

MISCELLANEOUS CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and
Mr. Justice Muhammad Raza.

GIRDHARI LAL AND ANOTHER (PLAINTIFFS-APPELLANTS)
v. THE DEPUTY COMMISSIONER, GONDA, AS
MANAGER, COURT OF WARDS, BIRWA MEHNON (DEFENDANT-
RESPONDENT).*

1928
October, 17.

*Civil Procedure Code (Act V of 1908), order IX, rule 13—
Ex parte decree, setting aside of—Defendant applying
for setting aside ex parte decree as well as appealing
against that decree—Trial court's jurisdiction for setting
aside ex parte decree after the dismissal of the appeal.*

Where a decree is passed *ex parte* by the trial Judge and the defendant takes two separate courses of applying to the trial Judge to set aside the *ex parte* decree and appealing to the appellate court against the decree on the merits, and the appeal is dismissed, the trial Judge has no jurisdiction to set aside the *ex parte* decree, for after an appeal is dismissed by the appellate court the decree of the trial Judge from that date ceases to exist and merges in the appellate court's decree. *Mathura Prasad v. Ram Charan Lal (1), Mahabali Prasad v. Balbhaddar Singh and others (2) and Kalim-ud-din Ahmad v. Esahak-ud-din (3)*, relied upon.

Mr. S. N. Roy, for the appellants.

Mr. G. H. Thomas, for the respondent.

STUART, C. J. and RAZA, J. :—These appeals fail on a preliminary point. Two decrees were passed against the appellants *ex parte* by the Subordinate Judge of Gonda on the 31st of May, 1927. The appellants who were convicts in jail at the time took two separate courses. They applied on the 13th of July, 1927, to the Subordinate Judge of Gonda to set aside these *ex*

*Miscellaneous Appeal No. 24 of 1928, against the order of Saiyed Shaukat Husain, Additional Subordinate Judge of Gonda, dated the 24th of January, 1928, refusing to set aside *ex parte* decree.

(1) (1915) I.L.R., 37 All., 208. (2) (1921) 24 O.C., 282.

(3) (1924) I.L.R., 51 Calc., 733.

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parte decrees and they appealed on the 11th of October, 1927, to the Chief Court against the decrees on the merits. Their appeals were dismissed on the merits by the Chief Court in First Appeals Nos. 122 and 123 of 1927 on the 14th of November, 1927. After their appeals had been dismissed the learned Subordinate Judge refused to set aside the *ex parte* decrees. His order is dated the 24th of January, 1928. The appeals must fail because the learned Subordinate Judge clearly took the right course as he had no jurisdiction to set aside those decrees. After the appeals were dismissed by the Chief Court, the decrees of the Subordinate Judge from that date ceased to exist and merged in the Chief Court's decrees. This principle has been laid down very clearly by a Bench of the Allahabad High Court in *Mathura Prasad v. Ram Charan Lal* (1). This decision was followed by the Judicial Commissioner's court in *Mahabali Prasad v. Balbhaddar Singh and others* (2) and was again followed by a Bench of the Calcutta High Court in *Kalim-ud-din Ahmad v. Esahak-ud-din* (3). There is thus no force in the appeals. But apart from that we are constrained to say that on the merits the applications for restoration rightly deserved to be dismissed. The appellants' interests were represented in the court below, both by their agent and by a pleader. After a time the agent absented himself. He stated that his absence was due to illness. The trial court has found, and has rightly found, that this story was untrue. The Pleader continued to appear until the end of the case when he stated that he had no further instructions and that he would do nothing more. Then the trial court passed *ex parte* decrees very properly. The trial court would have acted very improperly if it had not passed *ex parte* decrees at that time. The argument put before us is

(1) (1915) I.L.R., 37 All., 208.

(2) (1921) 24 O.C., 282.

(3) (1924) I.L.R., 51 Calc., 715 (733).

that because the appellants were in jail, special concession should be made in their favour. We do not understand why special concessions should be made in favour of criminals which would not be granted to non-criminals who were prevented from personal appearance. We dismiss these appeals with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge, and
Mr. Justice Wazir Hasan.*

BALDEO AND OTHERS (DEFENDANTS-APPELLANTS) v.
LOSAL AND ANOTHER (PLAINTIFFS-RESPONDENTS).*

1928
November,
1.

Redemption—Clog on the equity of redemption—Mortgage postponing redemption for 99 years and other terms not unconscionable—Long term whether by itself constitutes clog.

Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which a mortgage is created, the right of redemption can only arise on the expiration of the specified period, but where it is shown on the merit that the effect of the condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, the court is justified in setting it aside.

Where, therefore, a usufructuary mortgage contains a provision by which redemption is postponed for 99 years, and the terms of the mortgage are not unconscionable, there being nothing else except the long term in the deed of mortgage, to which objection can be taken, the long term by itself does not constitute a clog on the equity of redemption

*Second Civil Appeal No. 182 of 1928, against the decree of S. Asghar Hasan, Additional District Judge of Gonda, dated the 6th of February, 1928, confirming the decree of M. Zia-ud-din Ahmad, Officiating Subordinate Judge of Gonda, dated the 31st of May, 1927, decreeing the plaintiff's suit.