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there is no doubt that had the order to shew cause been made on a subsequent date or after some interval, the provisions of the law must have been held not to have been complied with. But here in the present case it is obvious, on the statement of the Magistrate, that the two orders were really passed at one and the same time and were a part of the same proceeding. In the case of *Ghulam Muhammad* v. *Vir Bhan*(1) the learned Chief Justice of the Lahore High Court finding that both the orders were passed on the same day and one followed the other, was of opinion that there had been a substantial compliance with the requirements of section 250, sub-section (1), of the Criminal Procedure Code. He followed the case of *Emperor* v. *Punamchand Hirachand*(2). The decision in the case of *Jiraj Singh* v. *Bansi*(3) is to the same effect. There have also been decisions which are to the same effect under the section before its amendment.

I would, therefore, hold that where the order to shew cause is practically simultaneous with the order of acquittal or discharge the provisions of the section have been substantially complied with.

I think, therefore, that the reference must be rejected and the order of the Deputy Magistrate must stand.

CHATTERJI, J.—I agree.

APPELLATE CIVIL.

1929.

April, 19.

Before Adami and Chatterji, JJ.

BALDEO LALL

v.

MUSAMMAT MATISARA KUER.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 105, *scope of*—"*error, defect or irregularity*", *whether*

*Appeal from Appellate Decree no. 671 of 1926, from a decision of Rai Bahadur A. N. Mitter, District Judge of Saran, dated the 16th February, 1926, confirming a decision of Babu Anjani Kumar Sahai, Munsif of Siwan, dated the 25th February, 1925.

(1) (1927) 102 Ind. Cas. 560. (2) (1906) 8 Bom. L. R. 847.
(3) (1925) 23 All. L. J. 1054.

extends to matters of fact—ex parte decree, appeal against—order setting aside ex parte decree against some only of the defendants, propriety of, whether can be questioned in appeal—order setting aside entire decree, whether can be challenged.

Section 105, Code of Civil Procedure, 1908, provides :

"(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

Held, on a review of the following cases :

Chintamani v. *Raghunath*(1), *Tasadduc Hussain* v. *Hayat-unnissa*(2), *Krishna* v. *Mahesh*(3), *Mohammad Nurul* v. *Manohar*(4), *Nishikant* v. *Umar Lall*(5), *Gopala Chetti* v. *Subbier*(6), *Nand Ram* v. *Bhupal*(7) and *M. S. Mohammad* v. *The Collector of Rangoon*(8),

(i) that the error, defect or irregularity referred to in the section must be either in matters of law or procedure and not in matters of fact;

(ii) that in an appeal from an ex parte decree the propriety of an order under Order IX, rule 13, setting aside an ex parte decree against some only of the defendants can be questioned; and

(iii) that section 105, however, has no application to a case where the entire ex parte decree has been set aside and a point is raised that the decree should not have been set aside at all.

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

Sambhu Saran, for the appellants.

Ram Prasad, for the respondents.

CHATTERJI, J.—The facts which have given rise to this appeal are as follows:—One Chuni Lal had three sons, Tilakdhari, defendant no. 1, Lalbehari,

(1) (1895) I. L. R. 22 Cal. 981.
(2) (1903) I. L. R. 25 All. 280.
(3) (1904-05) 9 Cal. W. N. 584
(4) (1924) 40 Cal. L. J. 588.
(5) (1925) 41 Cal. L. J. 186.
(6) (1903) I. L. R. 26 Mad. 604.
(7) (1912) I. L. R. 34 All. 592.
(8) (1927) I. L. R. 5 Rang. 80.

