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necessarily include parties who never put in any appearance in the Court and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. The wording of the present Code appears to me to set the matter at rest in accordance with the decision arrived at by the Allahabad Court in the last mentioned case. In my opinion it is not necessary that all the parties to a suit should concur in an application for an order of reference in order to make the submission valid. It is only necessary that all the parties who are interested in the subject-matter of the reference should have joined in the submission.

The order of the learned Subordinate Judge will be set aside and the case will be remitted to the lower Court to deal with it under clause 12 of the Second Schedule of the Civil Procedure Code with directions to separate such part of the award as deals with the interests of Nathuni and Manu from the other part of the award and to give effect to the award in so far as it deals with the matters in difference between the plaintiffs and the other defendants by filing the same and pronouncing judgment in accordance therewith.

The petitioners are entitled to the costs of this application and to the costs of the objection petition in the lower Court.

KULWANT SAHAY, J.—I agree.

REVISIONAL CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

RAMBHANJAN SINGH

v.

PASHUPAT RAI.*

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June, 5.

Code of Civil Procedure, 1908 (Act V of 1908), Order VII, rule 11, Order IX, rules 8 and 9—Dismissal for default, application for restitution, grounds for

* Civil Revision No. 59 of 1923, from an order of D. H. Kingsford, Esq., I.C.S., District Judge of Shahabad, dated the 11th November, 1923, affirming an order of Babu Sheonandan Prasad, Subordinate Judge of Shahabad, Arrah, dated the 22nd July, 1923.

When a suit has been dismissed for default the plaintiff is not entitled to have the order of dismissal set aside under Order IX, rule 9, on the ground that the plaint should have been rejected under Order VII, rule 11.

Application by the plaintiff.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Bhubaneswar Prasad, for the petitioner.

Harihar Prasad Sinha, for the opposite party.

DAWSON MILLER, C. J.—This is an application in revision from an order of the District Judge of Shahabad, affirming an order of the Subordinate Judge dismissing an application of the petitioner for restitution of his suit under Order IX, rule 9, Civil Procedure Code.

The suit in question was ordered to be heard on the 9th March, 1922. Upon that day the petitioner apparently arrived at Court but he went away again and although he had instructed a pleader on his behalf in other proceedings in the suit nobody appeared on his behalf when the case was called on for hearing on that day. His case was accordingly dismissed under Order IX, rule 8, for default of appearance. The petitioner thereupon took proceedings under Order IX, rule 9, before the Subordinate Judge, asking that the case should be restored and giving as a ground for his non-appearance at the hearing the fact that his brother had been taken ill which he was informed of on the day he went to Court and that he had gone away to look after his brother. No sort of reason was given apparently why his pleader should not have been instructed to appear on his behalf on that day. The pleader, however, when called upon said that he had no instructions in the matter. The learned Subordinate Judge refused to accept the explanation given by the plaintiff as sufficient within the meaning of Order IX, rule 8, and he dismissed the application for restitution. The matter then came before the learned District Judge on appeal and he too refused to restore the case.

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The only grounds which were open to the plaintiff for obtaining an order under Order IX, rule 9, were those which are mentioned in the Order itself, namely, that there was sufficient cause for the plaintiff's non-appearance when the suit was called on for hearing. If the plaintiff showed sufficient cause then the Court could make an order setting aside the dismissal of the suit and appoint a day for proceeding with it. When the matter came before the learned District Judge it appears that a further point was argued before him in support of the application. The point put forward then and the point which has been argued before us in this application was that the trial Court, instead of dismissing the suit, ought to have rejected the plaint under the provisions of Order VII, rule 11. It seems to me that in the circumstances which have arisen it was not open to the plaintiff to put forward that matter as a ground for having his case restored under Order IX, rule 9. The order made or the decree passed, dismissing his suit on the 9th March, 1922, may or may not have been a proper order to make, but there was no appeal or application in revision from that order and if the order was an improper one on the ground that the Court ought not to have passed it at that stage before considering the question which arose under Order VII, rule 11, then that was a matter either for appeal or revision but there was no appeal or application in revision from that order and it was accepted by the plaintiff as a proper order. The only step which the plaintiff did take was an attempt under Order IX, rule 9, to get the case re-instated on the ground that there was good cause for his not appearing on the day in question. In the circumstances it appears to me to have been unnecessary to consider whether or not the Court ought, in the circumstances, to have acted under Order VII, rule 11. If it ought then that was a matter, as I have already said, on which the plaintiff had an appropriate remedy which he did not take. In any case, after hearing the learned Vakil for the petitioner, it seems to me that this

circumstances contemplated in Order VII, rule 11(c), did not arise because no order had been made upon the plaintiff to pay a deficit court-fee at all, and, therefore, it was not a case in which he had failed to comply with an order made by the Court and the Court was under no obligation under Order VII, rule 11, to reject the plaint. That was the only ground which was put before us in this application, but it does not seem to me that the point really arises. No ground has been made out why we should interfere in revision with the order made by the learned District Judge, an order which, in my opinion, he had absolute jurisdiction to pass.

The application is rejected with costs.

KULWANT SAHAY, J.—I agree.

Application rejected.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

CHAURASI MAHASARICK

v.

BHAGAN SAHU.*

1923.

June, 5.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 14, Order XXI, rule 17—Mortgage suit—compromise decree—decree-holder entitled, in default, to sell other properties of judgment-debtors and then the mortgaged property—application for sale of mortgaged properties, whether maintainable—Execution of decree, amendment of application for, what amounts to.

A suit to enforce a mortgage on a 4-annas share in a certain village was compromised, the defendant undertaking to pay a certain sum by instalments. The compromise decree also stipulated that in the event of there being default in respect

* Appeal from Appellate Order No. 14 of 1923, from an order of R. E. Russell, Esq., District Judge of Santal Parganas, dated the 7th December, 1922, confirming an order of Babu S. Chandra, Subordinate Judge of the Santal Parganas, dated the 21st December, 1921.

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