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THE OFFICIAL LIQUIDATOR, THE KATHIAWAR AND AHMEDABAD BANKING CORPORATION, LTD. v. RAM CHARAN LAL

Nanavutty, J.

under section 80 of the Code of Civil Procedure was not necessary to be given by the plaintiff and that the period of two months should not be excluded so as to make the plaintiff's suit within time.

As regards the second relief claimed by the plaintiff by way of damages, the learned counsel for the defendant-appellant invited my attention to a ruling of the Madras High Court reported in *Sokalinga Chetty* v. *P. S. Krishnaswami Ayyar* (1). In this ruling it was held that the period of limitation applicable to a suit for damages on account of the sale of goods attached before judgment at a low price and for injury to trade and reputation consequent on the attachment itself was governed by article 29 of Schedule I of the Indian Limitation Act. This ruling of the Madras High Court was, however, not followed by that High Court in *Pannaji Devi Chand* v. *Sanaji Kapur Chand* (2). In my opinion the article of the Indian Limitation Act which governs both reliefs claimed by the plaintiff in the present suit is article 62, and the plaintiff's suit is, therefore, within time.

These were all the points urged before me by the learned counsel for the defendant-appellant. For the reasons given above, this appeal fails and is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Rachhpal Singh

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February, 13

PREM KUMAR AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* GIRDHARI LAL AND OTHERS (PLAINTIFFS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), order IX, rule 13 and Order XVII, rule 3—Defendant minor—Guardian ad litem of minor defendants to be appointed before date fixed for

*Miscellaneous Appeal No. 8 of 1933, against the order of Pandit Brij Kishen Topa, Additional Subordinate Judge, Lucknow, dated the 7th of November, 1932.

(1) (1919) 55 I.C., 786 (790). (2) (1930) 126 I. C., 721.

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filing written statement—Defective procedure in appointment, effect of—Date fixed for evidence—Defendants' counsel praying for adjournment—Court refusing prayer and the counsel then stating that he had no instructions to proceed with the case—Court proceeding to decide the case—Case is one decided under order XVII, rule 3—Order IX, rule 13, whether applies to the case.

The order for the appointment of a guardian should be made before the minors are asked to file a written statement and not at a late stage of the case when it comes up for hearing of the evidence. Where a minor defendant is not represented at all, the decree passed against him is a nullity. But where the court has recognized a guardian *ad litem,* but has made no formal appointment, or has made an appointment which is open to objection owing to some defect of procedure, the decree will bind the minor unless it is shown that the defect of procedure has prejudiced him.

Order IX, rule 13 of the Code of Civil Procedure is applicable to those cases only in which the decree has been passed *ex parte* against a defendant. In such a case he is at liberty to apply to the court by which the decree is passed for an order to set it aside if he is able to satisfy 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. But where on the date fixed for hearing the evidence of the parties, the counsel for the minors is present in court, in other words, the minors were represented and they move the court to adjourn the case which request is not granted, and then the counsel appearing for the minors states that he had no instructions to proceed with the case, it cannot be said that the case is decided *ex parte* so as to attract the consequences of rule 13 of order IX of the Code of Civil Procedure. Such a case must be held to be decided by the court under rule 3, order XVII of the Code of Civil Procedure and therefore the only remedy which the minor defendants have is to prefer an appeal against that decision passed against them. *Radha Mohan Datt* v. *Abbas Ali Biswas* (1), *Manmohan Das* v. *Krishna Kant Malaviya* (2), relied on.

Messrs. *Ghulam Hasan* and *Iftikhar Husain,* for the appellants.

Messrs. *Ali Zaheer* and *P. D. Rastogi,* for the respondents.

(1) (1931) I.L.R., 53 All., 612. (2) (1933) 1 A.W.R., 432.

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NANAVUTTY and RACHHPAL SINGH, JJ.:—This is a defendants' miscellaneous appeal arising out of a mortgage suit.

