1929.

AMBIKA PRASHAD SINGH v. ACHAMBIT THAKUR.

FAZL ALI, J.

it must be held that under section 44 of the Bengal Tenancy Act they are liable to ejectment only on one or more of the grounds mentioned in that section and not otherwise. In this case it has not been shown that any of the conditions mentioned in section 44 are present and the defendant first party had made themselves liable to ejectment on one or more of the grounds mentioned in that section. That being so, it must be held that the suit has been rightly dismissed by the lower appellate court.

The learned Advocate for the appellant, however, contends that the lower appellate court should not have treated the defendants first party as non-occupancy raiyats. I am afraid, however, this position cannot be consistently taken up by the learned Advocate for the appellant at this stage when it was urged on behalf of the appellants themselves before the District Judge that the defendants should be treated as non-occupancy raiyats and when on that ground the District Judge was asked to hold that the defendants first party were not under-raiyats and that no notice to quit was in the circumstances of the case necessary. In my opinion the appeal must fail and be dismissed but without costs.

CHATTERJI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

1929.
April, 30.
May, 1, 14.

RAM LAL GOPE
v.
KALI PRASAD SAHU.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 105 *and Order XLI, rule* 18—*Appellant's failure to file*

*Appeal from Appellate Decree no. 360 of 1928, from a decision of Babu Narendra Nath Chakravarty, Subordinate Judge of Monghyr, dated the 29th August, 1927, affirming a decision of Babu Ananta Nath Banarji, Munsif of Monghyr, dated the 22nd September, 1926.

affidavit in proof of service—appeal, dismissal of, whether illegal—order dismissing appeal against some respondents, whether can be challenged in appeal from final decree—ex parte decree, appeal from—order refusing adjournment, propriety of, whether can be questioned in appeal—section 105, scope of.

Under Order XLI, rule 18, Code of Civil Procedure, 1908, a court has no power to dismiss an appeal in consequence of the appellant's failure to file an affidavit in proof of service of notice on the respondents, where notice on them had been served on the peon's own identification.

An order dismissing for default an appeal against some of the respondents and which entails the dismissal of the entire appeal, is an order "affecting the decision of the case"; and any error, defect or irregularity in that order can be taken as a ground of objection in an appeal against the final decree of the appellate court under section 105, Code of Civil Procedure, 1908.

Semble, that in an appeal from the ex parte decree it is open to the appellant to question the propriety of an order refusing an adjournment and proceeding to hear the case ex parte.

S. N. Mullick v. *Ganga Gope* (1), *Sadhu Krishna Ayyar* v. *Kuppan Ayyangar* (2), followed.

Jonardan Dobey v. *Ramdhone Singh* (3), *Hummi* v. *Azizuddin* (4) and *Raj Chandra Dhar* v. *Messrs. K. D. O. C. Ray* (5), distinguished.

Appeal by the defendants.

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

Siva Narayan Bose, for appellants.

Syed Ali Khan, for respondents.

CHATTERJI, J.—This appeal arises out of a mortgage suit brought on the foot of a mortgage said to have been executed by defendant first party in

(1) (1925) 91 Ind. Cas. 167.
(2) (1907) I. L. R. 30 Mad. 54, F. B.
(3) (1896) I. L. R. 23 Cal. 738.
(4) (1917) I. L. R. 39 All. 143.
(5) (1924) I. L. R. 2 Rang. 108.

1929.

RAM LAL GOPE v. KALI PRASAD SAHU.

favour of the plaintiffs for paying rent to the malik and also for some other family necessity. The claim was for Rs. 151 as principal and Rs. 635 as interest with six monthly rests. The plaintiff is in possession of the mortgaged property by virtue of an earlier sudbharna bond executed by the defendants in favour of one Ramprasad Bhagat who assigned the same to the plaintiffs. The defence, amongst other things, is that there was no passing of consideration under the deed in question and that the defendants first party were not liable for payment of rent, because the liability attached to the plaintiffs as sudbharnadars in possession.

