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like those cited by the learned Counsel for the petitioner. The courts below, in my opinion, have rightly held that the petitioner did kidnap the girl and that it was he who took her out of the lawful guardianship of her father. Until she was put into the car she could still be said to be under her father's guardianship.

The only other question raised on behalf of the petitioner is that the sentence is too severe. It is represented that the prosecution case was that the purpose of the kidnapping was that the petitioner might marry the girl, and there is no insinuation that he was taking her away for any improper purpose. It is also pointed out that his companion Latu received a punishment of one year's rigorous imprisonment only. Under the circumstances of the case we are of opinion that the sentence of two years is somewhat severe considering that the petitioner had honourable motives and that no eventual harm had happened to the girl.

We think that a sentence of one year's rigorous imprisonment would be sufficient and reduce the sentence accordingly. The conviction is upheld.

SCROOPE, J.—I agree.

Order modified.

APPELLATE CIVIL.

Before Adami and Scroope, JJ.

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Feb., 17.

MUSAMMAT BODHIA

v.

RAM CHANDRA MARWARI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order IX, rule* 13 *and Order XLIII, rule* 1(*d*)—*Application to set aside ex parte decree, dismissal of—whether appeal lies.*

* Appeal from Original Order no. 108 of 1926, from an order of Rai Bahadur Amrita Nath Mitter, Subordinate Judge of Dhanbad, dated the 27th March, 1926.

An appeal lies from an order dismissing an application to set aside an ex parte decree whether the dismissal be on the merits or otherwise.

Kumud Kumar Bose v. *Hari Mohan Samadar* (1), referred to.

Appeal by defendant no. 2.

This was an appeal from a decision of the Subordinate Judge of Dhanbad, dismissing an application under Order IX, rule 13, of the Code of Civil Procedure, to restore a mortgage suit which had been decreed ex parte against the defendant no. 2 Musammat Bodhia, who was the appellant.

The suit was decreed ex parte on the 5th January, 1926, and on the 3rd February, the present appellant, filed an application for restoration under Order IX, rule 13, alleging that on the 5th January, the date on which the suit was decreed ex parte, she was under treatment in the Medical College at Patna for eye disease, that she had entrusted the conduct of the suit to her son-in-law, Sitaram Sao, but that he had made a mistake as to the pleader engaged and instead of giving the petition for time to the pleader engaged in the case, Babu Suresh Chandra Singha, he had made it over to another pleader, Babu Manindra Nath Das, and that as the latter's vakalatnama was not on the record, the court had declined to accept the petition and had decreed the suit ex parte. The application under Order IX, rule 13, was registered on the 3rd February, 1926, and the 13th March was fixed for hearing. On that date the opposite party had appeared and were ready and yet the case was adjourned on the petitioner's application to the 27th March for hearing and the parties were directed to come ready on that date. On the 22nd March the petitioner prayed for the examination of a witness, Dr. Khan of Patna, on commission. This was heard

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on the next day 23rd March but was disallowed on the objection of the opposite party. Application was then made for summons on her witnesses; these were ordered to be issued at her own risk. On the 27th March the case was next taken up but petitioner again applied for time and for issue of summonses on her witnesses who had not yet been served but the court disallowed the prayer and dismissed the application.

N. C. Sinha and *P. De*, for the appellant.

A. B. Mukerji, for the respondents.

SCROOPE, J. (after stating the facts set out above, proceeded as follows): A preliminary objection is taken that no appeal lies: it is urged that Order XLIII, rule 1(*d*), which allows an appeal from an order dismissing an application under Order IX, rule 13, applies only where there has been an actual hearing of the application and that in this case there was no actual hearing of the application which was dismissed for default. But there is direct authority in the case of *Kumud Kumar Bose* v. *Hari Mohan Samadar* (1) for holding that an appeal lies under Order XLIII, rule 1 (*d*), against an order dismissing for default an application to set aside an ex parte decree and the learned Vakil for the respondent has not shown any authority for discriminating for the purpose of Order XLIII, rule 1(*d*), in this way between a dismissal on the merits and a dismissal for default. This contention therefore cannot succeed.

As regards the merits of the appeal there is no getting away from the fact that on the 13th March there was a direction of the court that the parties must come ready by the 27th March and that it was only on the 22nd March that the application for the examination of Dr. Khan on commission was made. The appellant must have known that there was no

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possible chance of getting a commission executed at such short notice, and I do not see any substance in the argument put forward that at least the court might have sent out the commission and allowed it to take its chance. Obviously there was no chance of it being executed. Besides, after the refusal to issue the writ of commission, there was no reason why the appellant should not have had her pleader Suresh Chandra Singh examined on her behalf as the real ground for the rehearing application was that her son-in-law had made a mistake and had gone to the wrong pleader. No application was made at any stage to examine either pleader. Further the application which was filed on the 23rd March for the examination of witnesses shows that there were Jharia witnesses and there is nothing to show why the application could not have been made before to examine these three witnesses. Another feature is that the appellant on her own showing had entrusted the management of the case to her son-in-law on the 5th January, 1926. It is not suggested that he ever offered himself for examination in the rehearing matter. He must have known all the facts and was the person really in charge of the case yet no attempt was made to have him examined. There is no doubt that the appellant put off till the eleventh hour any real effort to take steps to support her restoration petition by evidence and if she has now suffered for it, it is her own fault. She was certainly guilty of laches in the matter, and, on the materials before me, I would say that the learned Subordinate Judge had no alternative but to dismiss the rehearing application for default, and I can see no reason for disturbing that decision.

The appeal accordingly fails and is dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.