FULL BENCH.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and Mr. Justice Daniels.

1925 *July*, 16.

RAM SARUP (APPLICANT) *v.* GAYA PRASAD (OPPOSITE PARTY).*

Civil Procedure Code, order IX, rule 13—Decree passed ex parte—Decree set aside by lower appellate court, without having power to direct re-hearing of case—Revision—Jurisdiction of High Court.

The High Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree when the appellate court had no power under the provisions of order IX, rule 13, of the Code of Civil Procedure to direct the case to be re-heard.

Hevanchal Kunwar v. *Kanhai Lal* (1), *Chintamony Dassi* v. *Raghoonath Sahu* (2), *Gulab Kunwar* v. *Thakur Das* (3), *Tasadduq Husain* v. *Hayat-un-nissa* (4), *Nand Ram* v. *Bhopal Singh* (5), *Sheikh Kallu* v. *Nadir Bakhsh* (6), and *Neelaveni* v. *Narayan Reddi* (7) referred to. *Ghuznavi* v. *The Allahabad Bank Ld.*, (8), and *Buddhu Lal* v. *Mewa Ram* (9), distinguished.

THIS was an application in revision from an appellate order of the District Judge of Bareilly setting aside an *ex parte* decree. Both the lower courts found that the absence of the defendant on the date on which the case was decided was intentional, but the appellate court restored the case for extraneous reasons. When the case came up for hearing the opposite party took an objection that, in view of the ruling in *Sheikh Kallu* v. *Nadir Bakhsh* (6), no revision lay to the High Court. As the Bench concerned entertained doubts as to the soundness of the decision quoted, they ordered the application to be laid before the Chief Justice with a view to the question raised being decided by a larger Bench. The case was ordered to be laid before a Bench consisting of

* Civil Revision No. 20 of 1925.

(1) (1909) 12 Oudh Cases, 405. (2) (1895) I.L.R., 22 Calc., 981.
(3) (1902) I.L.R., 24 All., 464. (4) (1903) I.L.R., 25 All., 280.
(5) (1912) I.L.R., 34 All., 592. (6) (1921) 19 A.L.J., 907.
(7) (1919) I.L.R., 43 Mad., 94. (8) (1917) I.L.R., 44 Calc., 929.
(9) (1921) I.L.R., 43 All., 564.

1925

RAM SARUP v. GAYA PRASAD.

LINDSAY, J., and the two Judges before whom the case was originally placed, viz., SULAIMAN, J., and DANIELS, J.

Pandit *Uma Shankar Bajpai* and Dr. *Kailas Nath Katju*, for the applicants.

Mr. *B. Malik*, for the opposite party.

LINDSAY, J.—The question which has to be determined by the Full Bench is whether this Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree when the appellate court had no power, under the provisions of order IX, rule 13, to give such a direction.

There are two grounds upon which it has been urged before us that the Court cannot subject this order to revision—

(1) because the party against whom the order has been passed is not without another remedy; and

(2) because the order does not fall within the purview of section 115 of the Code of Civil Procedure as there is no case which has been decided.

Dealing with these propositions in inverse order I would say that the second one of them is untenable. In my opinion we have before us a case which has been decided. It cannot with any show of reason be maintained that the order complained of is a mere interlocutory order passed in the course of the trial of the suit, for the suit had been brought to an end by the passing of the *ex parte* decree. At the time this order was made there was no suit pending between the parties. The proceedings in which the order was passed were quite distinct from the proceedings constituting the suit.

The defendant had had an *ex parte* decree given against him and was seeking to have it set aside

under the provisions of order IX, rule 13, which gives him a right to have the decree set aside provided he is able to satisfy the court which passed it that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. By these proceedings he was endeavouring to enforce a right which did not, and could not, come into existence until the suit had been decided. These later proceedings being distinct from those in the suit, no order passed in the course of them could possibly be an interlocutory order in the suit. The application was rejected by the first court, and the order of rejection was appealed. The order allowing the appeal is a final order not subject to further appeal and has clearly brought to a termination the proceedings instituted for the setting aside of the *ex parte* decree.

