

much at large. In my opinion therefore the order of the learned District Judge cannot be looked upon as a decree within the meaning of that term as used in section 2 of the Code of Civil Procedure. I am aware that other courts and other Judges have taken a different view; but I adhere to the opinion which I have frequently expressed in this court.

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CHAUDHARY
CHANDRIKA
PRASAD
SINGH
v.
MITRU
RAI.

I hold that these appeals are incompetent and I dismiss them with costs.

DAS, J.

ADAMI, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

KHEDU NAEK

v.

RAJIB RAY.*

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Jan., 26.

Ex parte decree—decree passed in presence of defendants represented by pleader—application to set aside decree not maintainable.

On the 9th June, 1925, the order sheet in a suit recorded that the parties were ready. On the application of the parties, however, the hearing of the suit was adjourned to allow the parties to settle out of court. Subsequently the suit was compromised between the plaintiff and all the defendants except defendants 2 and 3. The pleader for defendants 2 and 3 stated that he had no power to compromise. The plaintiff thereupon led evidence as against defendants 2 and 3 and the court on the 11th in its judgment purported to decree the suit *ex parte* as against these defendants and in terms of the compromise as against the others. Defendants 2 and 3 applied to set aside the decree as against them.

* Appeal from Original Order no. 125 of 1926, from an order of Babu Ashutosh Mukerji, Subordinate Judge of Hazaribagh, dated the 12th April, 1926.

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Held, that as defendants 2 and 3 were represented by a pleader and the parties were ready on the 11th, the decree passed against defendants 2 and 3 was not an *ex parte* decree and, therefore, the application to set it aside was not maintainable.

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

S. M. Mullick (with him *Harihar Prasad Singh*) for the appellants.

B. C. De, for the respondents.

DAS, J.—This appeal is directed against the order of the 12th April, 1926, passed by the learned Subordinate Judge of Hazaribagh. The appellants were defendants 2 and 3 in a suit for recovery of possession of certain properties. The suit was fixed for hearing on the 9th June, 1925. The order-sheet of the 9th June, 1925, runs as follows—

“Parties ready. Facts of the suit stated after which both parties’ pleaders request for half an hour’s time to settle the matter out of Court. This allowed till 10 A.M. Documents filed by plaintiff be kept with the record. Its admissibility will be considered when tendered.”

Stopping here for a moment it is quite clear that the parties were ready on the 9th June, 1925, and the question whether defendants 2 and 3 were ill or well that day did not matter at all so far as the hearing of the suit was concerned. It appears that the parties then filed a joint petition for one day’s time to compromise the suit. The case was ultimately compromised as between the plaintiffs and all the defendants other than defendants 2 and 3. The pleaders for defendants 2 and 3 who were actually present in court stated that they had no power to compromise the suit on behalf of the defendants who were absent. The Court thereupon asked the plaintiff to prove the case against defendants 2 and 3; that evidence was given and the learned Subordinate Judge pronounced judgment on the 11th June 1925. In that judgment he deals with the compromise

between the parties and then his order runs in these terms—

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DAS, J.

“ And I order that the suit be decreed on compromise against defendants 1, 4, 8, 10 and 12 to 14 and ex parte against the remaining defendants. The terms be all embodied in the decree.”

Thereafter defendants 2 and 3 presented an application for setting aside the ex parte decree. That application failed. The present appeal is against the order refusing to set aside the ex parte decree. In my opinion the decree passed by the learned Subordinate Judge on the 11th June 1925 cannot be regarded as an ex parte decree. It is quite clear that the parties were ready that day, although defendants 2 and 3 were not actually present in court. Although defendants 2 and 3 were not present in court their pleader was present and their pleader was competent to cross-examine the plaintiff and to adduce evidence on behalf of defendants 2 and 3. There is nothing in the order-sheet to show that any application for adjournment of the suit was made on behalf of defendants 2 and 3 and nothing to suggest that the pleaders of defendants 2 and 3 retired from the suit. It is well settled that if a pleader engaged by a party be actually present in court, the decree passed in the presence of that pleader cannot be regarded as an ex parte decree, although it may be that his client may not have been present. In my opinion therefore the judgment of the 11th June as against defendants 2 and 3 cannot be regarded as an ex parte judgment. This being the position, an application for setting aside the ex parte decree did not lie and the learned Subordinate Judge was right in dismissing that application.

I would therefore dismiss this appeal with costs.

ADAMI, J.—I agree.