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interfered with, similarly by sub-section 5 of section 14 of the Encumbered Estates Act the intention was that only those subsequent contracts should be given effect to which were made some nineteen years before the passing of the Act and not those which were made within that period. In other words both proviso (i) to section 3(1) of the Usurious Loans Act and sub-section 5 of section 14 of the Encumbered Estates Act deal with renovations of contract and not with the original contracts.

We therefore agree with the learned Judge of the Court below that only Rs.6,500 should be taken as the principal in this case as no subsequent statement or settlement of account or contract by which interest should have been converted into principal is proved or alleged in the case.

As this was the only point argued in the appeal, the appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice G. H. Thomas Chief Judge and Mr. Justice Ziaul Hasan

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PRATAP NARAIN AND ANOTHER (PLAINTIFFS APPLICANTS) *v.* BHAGWATI SINGH AND OTHERS (DEFENDANTS OPPOSITE-PARTIES)*

Civil Procedure Code (Act V of 1908), Order 9, rule 13 and Order 34, rule 3—Mortgage—Foreclosure decree passed ex parte*—Jurisdiction of Court to set aside* ex parte *decree under Order 9, rule 13, C. P. C.*

A final decree for foreclosure passed in the absence of the defendant is an *ex parte* decree and as such the provisions of Order 9, rule 13, C. P. C., are applicable to it. Under that order an *ex parte* decree can be set aside if the defendant satisfies the Court that the summons was not duly served on him or that he was prevented by any sufficient cause from appear-

*Section 115 Application No. 192 of 1936, for revision of order of Pandit Kishan Lal Kaul, Civil Judge of Fyzabad, dated the 11th August, 1936.

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ing when the suit was called on for hearing. *Awadh Bihari* v. *Fahiman* (1), relied on, and *Thakur Prasad* v. *Barati Lal* (2), referred to.

Mr. *T. N. Srivastava,* for the applicants.

Mr. *Radha Krishna Srivastava,* for the opposite-party.

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THOMAS, C. J. and ZIAUL HASAN, J.:—This is an application for revision of an order of the learned Civil Judge of Fyzabad setting aside a final decree for foreclosure passed in favour of the plaintiffs applicants in the absence of the defendants opposite-parties.

The preliminary decree in the case was passed on the 5th March, 1935. On the 28th September, 1935, the plaintiffs applied for the decree being made absolute. Notices were issued to the defendants two or three times but every time service was effected by the notices being affixed to the residences of the defendants. Finally on the application of the plaintiffs substituted service was ordered on the 9th December, 1935, and on the 21st December, 1935, the decree was made absolute. Delivery of possession was made to the plaintiffs on the 24th March, 1936. On the 27th March, 1936, some of the defendants applied for setting aside the final decree on the ground that they were not aware of the date fixed in the case.

The application of the defendants was contested by the plaintiffs, who alleged that after their filing the application for passing of the final decree for foreclosure, the defendants came to them in order to settle the matter out of court. Evidence was given by both parties and the learned Judge of the court below disbelieving the plaintiffs' allegation held that the defendants were not aware of the date fixed for disposal of the plaintiffs' application for final decree. He accordingly set aside that decree and allowed the defendants' application with costs.

The learned counsel for the applicants has vehemently challenged the finding of the Court below that it

(1) (1929) I.L.R., 51 All., 654. (2) (1931) 8 O.W.N., 845.

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was necessary under the law to give notice to the defendants of the date fixed for the disposal of the application for preparation of a final decree and has relied on various cases in support of his contention. We think however that it is not necessary in this case to decide whether or not notice to the defendants, was necessary. It cannot be denied that, as remarked in the case of *Awadh Bihari* v. *Fahiman* (1), a final decree passed in the absence of the defendant is an *ex parte* decree and as such the provisions of Order 9, rule 13, C. P. C. are applicable to it. Now under that order (Order 9, rule 13) an *ex parte* decree can be set aside if the defendant satisfies the Court that the summons was not duly served on him or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing and a proviso to this rule has been added by this Court to the effect that no *ex parte* decree shall be set aside on the ground that the summons was not duly served if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim. In the present case the learned Judge of the Court below has held on the evidence before him that the defendants were prevented from appearing by their ignorance of the date fixed in the case, and he has disbelieved the plaintiffs' allegation which was calculated to show that the defendants had knowledge of the date. These findings of the Court below have not been challenged before us, nor can they be under section 115, C. P. C.

On the finding of the Court the application for setting aside the final decree was not also barred by time. The learned counsel for the applicants relied on the case of *Thakur Prasad* v. *Barati Lal* (2) but in that case which was an application for revision of a decree of a Judge, Small Cause Court, the question was of service of notice and a learned Judge of this Court considered the evidence on the record and held that the order for

(1) (1929) I.L.R., 51 All., 634. (2) (1931) 8 O.W.N., 845.

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substituted service was made for good reasons, and that therefore the application was time-barred.

As the decree was an *ex parte* decree, the court below had jurisdiction to set it aside under Order 9, rule 13, C. P. C., and no illegality or irregularity was committed by it in the exercise of that jurisdiction. The present application therefore has no force.

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It was also urged that the Court below should not have awarded costs of the application to the defendants opposite-parties against the plaintiffs; but we do not think that the Court exercised its discretion on the question of costs improperly, seeing that the application of the defendants was allowed in spite of the plaintiffs' contest. We therefore see no reason to interfere with the lower court's order about costs also.

The application is dismissed with costs.

Application dismissed.

REVISIONAL CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice Ziaul Hasan

1939 *January*, 17

SHEIKH PUDAI (PLAINTIFF APPLICANT) *v.* MST. BILASI AND ANOTHER (DEFENDANTS OPPOSITE-PARTIES)*

Negotiable Instruments Act (XXVI of 1881), sections 8, and 37—Promissory note—Document promising to pay on demand intended to be a promissory note—Provisions of Negotiable Instruments Act, if apply to it—Attentation, effect of—Promissory note without consideration—Purchaser of note, if can recover its amount from maker.

Where the executant of a document obliges himself to pay the same on demand and though it is attested by witnesses the intention of the executant is to treat it as a promissory note the document is one to which the provisions of the Negotiable Instruments Act apply. *Khetra Mohan Saha* v. *Jamini Kanta Dewan* (1), and *D. Rozario* v. *Harballabh Onkarjee* (2), dinstinguished.

*Section 25 Application No. 94 of 1936, for revision of the order of Babu Raghunath Prasad Varma Saheb, Munsif (as Judge, Small Cause Court) of Kunda at Partabgarh, dated the 27th July, 1936.

(1) (1927) I.L.R., 54 Cal., p. 445. (2) (1927) 100 I.C., p. 794.