And this being so I have no doubt we have here a " case " which has been decided.

It would be unprofitable to discuss the various rulings concerning the meaning of the word " case " as used in section 115. No definition of the word is to be found in the Code of Civil Procedure and probably no exhaustive definition of the word could be given.

The meaning of the word " case " in section 115 has been well discussed in *Hevanchal Kunwar* v. *Kanhai Lal* (1), and I would quote the following passage from page 413 of the report :—

" Where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree *ex parte* for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a case within the meaning of the section (*i.e.*, section 115)."

(1) (1909) 12 Oudh Cases, 405.

1925

RAM SARUP v. GAYA PRASAD.

I agree with this view and hold, therefore, that in the courts below these proceedings under order IX, rule 13, were a "case" and that that "case" has been "decided."

Lindsay, J.

To turn now to the other proposition, the argument is that the applicant here has another remedy available—a circumstance which debars this Court from the exercise of its revisional jurisdiction, and reliance is placed upon the provisions of section 105, sub-section (1), of the Code of Civil Procedure. It is said that in the event of the plaintiff's suit being dismissed after fresh trial, he will have a right of appeal and that in the prosecution of the appeal he would be entitled to challenge the order now under discussion by setting forth in his memorandum of appeal an objection to it on the ground of error, defect or irregularity "affecting the decision of the case." In reply to this it has been argued that as the appeal against the decree in the event contemplated would lie to the same court which has passed the order now complained of, section 105 (1) would be of little or no avail to the appellant.

It would, perhaps, be inexpedient or indiscreet to approach the appellate court with a plea imputing error in its former order, but if the law allows the plea to be raised, the inconvenience of raising it would be no answer to the argument advanced here on behalf of the opposite party.

But I am definitely of opinion that section 105 (1) does not provide any remedy for the prospective appellant in a case like the present.

I would observe, in passing, that on the grammatical construction of the latter part of the sub-section just mentioned, it is the "error, defect or irregularity" in the order which may be pleaded

1925

RAM SARUP v. GAYA PRASAD.

Lindsay, J.

by way of objection, not the order itself—and that the ground of objection must be that the error, defect or irregularity is one "affecting the decision of the case." By the words "affecting the decision" I understand that there has been at work something which has influenced the Judge in the mental process of arriving at his decision—that the error, defect or irregularity in the order has, so to speak, warped the mind of the Judge so as to lead him to a wrong conclusion.

If this is the meaning to be attributed to the word "affect", it seems to me that the word "decision" must necessarily be taken to mean the decision upon the merits.

The learned advocate for the opposite party, while admitting that this view of the interpretation of the word "decision" has been taken, protests against it as involving the introduction into the text of the sub-section of the words "upon the merits" which are not there, and he has been able to fortify his argument by reference to a number of rulings which support it. But although these words are not to be found in the sub-section, they must be supplied by necessary implication if the context so requires—and the use of the word "affect" does, in my opinion, render it necessary that the word "decision" should be taken to mean "decision upon the merits."

I am quite unable to see how any error, defect or irregularity in the order now complained of could in any sense "affect" the decision of the suit which may follow if the order setting aside the *ex parte* decree is maintained.

The error imputed to the court below is that in spite of its finding that the defendant had no sufficient cause for non-appearance it has directed the *ex parte* decree to be set aside. The order which is

1925

RAM SARUP v. GAYA PRASAD.

vitiated by this error has, no doubt, provided the occasion for a fresh trial of the suit and has thereby created a possibility that the new trial may result in a decision different from that which was reached on the earlier trial, but that to me appears to be a very different thing from saying that the decision in the second trial will be or can be affected by the preceding error of the appellate court.

I am satisfied that "decision" in section 105(1) means "decision upon the merits." That was the view taken in *Chintamony Dassi* v. *Raghoonath Sahu* (1). That case has been followed in this Court in *Gulab Kunwar* v. *Thakur Das* (2), in *Yasadduq Husain* v. *Hayat-un-nissa* (3), and in other cases more recently decided.