Lala Girdhari Lal and others instituted a suit on the basis of a mortgage-deed against one Kunwar Behari Lal to recover a sum of Rs.1,08,510 on foot of a mortgage-deed executed by him. The plaint was filed on the 2nd of November, 1931. On the 7th of January, 1932, one Musammat Thakur Dei, the mother of Prem Kumar and Jawahir Lal, minors, made an application to the court in which she said that the aforesaid two minors were the sons of Kunwar Behari Lal, that the property in suit was joint family property and therefore it was necessary that the two minors should be made defendants in the case. On the 28th of January, 1932, the court passed an order directing that the names of these two minors be brought on record as defendants. It appears that the aforesaid two minors have another brother, Babu Raj Kumar, who is a major. On the 1st of February, 1932, the plaintiffs had made an application that he should also be made a party to the suit. This was done. Written statements were filed and a date was fixed for framing issues. The case was adjourned to the 29th of June, 1932. On that date, 5th of September, 1932, was fixed for the hearing of evidence. Before that date, Kunwar Behari Lal died on the 11th of July, 1932. The case was taken up by the court on the 5th of September, 1932, the date fixed, and it was intimated to the court that Kunwar Behari Lal had died. An application had been made for the removal of his name from the record. The court found that the plaintiffs had not given the ages of the two minor defendants who had been impleaded as defendants by the court on the 28th of January, 1932, under the guardianship of their mother. The court ordered that the plaintiffs should give the ages of the defendants and file a formal application for appointment of a guardian. On this date the learned counsel for the defendants made an

application asking for an adjournment, but the court rejected it. Thereupon the counsel appearing for the defendants made a statement to the effect that they had no instructions to appear, and the court directed the case to proceed *ex parte* against the defendants. The evidence of the plaintiffs' witnesses was then recorded and the case was fixed for delivery of judgment the next day, when it was pronounced, and the claim of the plaintiffs was decreed. The defendants made an application to the court below praying that the *ex parte* decree should be set aside. This application was rejected by the learned Additional Subordinate Judge on the 7th of November, 1932. The present miscellaneous appeal has been preferred by the two minor defendants, Prem Kumar and Jawahir Lal, through their mother.

The learned counsel appearing for the plaintiffs-respondents has raised a preliminary objection that no appeal lies, because the case was decided by the trial court under rule 3, order XVII of the Code of Civil Procedure, and it was, therefore, open to the defendants to have preferred a regular appeal against that decision. In our opinion this objection is well founded and must, therefore, prevail. In our opinion it is not necessary for the purpose of deciding this appeal to go into the question as to whether or not the provisions of order XXXII of the Code of Civil Procedure were complied with. It may be that the procedure adopted by the court was wrong. When the mother of the minor defendants had made an application to the court asking that the minors should be made parties, it was the duty of the court to have appointed a guardian *ad litem* to prosecute the case on their behalf. Rule 3 of order XXXII of the Code of Civil Procedure ordains that where the defendant is a minor, the court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor and that an order for the appointment of a guardian for the suit may be obtained upon application in the name

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and on behalf of the minor or by the plaintiff . . . No order shall be made on any application under this rule, except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. In the case before us it was not necessary to serve notice on the minors who were below 10 years, but it was incumbent on the court to have passed a formal order ordering that the mother of the minors be appointed to act as their guardian *ad litem*. This was not done, and it would appear that on the date fixed for the hearing of the evidence (5th of September, 1932) the court noticed this defect and ordered that the plaintiffs should make a formal application asking that the mother of the minors be appointed as their guardian *ad litem*. The procedure was certainly defective. The order for the appointment of a guardian should have been made before the minors were asked to file a written statement and not at a late stage of the case when it came up for hearing of the evidence. But we do not think that this defect in procedure can help the minor defendants in any manner so far as this appeal is concerned. There are two kinds of cases: one is where a minor defendant is not represented at all. Where such is the case the decree passed against him will be a nullity. The other will be a case where the court has recognized a guardian *ad litem*, but has made no formal appointment, or has made an appointment which is open to objection owing to some defect of procedure. In the latter case the decree will bind the minor, unless it is shown that the defect of procedure has prejudiced him. It may be that, if the minors institute a regular suit to have the decree passed against

them set aside, on the allegation that there was no proper representation so far as they were concerned, they might be successful, but we have not got to decide that question. The minors were represented and the decree passed against them will stand till they are able to establish that for some reason it should be set aside.

