree. It appears to us that what the learned CHIEF JUSTICE meant was that when two remedies were open to the defendants and they had taken both remedies the same point could not be raised in both the proceedings by the defendants in the appellate court. We do not consider that the dictum laid down by the learned CHIEF JUSTICE is meant to be extended to cover cases like the present and it is to be noted that it has not been followed as a general principle of law. No Bench ruling of this Court has been produced in which the alleged principle has been applied as a general rule.

Reference has been made to *Ganesh Das Varma* v. *Hari Chand* (1), which is a ruling of two learned Judges.

(1) A.I.R. 1934 Oudh 131.

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This was an order on an application under section 5 of the Limitation Act which was filed in a first appeal. In support of the application there was an affidavit as is mentioned in the second line of the judgment. For the appellant reliance is placed on the following passage: "As pointed out by the late Court of the Judicial Commissioner of Oudh in the case of *Jadu Nath Basak* v. *Ram Narayan* (1), although a person against whom an *ex parte* decree has been made is entitled to appeal against it instead of resorting to the procedure prescribed by section 108 of the Code of Civil Procedure (order IX, rule 13 of the present Code) yet his contentions on appeal must be limited either to questions of law or to such arguments as arise upon the record as it stood when the *ex parte* decree was passed. He is not entitled to ask the appellate court to accept the appeal on grounds which could be urged in an application under section 108 (order IX, rule 13 of the present Code) and to remand the suit for re-hearing."

It does not appear to us that this passage does support the contention of the appellant. It appears to mean that the defendant is not entitled to refer to arguments which would be based on an affidavit such as the affidavit before that Court, and that if the defendant appeals against the decree he is confined to the record itself. It is also to be noted that the ruling is based on the assumption that the case is one in which the defendant has a right to apply under order IX, rule 13 and in the present case there is no such right.

Reference was also made to the ruling of a learned single Judge in *Syed Mazhar Husain* v. *Sheikh Rafiq Husain* (2). In that ruling there was firstly an *ex parte* order dated 15th January, 1923, the nature of which is not specified in the ruling and there was, secondly, an *ex parte* decree on 30th April, 1923. The learned Judge held that the question of the first order could not be raised in an appeal from the *ex parte* decree which was

(1) (1909) 12 Oudh Cases 25. (2) A.I.R. 1925 Oudh 645.

passed later. This decision does not appear to have any bearing on the question before us.

Reliance was placed on *Raj Chandra Dhar* v. *Messrs K. D. O. C. Ray* (1). This again is the judgment of a single Judge, YOUNG, A. C. J. As is shown by the fact that the judgment ends with the words "I would accordingly dismiss the appeal with costs" there must have been a judgment by the other learned Judge which has not been printed. On page 133, column 2 the learned Judge stated: "I have no doubt that under order XVII, rule 2, the suit must be deemed to have been decided *ex parte*, and that the provisions of order IX applied, and that the defendant could have applied to set aside the decree." That differentiates the ruling from the present case because in the present case the defendant had no such remedy. It may also be noted that in the portion of the ruling on which reliance was placed no general rule was laid down, but the word "ordinarily" is introduced.

Reference was also made to *Radha Mohan Datt* v. *Abbas Ali Biswas* (2). That, however, dealt with an order setting aside an *ex parte* decree and the first question referred was " Whether an appeal indirectly lies under section 105 of the Code of Civil Procedure from an order setting aside an *ex parte* decree." It was held that it did not lie. On page 617 it is stated: "But a right of appeal has been expressly provided from an order refusing to set aside an *ex parte* decree." This then was the basis of the decision that where there was an order to set aside an *ex parte* decree and an appeal was allowed from that order then the matter could not be questioned in an appeal against a decree under section 105(1) of the Civil Procedure Code, but the present case is one in which no order was passed refusing to set aside an *ex parte* decree and in which no application to set aside an *ex parte* decree could have been made. The principle,

(1) A.I.R. 1924 Rang. 137. (2) (1931) I.L.R. 53 All. 612.

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therefore, of the Full Bench ruling will not apply in the present case. In section 105(1) of the Civil Procedure Code it is provided as follows: "Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." We consider that this section entitles the appellant in a court of appeal to refer to such matters as those which arise in the present case, that is, the orders refusing to give an adjournment to the defendant. Those orders did affect the decision of the case as those orders prevented the defendant from filing his written statement and from producing evidence. The matter therefore, in our opinion, comes under section 105(1) and the order of the lower appellate court was an order which that court was entitled to make on the appeal before it.

In regard to the fourth ground which deals with the merits of the order of the lower court we have set forth the procedure of the trial court. The defendant was a person resident in Bihar province in the town of Motihari which is about two days' journey by rail from the trial court at Dehra Dun and there appears to have been a good ground for the finding of the appellate court below. It was open to the trial court to inquire from the registers in the office of the trial court to see whether the summons had been accompanied by a copy of the plaint, and if this had not been noted in the despatch register maintained by the office or by the nazir then there would have been a good ground to accept the contention alleged by the application of the defendant that he had not received a copy of the plaint with summons. Under order V, rule 2 it is provided that "every summons shall be accompanied by a copy of the plaint." It was quite impossible for the defendant to make a written statement without receiving a copy of the plaint.

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Moreover, the District Judge is not correct in thinking that the defendant might have instructed his pleader to make a written statement on cerain lines. It is necessary for a written statement that there should be a verification on the point in question by the defendant himself, namely that he never bought any goods from the shop of the plaintiff.

We consider that the order of remand by the court below was correct and we dismiss this appeal from order with costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

DHANESHWAR NATH TEWARI (DEFENDANT) *v.* GHANSHYAM DHAR MISRA (PLAINTIFF)*

1939 *December*, 7

Civil Procedure Code, section 151—Inherent power to grant injunction apart from any express provision of the Code—Temporary injunction restraining the defendant from appropriating or alienating the subject matter of litigation—Grant of the temporary injunction to an applicant for leave to sue as a pauper, before his application for such leave has itself been granted—Civil Procedure Code, order XXXIX, rule 1—"Suit".

Apart from the provisions of order XXXIX of the Civil Procedure Code the court has inherent jurisdiction to pass an order of temporary injunction providing for the necessary protection and security of the property which is the subject matter of the litigation. The express provisions contained in the Civil Procedure Code are not exhaustive.

Before an application for leave to sue as a pauper had been granted the applicant prayed for, and the court issued, an order of temporary injunction restraining the defendant from appropriating or alienating the property which was the subject matter of the litigation: *Held* that, apart from the question whether the application for leave to sue as a pauper amounted at that stage to a "suit" so that the order of injunction could come under order XXXIX, rule 1 of the Civil Procedure Code, the order could be passed by the court, in the exercise of its inherent powers under section 151 of the Code, in the interests of justice, for the preservation of the property.

*First Appeal No. 154 of 1938, from an order of Raghunath Prasad, Civil Judge of Gorakhpur, dated the 2nd of June, 1938.