I dissent from the contrary view expressed in *Nand Ram* v. *Bhopal Singh* (4), and in other cases decided in the same sense. My answer to the reference is that it is competent to this Court to exercise its revisional powers in the case now before us.

SULAIMAN, J.—I agree that the answer should be in the affirmative. I would like to emphasize the fact that the revision before us is from the order of the District Judge passed on appeal. When the appeal was before the Judge, there was certainly a case pending before him. That case has been finally decided so far as the Judge is concerned. No matter is now pending before him at all. His order cannot, therefore, be called an interlocutory one. We undoubtedly have jurisdiction to interfere under section 115 of the Code of Civil Procedure.

DANIELS, J.—The question referred for our decision is whether a revision lies from an appellate

(1) (1895) I.L.R., 22 Calc., 981. (2) (1902) I.L.R., 24 All., 464.
(3) (1903) I.L.R., 25 All., 280. (4) (1912) I.L.R., 34 All., 592.

order restoring a case dismissed for default when the appellate court had no power under the provisions of order IX, rule 13, of the Code of Civil Procedure to direct the case to be restored. The revision was necessitated by a doubt on the part of the referring Bench as to the correctness of the decision in *Shaikh Kallu* v. *Nadir Bakhsh* (1), which held that no revision lay in such a case. The ground of that decision was that the case was covered by the Full Bench ruling in *Buddhu Lal* v. *Mewa Ram* (2). The Full Bench case is, however, clearly distinguishable. The order passed there was interlocutory. It was an order deciding separately a preliminary issue as to jurisdiction. Here the original suit had been decided when the order complained of was passed. It had been decreed *ex parte* by the Subordinate Judge, and the Subordinate Judge had rejected an application for restoration. The question is whether the restoration proceedings constituted a separate case within the meaning of section 115 of the Code of Civil Procedure. I have no doubt whatever that this question must be answered in the affirmative, and this does not conflict in any way with the interpretation placed on the word "case" by the majority of the Full Bench in *Buddhu Lal* v. *Mewa Ram* (2). The original suit had been, so far as the trial court was concerned, finally disposed of. The restoration application was a separate proceeding initiated not by the plaintiff in the suit but by the defendant, and the order passed upon it by the appellate court was in no sense an interlocutory order.

BY THE COURT.—The case is now returned to the Bench concerned for disposal in accordance with the answer to the reference.

(1) (1921) 19 A.L.J., 907. (2) (1921) I.L.R., 43 All., 564.

1925

RAM SARUP v. GAYA PRASAD.

On receipt of the Full Bench decision, the following judgement was delivered :—

SULAIMAN and DANIELS, JJ. :—The answer of the Full Bench to the question referred is in the affirmative. We, therefore, have jurisdiction to entertain this revision.

The lower appellate court had itself found that there was no sufficient cause for the defendant for not appearing when the suit was called on for hearing and that his absence was intentional. The case accordingly did not fall under order IX, rule 13. It is urged before us that apart from order IX, rule 13, the court had inherent jurisdiction to set aside an *ex parte* decree. It is to be borne in mind that the order setting aside the decree was passed by the appellate court to which an appeal had been preferred from an order under that rule. In our opinion it had no jurisdiction outside the provisions of that rule. This was the view clearly expressed by a Bench of this Court in the case of *Sheikh Kallu* v. *Nadir Baksh* (1). A Full Bench of the Madras High Court, in the case of *Neelaveni* v. *Narayana Reddi* (2), has come to the same conclusion. The learned advocate for the respondent relies on the case of *Ghuznavi* v. *The Allahabad Bank Ld.* (3) which, however, is distinguishable inasmuch as there it was not an *ex parte* decree which had been set aside, but the case itself had been remanded by the appellate court.

In our opinion the court below had no jurisdiction to set aside the *ex parte* decree.

We accordingly allow this revision and setting aside the order of the lower appellate court restore that of the court of first instance. We allow costs to the plaintiff in all courts.

Revision allowed.

(1) (1921) 19 A.L.J., 907. (2) (1919) I.L.R., 43 Mad., 94.
(3) (1917) I.L.R., 44 Calc., 929.