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defendant no. 2, and Kali Lal, the deceased husband of the plaintiff. The defendants 3 to 5 are the maliks of 3 as. 4 pies patti in mauza Chari forming tauzi no. 1430 wherein the disputed land is situated. Defendants 6 and 7 are the sons of one Lala Rambaran Lal who was the zarpeshgidar of a portion of the share of defendant no. 3. The malik defendants along with the zarpeshgidars, defendants 6 and 7, brought a rent suit in respect of the land in suit against defendants 1 and 2 and obtained an ex parte decree on the 13th March, 1916. Subsequently in execution case no. 11 of 1917 the disputed property was put up to sale and purchased in the name of the father of defendants 6 and 7. The plaintiff's case is that the land in suit fell to the share of the plaintiff's husband on a partition between the three brothers and was in his possession and after his death in that of the plaintiff on payment of rent to the maliks. She assails the decree in the rent suit as well as the sale held thereunder as fraudulent and collusive brought about at the instance of defendants 1 and 2 and further that they (namely, defendants 1 and 2) made the purchase in the farzi name of the father of defendants 6 and 7. She complains that she was dispossessed of the disputed land in 1922 on the strength of the revisional survey entry. On these allegations the plaintiff claims for an adjudication that the decree and the sale in question are collusive, fraudulent and not binding on her, and that the entry in the revisional survey is wrong, and also for recovery of possession of the disputed land. There is a statement that the plaintiff would bring a separate suit for damages and mesne profits against such of the defendants as would be found to be in illegal possession of the land.

The malik, defendant no. 3, filed a written statement contesting the suit and pleading that the plaintiff or her alleged husband had no concern with the disputed land and that the decree was obtained against the recorded tenant and this and the sale held in

execution thereof are valid and operative. There was an averment that the defendant did not admit the plaintiff to be the widow of Kali Lal and further that Kali Lal had died during the lifetime of his father Chuni Lal.

Then defendants 1 and 2 entered into a compromise with the plaintiff admitting her claim. After that the plaintiff asked for expunging the name of defendant no. 3 from the category of defendants. The Court allowed that prayer without notice to defendant no. 3 and without hearing him and passed a decree on compromise against defendants 1 and 2 and ex parte against defendants 4 to 7.

After this, the defendant no. 4 for self and as guardian of defendant no. 5 made an application under Order IX, rule 13 of the Code of Civil Procedure, for setting aside the ex parte decree. The Court by its order no. 17, dated 15th November, 1924, set aside the ex parte decree as against the said petitioners (namely, defendants 4 and 5). In passing that order the Court made the following observations:—

"Besides the present applicants the only defendant who contested this suit was one Rambahal Lal. The plaintiff cunningly expunged him and compromised the suit with other defendants and got ex parte decree against the present applicants. This clearly shows that the plaintiff is not proceeding bona fide. I accordingly hold that summonses were not served on the applicants and the ex parte decree will be set aside."

It will appear from the quotation made above that the Court had no notice of the fact that the ex parte decree had been passed also against two other persons, namely, defendants 6 and 7. Be that as it may, after the restoration of the suit plaintiff filed a petition stating that the defendant no. 5 was a minor and praying that he might be represented by defendant no. 4 as his guardian-ad-litem. Notice was issued to the minor defendant and the proposed guardian and on the date fixed (22nd December 1924) the proposed guardian filed a petition expressing his consent to act as guardian-ad-litem of the minor defendant no. 5 and was appointed as such. Then summonses

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were ordered to be issued to defendants fixing 12th January, 1925, for settlement of issues. Summonses were issued not only against defendants 4 and 5, but also against defendants 6 and 7.

Before the date fixed for settlement of issues and on the 6th January, 1925, a written statement purporting to have been on behalf of defendants nos. 4 and 5 (now described as defendants 3 and 4, because of the elimination of the original defendant no. 3) appears to have been filed admitting the plaintiff's claim. On the 12th January summons was specifically directed to be issued on defendants other than 3 and 4 fixing 2nd February, 1925. On that date defendants 4 and 5 applied for time to file written statements. On the next date, namely, 11th February a written statement was filed by defendants 4 and 5 (now styled defendants 3 and 4); and another written statement was put in by defendants 6 and 7. The suit was adjourned to 13th February. In the meantime, namely, on the 12th February the original defendant no. 3 Rambahal Lal filed a petition to be added as party. On the 13th February the defendant no. 4 (now styled as defendant no. 3) filed a petition supported by an affidavit that the written statement purporting to be filed by him on 6th January 1925 had not been filed by him. After an enquiry into the matter the Court held that the first written statement had been filed by Baldeo Lal, defendant no. 4 (at present defendant no. 3). The Court took this view on two grounds, namely, (*1*) that the vakalatnama was handed over by Baldeo Lal to Moulvi Abid Hussain, pleader, who was unable to identify him at the time of his examination but says

