

refer to *Govindaswami Kadavaran v. Kaliaperumal Munayathiriyar*⁽¹⁾. The Calcutta High Court also has not gone so far, inasmuch as it is of the view that the aggrieved party though he may not be able to appeal against the order recording the compromise, may nevertheless appeal against the decree passed in accordance with that order; and in that case the appeal preferred against the order directing the compromise to be recorded was treated as an appeal against the decree itself upon payment of proper court-fee. In trying to get rid of the anomaly under section 97 of the Code of Civil Procedure to my mind the Calcutta High Court's decision, with great respect to the learned Judges who decided that case, has created another anomaly as regards the right of appeal against the decree passed by consent under section 96, clause (3), of the Code.

In the present case the appellant has also filed a pauper appeal against the final decree.

The order that I would propose to make in the present case is that the miscellaneous appeal with which we are dealing at present be admitted.

S. A. K.

Appeal admitted.

REVISIONAL CIVIL.

Before Ross and Chatterji, JJ.

MUFTI REAZUDDIN

v.

LALA MAHESHANAND.*

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 dismissed for default—whether any appeal lies.

An appeal lies, under Order XLIII, rule 1(d), Code of Civil Procedure, 1908, from an order dismissing for default an application to set aside an ex parte decree.

*Civil Revision nos. 91, 166 and 167 of 1928, from an order of A. C. Davies, Esq., i.c.s., District Judge of Shahabad, dated the 14th of January 1928.

(1) (1922) 66 Ind. Cas. 837.

1928.

SEIMATY
SABITRI
THAKURAIN
v.
F. A. SAVI.

1928.

Dec., 17.

1928. *Kumud Kumar Bose v. Hari Mohan Samadar*(1), *Pakari Pramanik v. Sarat Sundari Debya*(2) and *Mussammat Bodhia v. Ram Chandra Marwari*(3), followed.
- MUFTI REAZUDDIN
v.
LALA MAHESHANAND.
Bajit Lal Pathak v. Maharajadhiraj Sir Rameshwar Prasad Singh Bahadur(4), dissented from.
- Jagdish Narain Prasad Singh v. Hari Bans Narain Singh*(5), distinguished.

The facts of the case material to this report were as follows :

These revisions arose out of applications under Order IX, rule 13, of the Code of Civil Procedure, to set aside certain ex parte decrees passed against the petitioners. On the date of hearing of the applications the applicants filed petitions for time, which were rejected by the learned Subordinate Judge. After this their pleaders retired from the case and the original applications were dismissed for default in the presence of the plaintiff-opposite party. The District Judge in appeal considered that no appeal lay against the orders in question and in that view he dismissed the appeals before him.

Nurul Hasan (with him *Syed Ali Khan*), for the petitioner :—An appeal lies from an order dismissing for default an application for setting aside an ex parte decree. For the purposes of Order XLIII, rule 1(d), it is immaterial that the application to set aside the ex parte decree had been dismissed, not on the merits, but for default. I rely on *Kumud Kumar Bose v. Hari Mohan Samadar*(1), *Sheikh Sacheeni v. Sheikh Kanta Hazi*(6), *Pakari Pramanik v. Sarat Sundari Debya*(2), *Bahadur Singh v. Wasawa Singh*(7), *Narayan Putapa Chandragatgi v. Vaikunt Subaya Sonde*(8)

(1) (1915) 30 Ind. Cas. 45.

(2) (1917) 37 Ind. Cas. 835.

(3) (1927) I. L. R. 6 Pat. 474.

(4) (1928) I. L. R. 7 Pat. 333.

(5) (1917) 2 Pat. L. J. 720.

(6) (1916) 36 Ind. Cas. 798.

(7) (1922) 69 Ind. Cas. 713.

(8) (1927) I. L. R. 51 Bom. 67, F. B.

and *Mussammatt Boāhia v. Ram Chandra Marwari*(¹). There is no conflict between the decision in *Mussammatt Bodhia v. Ram Chandra Marwari*(¹) and the case of *Bajit Lal Pathak v. Maharajadhiraja Sir Rameshwar Prasad Singh Bahadur* (²) which deals with an order dismissing for default an application for restoring a suit dismissed for default.

1928.

 MUFTI
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 NAND.

The case of *Jagdish Narain Prasad Singh v. Hari Bans Narain Singh*(³) on which *Bajit Lal Pathak v. Maharajadhiraja Sir Rameshwar Prasad Singh Bahadur*(²) is based has no application either.

Sambhu Saran (with him *Dhanendra Nath Verma*), for the opposite party: An appeal will lie only in cases where the application to set aside the ex parte decree is dismissed on the merits. The case of *Bajit Lal Pathak v. Maharajadhiraja Sir Rameshwar Prasad Singh Bahadur*(²) which follows *Jagdish Narain Prasad Singh v. Hari Bans Narain Singh*(³) supports my contention.