There was a reference to arbitration but it was returned unexecuted by the arbitrators. Then there was another reference to arbitration but it appears that the vakalatnama did not empower the pleaders to make a reference to arbitration and therefore the parties were directed to file a proper vakalatnama on the 13th of August, 1926. On the 19th of August the defendants applied for time to file vakalatnama, but the Court did not apparently grant time and rejected the petition filed by the parties for referring the suit to arbitration and adjourned it to 21st September, 1926, for disposal. 21st September, 1926, was, however, a holiday and the suit was taken up on the 22nd when the defendants first party applied for time on the ground that their witnesses who had come on the preceding day had gone to Baidyanath Dham. The Court rejected that petition as also the petition of defendant 2nd party (subsequently transferee) and decreed the suit ex parte after the defendants' pleaders retired from the suit stating that they had no instructions. The defendants first party preferred an appeal to the District Judge who dismissed it as against respondents 5 to 8 for failure to prove service of notice on them and transferred the appeal to the file of the second Subordinate Judge for disposal,

The learned Subordinate Judge stated that respondent no. 8 had appeared and the appeal could not have been dismissed under Order XLI, rule 18, against him; but the order regarding respondents 5 to 7 held good. In this view he held that the appeal having been dismissed against some of the plaintiffs-respondents it could not be heard against any of the respondents. Further he held that the defendant-appellants should have taken warrant of arrest against their witnesses if they thought they would go away after attending the Court on a holiday. In the result, he dismissed the appeal.

It is urged by the learned Advocate for the appellants that Order XLI, rule 18, had no application and that the learned District Judge had no jurisdiction to dismiss the appeal as against respondents 5 to 8. Order XLI, rule 18, empowers the Court to dismiss an appeal where notice to the respondent has not been served in consequence of the appellant's failure to deposit cost. The ordersheet shows that there was no such failure on the part of the appellant but it was considered that the appellant was required to file identifier's evidence and on a consideration of this failure the appeal appears to have been dismissed. Therefore, the case does not come within the purview of this rule nor does it come under Order XLI, rule 17, which deals with the dismissal of appeal for appellant's default in appearance. It is, however, contended on behalf of the respondent that the appellant should have applied for restoration of the appeal under Order XLI, rule 19, and cannot agitate this matter in a second appeal. Now, Order XLI, rule 19, is applicable where an appeal is dismissed for appellant's default in appearance under rule 11 and sub-rule (2) of rule 17 or when the appeal is dismissed in consequence of appellant's failure to deposit cost under rule 18; but none of these conditions exist in the present case and so it cannot be said that it was the bounden duty of

1929.

RAM LAL GOPE v. KALI PRASAD SAHU.

CHATTERJI, J.

the appellants to make an application under Order XLI, rule 19. Whatever that may be, they are, in my opinion, entitled under section 105 of the Code of Civil Procedure to raise this point as a ground of objection in the memorandum of appeal if there is an error, defect or irregularity in the order affecting the decision of the case.

A perusal of the service report shows that notice was served on the respondents 5 to 8 on the identification of the serving peon himself. There was no identifier. The peon did swear to an affidavit as to the service. The Court was, therefore, in error in directing the appellants to file an affidavit in proof of service of notice and in ultimately dismissing the appeal as against these respondents for failure to file such an affidavit. This error or irregularity has affected decision of the case, because, the lower appellate court has dismissed the appeal in its entirety on the ground that it had already been dismissed against some of the respondents. The High Court is competent in second appeal to enter into the question of a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon its merits. It is apparent from what has been said above that this matter can be considered in an appeal against the final decree of the appellate court. I hold that the learned District Judge was not justified in dismissing the appeal as against respondents 5 to 8 and consequently the appellate court was in error in holding that the appeal was incompetent.