> "I was satisfied about the identity of this man before accepting vakalatnama from him and filing first written statement"

and (*2*) there is no explanation on behalf of Baldeo Lal why he made no pairbi in the suit for $2\frac{1}{2}$ months before 11th February 1925 when the new written statement was filed. The Court rejected the written statement filed by defendants 6 and 7 on the ground

that the ex parte decree had been set aside on the application of Baldeo Lal and Sarjug Lal (defendants 4 and 5) as against them, and they have no locus standi to file a written statement. The petition of Rambahal Lal (original defendant no. 3) for being added as defendant was rejected on the ground as alleged

"that there is no provision in the law for doing so."

After all this the suit was decreed on confession against Baldeo Lal and Sarjug Lal the original defendants 4 and 5. The ex parte decree continued as against defendants 6 and 7. An appeal was preferred to the District Judge by these four defendants, namely, original defendants 4 to 7. The learned District Judge held that the question as to the decree not having been set aside as against defendants 6 and 7 did not arise inasmuch as the Munsif dealing with the application under Order IX, rule 13, had made an order setting aside the decree as against defendants 4 and 5 only and further that the Munsif was right in rejecting the second written statement filed on behalf of defendants 4 and 5 and in proceeding with the case on the basis of the first written statement.

In appeal it is urged that it was competent in appeal against the original decree to question the propriety of the order under Order IX, rule 13, restoring the suit as against defendants 4 and 5 only and that in the circumstances of the present case the entire decree should have been set aside. In support of this contention reference is made to the terms of section 105 of the Code of Civil Procedure, and to the cases of *Nand Ram* v. *Bhupal Singh*(1), *Gopala Chetti* v. *Subbier*(2) and *M. S. Mohammed* v. *The Collector of Toungoo*(3). On the other hand reference may be made to the cases of *Chintamani Dasi* v. *Raghunath Sahu*(4) and *Krishna* v. *Mahesh*(5).

(1) (1912) I. L. R. 34 All. 592.
(2) (1903) I. L. R. 26 Mad. 604.
(3) (1927) I. L. R. 5 Rang. 80.
(4) (1895) I. L. R. 22 Cal. 981.
(5) (1904-05) 9 Cal. W. N. 584.

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Section 105 lays down that where a decree is appealed from, any error, defect, or irregularity in any order affecting the decision of the case may be set forth as the ground of objection in the memorandum of appeal. It is settled law that an error, defect or irregularity in the order may be set forth as a ground even where the interlocutory order is one from which no appeal lies. The error, defect or irregularity referred to in this section must be either in law or procedure and not in matters of fact. There is, however, a conflict of decisions round the above "affecting the decision of the case" in the above section. It has been laid down in a class of cases that the words "affecting the decision of the case" mean affecting the decision of the case with reference to the merits of it. *Chintamani* v. *Raghunath*(1); *Tasadduq Hussain* v. *Hayatun-nissa*(2); *Krishna* v. *Mahesh*(3); *Mohammad Nurul* v. *Manohar*(4); *Nisikant* v. *Umar Lal*(5). On the other hand in *Gopala Chetti* v. *Subbier*(6), the Madras High Court allowed an objection as to the irregularity of an order passed under section 108 of the old Code of Civil Procedure, 1882, in the appeal against the final decree and held that the decree should not have been set aside as against one of the defendants. In *Nand Ram* v. *Bhupal*(7) the Allahabad High Court takes the view that an order under Order IX, rule 13, setting aside an ex parte decree can be attacked in appeal from the final decree. In the case of *M. S. Mohammad* v. *Collector of Toungoo*(8) the view is taken that the propriety of an order setting aside an ex parte decree can be questioned in an appeal against the subsequent decree in the same suit and there is no need to read into section 105 the additional words "on the merits".