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The only question for consideration before us is, whether the decision of the case by the trial court was one under rule 3 of order XVII of the Code of Civil Procedure. If that be the case, then the minors were not competent to make an application under order IX, rule 13 of the Code of Civil Procedure. Order IX, rule 13 of the Code of Civil Procedure is applicable to those cases only in which the decree has been passed *ex parte* against a defendant. He is at liberty to apply to the court by which the decree was passed for an order to set it aside if he is able to satisfy 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 facts of the case before us are, however, altogether different. Here, on the date fixed for hearing the evidence of the parties, the counsel for the minors was present in court. In other words, the minors were represented. They moved the court to adjourn the case which request was not granted, and it was then that the counsel appearing for the minors stated that he had no instructions to proceed with the case. It cannot, therefore, be said that rule 13 would apply to the case. It is not a case where the summons was not served on the defendant, nor is it a case where the defendant was prevented from attending the court for any sufficient reason. The minor defendants did attend the court through their counsel who eventually withdrew. The question before us came up for consideration in a Full Bench ruling of the Allahabad High Court in *Radha Mohan Datt* v. *Abbas Ali Biswas and others* (1). That was a case in which, on the date fixed for

(1) (1931) I.L.R., 53 All., 612.

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the disposal of the suit, the defendants appeared through a pleader who applied for an adjournment and, on the application being refused, withdrew from the proceedings. The suit was taken up and tried on the merits and a decree was passed against the defendants. The learned Judges who decided the Full Bench case held that to a case of this description rule 13, order IX of the Code of Civil Procedure would not be applicable. The following observations were made by the learned Judges which are to be found at page 615:

> "If order IX, rule 13, applied to the case, the applicants had to satisfy the court (1) that the summons was not duly served, or (2) that they were prevented from appearing for sufficient cause. Neither of these conditions having been fulfilled, the Munsif had no jurisdiction to set aside the decree and restore the suit. It is clear, however, that order IX, rule 13, did not apply to the facts of the case. The decree passed against the applicants was not an *ex parte* decree. An issue was framed relating to their liability and that issue was decided on the merits. The defendants having appeared in the suit through their counsel, they could not in law be deemed to have failed to appear in the action. Explanation to order XVII, rule 2, which we have set out above is clear and conclusive on this point."

Another case on the point is that of *Manmohan Das* v. *Krishna Kant Malavia and others* (1) in which a Bench of two learned Judges of the Allahabad High Court held that where there is no default of appearance on behalf of the plaintiff and the suit is dismissed for want of prosecution the case falls under order XVII, rule 3 and not under order XVII, rule 2, Code of Civil Procedure, and the order, therefore, amounts to a decree dismissing the suit for want of evidence on the merits and not one for dismissing it for default of appearance.

(1) (1933) 1 A.W.R., 432.

It was held further that in such a case the plaintiff's remedy was either by review or an appeal to the higher Court and if, instead of appealing from the decree, he applies for the setting aside of the decree and for the restoration of the suit treating the dismissal as one for default of appearance, this remedy was obviously misconceived and the Court, in setting aside the decree, acts without jurisdiction and also with material irregularity. It appears to us that where a counsel appears on behalf of a person and makes an application or prayer for an adjournment, it cannot be said that the case was decided *ex parte* so as to attract the consequences of rule 13, order IX of the Code of Civil Procedure. Explanation to order XVII, rule 2, referred to by the learned Judges of the Allahabad High Court, is also added to the same rule by this Court and runs as follows:

> "*Explanation*—No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader, though engaged only for the purpose of making an application."

It appears to us that in view of this explanation added to rule 2 of order XVII of the Code of Civil Procedure it is impossible for us to concede to the arguments addressed by the learned counsel appearing for the appellants that the case was decided *ex parte* and therefore his clients had a right to maintain an application for setting aside the decree under rule 13, order IX, Code of Civil Procedure. It must therefore be held that the case was decided by the court under rule 3, order XVII of the Code of Civil Procedure and therefore the only remedy which the minor defendants had was to prefer and appeal against that decision passed against them. The application of the minors, therefore, was rightly rejected by the court below and the present appeal is incompetent. For the reasons given above we accordingly dismiss the appeal with costs.

Appeal dismissed