It is next urged by the learned advocate for the appellant that the trial court was wrong in taking up the case on a date not fixed for hearing and in passing an ex parte decree on such a date after rejecting the defendant's application for time. It is contended by the other side that this is a matter which cannot be considered in an appeal against the decree, on the alleged ground that this should be confined to the

merits of the case; and in support of this contention reference is made to *Raj Chandra Dhar* v. *Messrs. K. D. O. C. Ray* (1) which follows *Jonardan* v. *Ramdhone* (2) and *Hummi* v. *Azizuddin* (3) and dissents from the decision of the Full Bench of the Madras High Court in *Krishna* v. *Kuppan* (4). The view expressed in the case of *Raj Chandra Dhar* (1) is that in an appeal from an ex parte decree the only question with which the appellate court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree and that the question of due service of the summons is the subject-matter not of an appeal from the decree but of a special proceeding under Order IX of the Civil Procedure Code. I agree that the question of due service of summons may not be the subject-matter of an appeal from the decree but should be the subject-matter of a proceeding under Order IX of the Civil Procedure Code and then of an appeal under Order XLIII, rule 1; but if the ruling be taken as embodying that an appellate court cannot under any circumstances go beyond the consideration of the question whether the evidence is sufficient to support the decree I beg to differ from it. As a matter of fact I do not think that the decision lays down any such broad and general proposition as is contended on behalf of the respondents. The use of the word "ordinarily" makes the position clear.

In the Calcutta case of *Jonardan Dobey* (5) the point under consideration was whether section 108 of the Code of Civil Procedure of 1882 did not apply if a suit was decreed ex parte by reason of the defendant's non-appearance at an adjourned date. In discussing that question the Judges, referring the matter to the Full Bench, thought that a remedy by appeal against the original decree would not entitle

(1) (1924) I. L. R. 2 Rang. 108.
(2) (1896) I. L. R. 23 Cal. 738 (743).
(3) (1917) I. L. R. 39 All. 143.
(4) (1907) I. L. R. 30 Mad. 54, F. B.
(5) (1896) I. L. R. 23 Cal. 738.

1929.

RAM LAL GOPE v. KALI PRASAD SAHU.

CHATTERJI, J.

a defendant to show why he was unable to appear on an adjourned date and observed that "such a remedy can be efficacious only in those cases, and their number must be small, in which the ex parte decree is either wrong in law on the face of the proceeding or is based upon evidence so weak that even though unrebutted it is insufficient to sustain the decree". This is an observation by way of obiter dictum and the point whether the Court could go into the question of an improper refusal of an application for time did not come up for consideration specifically in that case. Even then their Lordships concede that it is possible in appeal to show that an ex parte decree is wrong on the face of the proceeding. In the case of *Hummi* v. *Azizuddin* (1), the defendant did not appear on an adjourned date for hearing and the Court thereupon heard evidence on behalf of the plaintiff and passed an ex parte decree. Later on an application was made on behalf of the defendant for restoration of the case but this application was refused by the Munsif. Then the defendant preferred two appeals —one against the decree and another against the order rejecting the application for restoration. Both these appeals were heard at the same time by the District Judge who dismissed the appeal against the order rejecting the application for restoration on the ground that the defendants had not shown sufficient cause for their absence and also dismissed the appeal against the decree. After that the defendants preferred a second appeal against the decree of the District Judge dismissing the appeal against the original decree but did not move the High Court against the dismissal of the appeal in the matter of the application for restoration of the suit. It was contended before the High Court in second appeal against the decree of the District Judge confirming the original decree, that the Munsif ought not to have disposed of the case in the absence of the defendants;

(1) (1917) I. L. R. 39 All. 143.

and it was held that this was a matter which could be considered in that appeal. The circumstances of that case are peculiar and the facts are quite distinguishable.