I have carefully considered the conflicting rulings and I am of opinion that section 105 can have no operation to a case where the ex parte decree is set aside

(1) (1895) I. L. R. 22 Cal. 981.
(2) (1903) I. L. R. 25 All. 280.
(3) (1904-05) 9 Cal. W. N. 584.
(4) (1924) 40 Cal. L. J. 588.
(5) (1925) 41 Cal. L. J. 186.
(6) (1903) I. L. R. 26 Mad. 604.
(7) (1912) I. L. R. 34 All. 592.
(8) (1927) I. L. R. 5 Rang. 80.

and the point is raised that the decree should not have been set aside at all, because an order so passed merely ensures a hearing upon the merits and cannot be considered to be an order affecting the decision of the case. But where a case cannot be properly decided, because the decree has been set aside only against some of the defendants but should have been set aside also against others, the order must be considered to be an order affecting the decision of the case and in a case like that, section 105 can clearly be invoked. The Calcutta cases dealing either with section 108 or Order IX, rule 13, dealt with applications which had been allowed in their entirety and it was held that the propriety of the order could not be reopened. If the view which I have indicated above be taken as the proper view then the conflicting views will be reconcileable.

Bearing this principle in mind let us approach the facts and circumstances of the present case. Now the suit was practically for the setting aside of the decree obtained not merely by the persons (defendants 4 and 5) who applied for re-hearing but also by the father of defendants 6 and 7. The sale sought to be set aside was held in execution of the decree standing in favour of the father of defendants 6 and 7 as well, and what is more their father was the certified auction-purchaser. It is, therefore, pre-eminently a case in which the decree should have been set aside not merely against the applicants but also against defendants 6 and 7. The original suit cannot in the circumstances of the case be properly adjudicated in the absence of these necessary parties. In fact it is to cover cases like this, that the proviso to Order IX, rule 13, of the present Code of Civil Procedure has been enacted. Rule 13 lays down that the decree should be set aside as against the defendant applying for an order to set it aside and then provides that

> "where the decree is of such a nature that it cannot be set aside as against such defendants only it may be set aside as against all or any of the defendants also."

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It is urged by the learned advocate for the respondent that when defendants 6 and 7 did not appear to set aside the decree and no materials were evidently placed before the Court that the decree should be set aside as against them as well these defendants are precluded from contesting the validity of the order. Now, the proviso itself makes it clear that even if a particular defendant does not apply for the decree to be set aside it is open to the Court to set it aside against him, if the circumstances of the case so demand. It is the bounden duty of the Court to look to the facts of each particular case and consider whether the decree should be set aside against the petitioner only or against other defendants as well. The Court cannot shirk this obvious duty and it cannot be maintained that because defendants 6 and 7 did not appear and submit proper materials before the Court, the Court was justified in passing an improper or wrong order. Seeing that the decree sought to be set aside was passed in favour of the father of defendants 6 and 7 and that the sale by virtue of which the plaintiff is said to have lost her possession was in execution of that decree, and remembering also that the father of defendants 6 and 7 was the certified purchaser and represented along with defendants 4 and 5, the joint body of landlords, the ex parte decree should not have been set aside only against some of the decree-holders who had made the application for setting it aside. The error, defect or irregularity in this particular order affects the decision of the case, because the suit cannot be effectively decided in the absence of defendants 6 and 7 who along with others represented the joint body of landlords who had obtained a decree and caused the sale thereunder. Consequently I am satisfied that this is a matter which falls within the purview of section 105. I am therefore, unable to agree with the view taken by the learned District Judge that the propriety of the order under Order IX, rule 13, cannot be questioned in the present

case. I find that the propriety of order can be questioned and that the decree should have been set aside against defendants 6 and 7 as well.