[Ross, J.—But the case of *Jagdish Narain Prasad Singh v. Hari Bans Narain Singh*(³) related to an application for setting aside an order dismissing the application under Order IX, rule 9, for restoring a suit dismissed for default.]

In any case the view taken in *Bajit Lal Pathak v. Maharajadhiraja Sir Rameshwar Prasad Singh Bahadur*(²) is contrary to the decision in *Mussammatt Bodhia v. Ram Chandra Marwari*(¹). Although *Bajit Lal Pathak v. Maharajadhiraja Sir Rameshwar Prasad Singh Bahadur*(²) refers to clause (c) of rule 1, Order XLIII, the principle will also apply to clause (d), the language of the two clauses being precisely the same.

Noorul Hasan, in reply.

S. A. K.

(1) (1927) I. L. R. 6 Pat. 474. (2) (1928) I. L. R. 7 Pat. 833.

(3) (1917) 2 Pat. L. J. 720.

1928.

MUFTI
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J.

CHATTERJI, J.—In my opinion, the order of the District Judge cannot be supported. Order XLIII, rule 1(d), of the Civil Procedure Code specifically provides for an appeal against an order under Order IX, rule 13, rejecting an application to set aside a decree passed *ex parte*. It is, however, urged on behalf of the respondents that the provision for an appeal is limited only to the case where an application under Order IX, rule 13, is dismissed on merits. There is no reason to take such a narrow view of the clause and to read into it words which are non-existent. The present Code of Civil Procedure has made a departure in the matter of appeal in suits dismissed for default, because the definition of the word 'decree' excepts such dismissals of suits from its operation. If the Legislature intended to lay down that no appeal should lie from an order of dismissal of a rehearing petition for default in the presence of the opposite party, suitable provision would have been made in the Code. I am supported in this view by various decisions of the Calcutta High Court; *Kumud Kumar Bose v. Hari Mohan Samadar*⁽¹⁾ and *Pakari Pramanik v. Sarat Sundari Debya*⁽²⁾ and also by a decision of this Court, in *Mussammat Bodhia v. Ram Chandra Marwari*⁽³⁾.

Reference was made on behalf of the respondent to the cases of *Bajit Lal Pathak v. Maharajahdiraja Sir Rameshwar Prasad Singh Bahadur*⁽⁴⁾ and *Jagdish Narain Prasad Singh v. Hari Bans Narain Singh*⁽⁵⁾. The last mentioned case arose out of an application to set aside an order dismissing the plaintiff's application for the restoration of a suit dismissed for default. It is settled law that an application like that cannot be one under Order IX, rule 9, and as such the order dismissing such an application cannot fall within the purview of Order XLIII, rule 1, clause (c), of the Civil Procedure Code. The case of *Jagdish Narain*⁽⁵⁾

(1) (1915) 30 Ind. Cas. 45.

(3) (1927) I. L. R. 6 Pat. 474.

(2) (1917) 37 Ind. Cas. 335.

(4) (1928) I. L. R. 7 Pat 333.

(5) (1917) 2 Pat. L. J. 720.

is therefore no authority for the position taken up by the learned Advocate for the respondent. The other case relies upon *Jagdish Narain's*(1) case, but in effect lays down a different rule. I do not agree with that decision, but as the case dealt with another clause of the rule no reference to the Full Bench is necessary.

I would allow the applications, set aside the orders of the District Judge and remand the cases for the rehearing of the appeals by him.

Ross, J.—I agree.

Cases remanded.

CRIMINAL REFERENCE.

Before Adami and Wort, JJ.

JANAKDHARI SINGH

v.

KING-EMPEROR.*

1928.

Dec. 19.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 203, 436 and 537—order for further enquiry—issue of summons without enquiry—irregularity—failure of justice, proof of—section 537, Explanation.

Where a further enquiry into a complaint was ordered under section 436, Code of Criminal Procedure, 1898, and the magistrate thereon summoned the accused persons without holding a further enquiry and convicted them,

Held, that the procedure adopted by the magistrate was merely irregular and that the conviction could not be set aside in the absence of proof of failure of justice.

V. M. Abdul Rahman v. The King-Emperor(2) and *Subrahmania Ayyar v. The King-Emperor*(3), referred to.

*Criminal Reference no. 57 of 1928, made by Rai Bahadur Surendra Nath Mukerji, Sessions Judge of Bhagalpur, by his letter no. 2410/X.R., dated the 17th August 1928.

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

(2) (1927) I. L. R. 5 Rang. 53, P. C.

(3) (1902) I. L. R. 25 Mad. 61, P. C.

1928.
 MUFTI
 REAZUDDIN
 v.
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 MAHESHA-
 NAND.
 CHATTERJI,
 J.