In my opinion it is open to a defendant to prefer an appeal against the ex parte decree as also to make an application under Order IX, rule 13, and then to come up in appeal under Order XLIII, rule 1, clause (*d*). If he follows the special procedure of Order IX, he will have an opportunity of placing before the Court materials as to why he was precluded from being present when the case was tried ex parte. On the other hand, if he proceeds straight in an appeal against the original ex parte decree he will be at some disadvantage, because, the Court of appeal will not be in possession of the materials which prevented his appearance. If, however, the defendant can show that there is an error, defect or irregularity, in an order rejecting his application for time, which affects the decision of the case, there is no reason why he will not succeed even if he does not adopt the special procedure for a restoration of the suit and comes up in second appeal so long as he can bring the case within the purview of section 100 of the Code of Civil Procedure. The view that I take is supported by the Full Bench decision of the Madras High Court in *Sadhu Krishna Ayyar* v. *Kuppan Ayyangar* (1) where also an appeal was preferred by a defendant against an ex parte decree without making an application under the special procedure provided by the Code for setting aside the said decree. I may also refer to a decision of this Court in *S. N. Mullick* v. *Ganga Gope* (2) where it was held that the improper refusal of the Court to grant time to the defendant had affected the decision of the case and he was entitled in appeal to question the propriety of the order refusing an adjournment.

(1) (1907) I. L. R. 30 Mad. 54, F. B.
(2) (1925) 91 Ind. Cas. 167.

1929.

RAM LAL GOPE v. KALI PRASAD SAHU.

CHATTERJI, J.

Holding as I do that the appellants were not confined in attacking the ex parte decree to the merits of the case let us see whether the Court was justified in proceeding with the suit on the 22nd September and passing an ex parte decree after rejecting the defendant's petition for time. The suit had been adjourned from the 19th of August to the 21st of September, 1926. That was a holiday and therefore the suit was taken up not on the date to which the hearing of the suit had been adjourned but on the following day when it was decided ex parte. Order XVII, rule 2, provides that the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX, where *on any day to which the hearing of the suit is adjourned*, the parties or any of them fail to appear. It is evident, therefore, that the Court was not justified in proceeding to pass an ex parte decree under Order IX, on a date to which the hearing of the suit had not been adjourned. In the next place the defendants first party applied for time on that date on the allegation that their witnesses had come on the preceding day but had gone away. The correctness of this allegation is not disputed in the Munsif's order dismissing the petition for time or in the judgment of the appellate court which states :

> " The appellants should have taken warrant of arrest against their witnesses if they thought they would go away after attending the Court on the holiday."

No party can anticipate that the date was fixed for a holiday or that the witnesses would go away. So how could they have taken out any warrant of arrest? It was clearly a case in which the petition for time filed on behalf of the defendants first party should have been granted and no ex parte decree should have been passed.

Lastly, it is contended on behalf of the appellants that if it be assumed that the appellants are limited to the ground of insufficiency of evidence in attacking the ex parte decree that has been passed, even then

1929.

RAM LAL GOPE v. KALI PRASAD SAHU.

CHATTERJI, J.

they must succeed. The burden of proving the want of consideration rests originally on the defendants, but it is urged that when it is conceded in the plaint that the plaintiffs are the sudbharnadars in possession of the mortgaged property and when the plaintiff's case is that at least part of the consideration money was for payment of rent, then the question would arise whether there was a special contract whereby the duty of paying this public charge devolved on the mortgagor, because the mortgagee in possession is bound under the law to pay rent in absence of the contract. There is no evidence on the record that there was any special contract or that the rent was payable for some other land. Therefore, it is a moot question whether the evidence is sufficient for a decree in favour of the plaintiffs. All these aspects have not at all been considered by the trial court or by the learned Subordinate Judge in appeal.

In the result the appeal is allowed. The judgments and decrees of the Courts below are set aside and the suit remanded to the trial Court for decision according to law after giving an opportunity to both the parties to adduce evidence. The costs to abide the result.

FAZL ALI, J.—I agree.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

Before Wort and James, JJ.

MUHAMMAD SADIK KHAN
v.
MASIHAN BIBI.*

1929.

May, 14, 15.

Pardanashin lady, transaction by—onus to prove that the lady understood it lies on the person dealing with her—

*Appeal from Appellate Decree no. 1440 of 1926, from a decision of Babu Pramatha Nath Bhattacharji, Subordinate Judge of Palamau, dated the 24th August, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Palamau, dated the 6th March, 1926.