It is next urged that defendants 4 and 5 should not have been pinned to the written statement purporting to have been filed on their behalf on the 6th January, 1925, and repudiated by them soon afterwards. In reply it is urged on behalf of the respondent that this is a question of fact which we are precluded from going into in a second appeal. Now the learned District Judge has not come to a definite finding that the original statement was actually filed by the defendants 4 and 5. All that he says is that there is no adequate ground for disbelieving the evidence of Maulavi Abid Hussain and the learned Munsif was, therefore, right in rejecting the second written statement and proceeding with the case to decide it on the basis of the first written statement. Now this pleader Maulavi Abid Hussain has stated as mentioned in the order of the trial court that he could not identify Baldeo Lal (defendant no. 4) at the time of his examination. This is what this gentleman has stated in his evidence:—

"I cannot definitely say if Baldeo Lal who is present in this hall was the person who handed over this vakalatnama to me. I can only say that I was satisfied about the identity before accepting the vakalatnama."

He does not say how he was satisfied about the identity; so this evidence on which reliance is placed by the learned District Judge does not carry us far. Then this Baldeo Lal made an application under Order IX, rule 13, for setting aside the ex parte decree. That proceeding was strenuously contested by the plaintiff but succeeded on the 15th November, 1924. On the 22nd December after the service of notice regarding the appointment of guardian of the minor defendant no. 5 he appeared in Court and filed an application expressing his consent to act as guardian-ad-litem. This appearance clearly indicates that he wanted to contest the suit so that an officer

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of the Court might not be appointed. Is it likely he will soon after, namely, on the 6th January, 1925, and even before the date (12th January 1925) fixed for settlement of issues appear and file a written statement admitting the claim? This is inconsistent with the ordinary course of human conduct, especially when it is remembered that the ex parte decree was set aside at his instance after a considerable fight. On the 2nd February defendant no. 4 applies for time to file written statement on his behalf and on behalf of his ward. If really the written statement had already been filed on 6th January why would he make this petition for time? The learned Munsif in accepting the first written statement as actually filed by him was influenced by the consideration, as stated in his order, that this defendant did not take any steps for about two months before the filing of the written statement on the 13th of February. It will appear that he did actually appear on the 22nd December to express his consent to act as guardian-ad-litem. On that date he was appointed as guardian as prayed for and an order was passed directing issue of summons to the defendant fixing 12th January for settlement of issues. This defendant would naturally labour under the impression that summons would be served upon him and it is, therefore, that he did not appear on the 12th of January but appeared later on the 2nd February, the order of which date runs as follows:—

"Summons served. Plaintiff present. Defendants apply for time."

Therefore, one can get sufficient explanation for his non-appearance before the 2nd of February, that is on the 12th of January. All these aspects have not at all been considered in the courts below and bearing in mind that there is no positive finding of the lower court that the original written statement was actually filed by defendants 4 and 5 I am of opinion that the first written statement should have been ignored and the Court should have accepted the later written statement filed on the 11th of February, 1925, by defendant Baldeo Lal and his ward. The

irregularity of this order can certainly be assailed in appeal from the final decree, because it affects the decision itself.

The suit must therefore go back for re-hearing of the case after the acceptance of the written statement filed by the original defendants 4 to 7. * *

* * * * *

ADAMI, J.—I agree.

REVISIONAL CRIMINAL.

Before Terrell, C. J. and James, J.

NARAYAN MAHARANA

v.

KING-EMPEROR.*

1929.

April, 22.

Acquittal—interference with in revisional jurisdiction at instance of a private party—Technical offence, conviction to be recorded in case of—Adjournment, when to be granted.

The High Court will not, in its revisional jurisdiction, interfere with a verdict of acquittal merely to vindicate the position of a private prosecutor where a merely technical offence has been committed, however clearly that technical offence may have been proved.

Where the evidence in a case shows that an offence has in fact been committed by the accused the trying court should record a conviction, but if the offence is of a purely technical nature and the prosecution is inspired by motives other than the pursuit of justice it should impose a purely nominal punishment. The court should not in such a case strain the evidence to show that no offence has been committed.

In criminal cases adjournments should be granted only where they are clearly necessary for the purposes of justice.

**Circuit Court, Cuttack.* Criminal Revision no. 10 of 1929, against an order of N. Senapaty, Esq., I.C.S., District Magistrate of Cuttack, dated the 19th January, 1929.