

aside, and it would be unreasonable that, because there were two reasons for setting aside the sale, there must be two applications. It is only reasonable that the executing Court should deal with every objection which the judgment-debtors put forward in one and the same proceeding.

The result is that the appeal must be allowed, and the executing Court, having disposed of the objection under Order XXI, rule 90, should now enquire into the objection under section 47. Costs in the Courts below will follow the result.

MACPHERSON, J.—I agree. It is admitted that neither on principle nor on authority can the orders of the Courts below be supported. It may further be indicated that had it in fact been necessary for the objectors to make an election in the first Court, that Court ought to have put them to their election and not have itself chosen at a late stage which of the two objections it should consider and which it should not consider.

Appeal allowed.

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

BAJIF LAL PATHAK

v.

MAHARAJADHIRAJ SIR RAMESHWAR SINGH
BAHADUR.*

Code of Civil Procedure, 1908 (Act V of 1908), Order IX, rules 4 and 8 and Order XLIII, rule 1(c)—defendant appears but applies for time—suit dismissed for default—rule 4, whether applicable—application to set aside dismissal, dismissed for default—appeal whether lies—Order XLIII, rule 1(c).

Where, on the date fixed for hearing, the plaintiff does not appear and the defendant appears but applies for time, and the Court dismisses the suit for default, the order falls

* Appeal from Original Order no. 66 of 1927, from an order of Babu Shivanandan Prasad, Subordinate Judge of Purnea, dated the 26th March, 1927.

1928.

BIBI JAMILA
KHATWOON
v.
DAYANAND
THAKUR.

ADAMI, J.

1928.

Jan., 13.

1928. under Order IX, rule 8, and not under Order IX, rule 4, Code of Civil Procedure, 1908.

**BAJIT LAL
PATNAK
v.
MAHARAJA-
DHIRAJ SIB
RAJESHWAR
SINGH
RAHADUR.**

An order dismissing for default an application to set aside the dismissal of a suit under Order IX, rule 9, is not covered by Order XLIII, rule 1(c), and, therefore, is not appealable.

Jagdish Narain Prasad Singh v. Harban's Narain Singh (1), followed.

Appeal by plaintiff.

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

D. L. Nandkeolyar, for the appellant.

Murari Prasad and *S. Saran*, for the respondent.

MACPHERSON, J.—This appeal is preferred by the plaintiff in a suit instituted before the Subordinate Judge of Purnea on the 19th March, 1926, adjourned on many occasions, chiefly at the instance of the defendant, and eventually dismissed for default on the 5th January, 1927, with the order—

"It is now 11-20 A.M. Plaintiff takes no step. Defendant applies for time. Case dismissed for default. Defendant's petition to remain on the record and no order thereon is necessary."

It appears that a petition for time which was to be filed on the 5th was actually filed on the 6th on behalf of the plaintiff. The plaintiff, however, also filed on that date the application under Order IX, rule 9, printed on the first page of this record bearing date the 5th January wherein he craved that the Court should set aside the dismissal upon terms. The ground given was that though his petition for time was ready before the commencement of the Court hours, no stamp-vendor was available, and having proceeded towards the Criminal Court to procure the necessary Court-fee stamp he found on his return that his suit had already been dismissed for default. The case under Order IX, rule 9, was set down for hearing on the 12th March, 1927. It was heard *ex parte* on

that date and the petitioner examined himself and one other witness and his pleader was heard. The order to this effect which is in the handwriting of the peshkar, stops short at this stage in a rather significant way. A subsequent order of the same date directs the petitioner to produce his witnesses again on the 26th March for cross-examination. That order was passed by the Court at the instance of the opposite party whose pleader was alleged to have been in the Criminal Court when the case was being heard. On the 26th March the order under appeal was passed. It sets out—

“Applicant does not appear on repeated call. He was required to be present today with his witnesses for cross-examination but he is keeping back. Opposite party is ready. Case dismissed for default with costs.”

Very soon after the order was passed the applicant appeared and put in a petition stating that as he had been indisposed he came to Court a little late and praying that he should then be cross-examined by the opposite party. The petition was directed to be filed.

