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treated him in Patna for two or three weeks before calling in any consultant and that Dr. Barat came in as consultant during the last two or three weeks of the illness, and that Colonel Sunder also came three or four times, i.e., after the first two or three weeks of Alak Prakash's stay in Patna.

The District Judge who saw and heard Dr. Sen in the witness box believed his evidence on this material point, and their Lordships consider it impossible to reject it without ascribing to a member of an honourable profession deliberate falsehood, for which no ground has been made out.

Taking the whole of the evidence and considering the position of both the doctors concerned, their Lordships agree with the finding of the trial Court that Alak Prakash was in Patna and not in Bihar on the 2nd February, 1913, and that the will bearing date the 2nd February, 1913, of which probate was granted on the 25th March, 1914, is not the will of Alak Prakash Singh and is a fabricated document.

Their Lordships will therefore humbly advise His Majesty that the judgment of the High Court should be set aside and the judgment of the District Judge restored, with costs of the appeal to the High Court and of this appeal.

Solicitor for appellant: *T. L. Wilson & Co.*

Solicitor for respondent: *W. W. Box & Co.*

APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

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PANDIT MAHABIR PRASAD DUBEY

v.

SHEODEYAL PATHAK.*

Code of Civil Procedure, 1908 (Act V of 1908), Order IX, rules 8 and 9, and Order XVII, rules 3 and 4—circumstances in which each rule is applicable.

*Appeal from Original Decree no. 162 of 1925, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 6th August, 1925.

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The provision, of Order XVII, rule 3, Code of Civil Procedure, 1908, apply only where the hearing of a suit has commenced and an application for an adjournment is then made by one of the parties.

Where, therefore, before the hearing of a suit is commenced, the plaintiff fails to appear on an adjourned date, the Court has to proceed under rule 2 and not rule 3; that is to say, it has power to dismiss the suit under Order IX, rule 8, so as to give the plaintiff an opportunity of having the dismissal set aside under Order IX, rule 9.

Appeal by the applicant.

The facts of the case will appear from the judgment of Das, J.

S. N. Roy and *Satyadev Sahay*, for the appellant.

S. M. Mullick, and *Jalgobind Prasad Sinha*, for the respondents.

DAS, J.—This appeal is directed against the order of the learned District Judge of Gaya dated the 6th August 1925, by which he dismissed an application for grant of probate under the provision of Order XVII, rule 3, with costs. Now the order itself shows that the hearing of the suit had not commenced. It appears that the petitioner took time to produce his evidence from time to time. Ultimately the Court refused to grant him further time and dismissed the application; but it is to be observed that the hearing of the suit had not commenced before the learned District Judge. That being so, Order XVII, rule 3, does not apply. It is well established that Order XVII, rule 3, only applies where the hearing of a suit has commenced and an application for an adjournment is then made by one of the parties. It is also established that when, before the hearing of a suit is commenced, the plaintiff fails to appear on an adjourned date, the Court has to proceed under rules 2 and 3; that is to say it has power to dismiss the suit under Order IX, rule 8, so as to give the plaintiff an opportunity of having the dismissal set aside under

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Order IX, rule 9. As the matter stands, the plaintiff had no opportunity to have the order of dismissal set aside. This being so, the order of the learned District Judge must be set aside.

The result of this is that the probate case must be taken to be pending, and the learned District Judge will fix a date and then proceed with the hearing of the suit. If the plaintiff refuses or fails to appear on that date, then it will be open to him to dismiss the suit under Order IX, rule 8, of the Code. The appellant is entitled to the costs of this appeal.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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Dec., 15.

JOHARMAL MATHURADAS FIRM

v.

HIRA LAL SHEWCHAND ROY.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 19 *and Schedule* 1, *Articles* 85 *and* 115—" *mutual open and current account,*" *what constitutes—suit for balance due—Article* 85, *applicability of—promise to pay what is found due on examination of accounts—whether is an acknowledgment—section* 19.

The term " mutual open and current account " as used in Article 85, Schedule 1, Limitation Act, 1908, means an account which consists in reciprocity of dealings between the parties and not merely of items on one side though made up of debits and credits.

Although a shifting balance is a test of mutuality, its absence is not conclusive proof against mutuality.

*Second Appeal no. 1143 of 1925, from a decision of J. A. Saunders, Esq., I.C.S., District Judge of Manbhum-Sambalpur, dated the 12th May, 1925, reversing a decision of Maulavi Najabat Husain, Munsif of Purulia, dated the 31st March, 1924.