Against this order of the 26th March the present appeal has been preferred and it is said in the grounds of appeal that the appellant turned up only five minutes late and that it is incorrect to say that the appellant was keeping back intentionally.

On behalf of the respondent Mr. Murari Prasad urges that no appeal lies. He contends in the first place that the order of the 5th January dismissing the suit was passed not under Order IX, rule 8, but under Order IX, rule 4. In my opinion there is no foundation at all for this contention. It does not follow because the defendant applied for time that he was not really ready to proceed and that therefore he should be held to have been absent. But the respondent is on stronger ground when he urges that Order XLIII, rule 1(c), does not cover the present case, since the dismissal on the 26th March is not an order under Order IX, rule 9, rejecting an application for an order to set aside the dismissal of the suit. The decision in

1928.

RAM LAL
PATRAK
v.
MAHARAJA-
DHIRAJ SINGH
RAHESHWAR
SINGH
BARADAR.

MACPHER-
SON, J.

1928.

BAJIT LAL
PATHAK

v.

MAHARAJA-
DHIRAJ SIR
RAHESHWAR
SINGH
BAHADUR.MACPHER-
SON, J.

Jagdish Narain Prasad Singh v. Harbans Narain Singh (1), is in his favour, and though a different view had been expressed in other High Courts, we are bound by the decision cited which is in accordance with the view which has obtained throughout in this Court. The preliminary objection therefore must be sustained and the appeal must be dismissed.

But we consider that in the circumstances it is reasonable to permit the appellant to press his case under the revisional jurisdiction of this Court. The facts which have already been set out show clearly that the plaintiff had had treatment in the trial Court. On at least seven occasions the defendant's petition for time was granted, while the plaintiff was ready. On two occasions both parties applied for time. On the 5th January the defendant actually applied for time at 11-20 A.M. The Court might well have had regard to the previous history of the litigation at which the plaintiff had so often, and the defendant had never been ready. *Prima facie* plaintiff, though a little late, possibly for the reason stated (though we need not decide that point), came bona fide to carry on the litigation. But he has even stronger ground in connection with the procedure on the 12th March regarding the hearing of the petition under Order IX, rule 9. It seems clear from the order sheet that the case had already been disposed of for the day and nothing remained except to write the order in the *ex parte* proceeding when the opposite party applied to be allowed to appear and received the permission without any payment of costs to the petitioner. If the petitioner and his witness were still in Court, it is not understood why they were not at once placed in the witness box for cross-examination instead of being brought back a fortnight later. This order inflicted a distinct hardship on the petitioner, even if passed in his presence. Then it may well be true that on the 26th March the petitioner only arrived a few minutes

(1) (1917) 2 Pat. L. J. 720.

later as he states. The circumstances of the case bring it within section 115(c) and it is open to this Court in revision, and it is warranted by the facts before us, to direct that the application under Order IX, rule 9, should be restored to the file of the learned Subordinate Judge and heard by him at an early date. The applicant will submit himself and his witness for cross-examination and the opposite party will be entitled to adduce the evidence of the stamp-vendor or any other evidence which he considers proper. The defendant-respondent will be allowed in this Court his costs of the appeal.

ADAMI, J.—I agree.

Case remanded.

CRIMINAL MISCELLANEOUS.

Before Adami and Macpherson, JJ.

SAILENDRA NATH CHAKERVARTY

v.

KING-EMPEROR.*

1928.

Jan., 20.

Santal Parganas Justice Regulation, 1893 (Beng. Reg. V of 1893), section 4(1)—enquiries and trials before a Magistrate—Commissioner of Bhagalpur is the High Court—Patna High Court, jurisdiction of, to transfer a case during enquiry by a Magistrate—Letters Patent, paragraph 17 and 22, scope, of.

Under section 4(1), Santal Parganas Justice Regulation, 1893, in the Santal Parganas the words "High Court" mean, first, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Court of Patna, and in reference to proceedings against other persons:—

- (a) in cases tried by the Court of Session and in appeals under section 417 from original or appellate orders of acquittal, the High Court of Patna; and
- (b) in other cases the Commissioner.

* Criminal Miscellaneous Case.