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MAUNG SAN MYAING *v.* U PON GYAW.

PRATT, J.

It is not necessary to go into the other grounds of appeal.

The decree against third defendant Maung San Myaing cannot stand.

The appeal is allowed and the decrees of the lower Courts as against the present appellant will be set aside and the suit against him dismissed. Appellant will be allowed costs throughout.

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Dec. 10

APPELLATE CIVIL.

Before Mr. Justice Young, Officiating Chief Justice, and Mr. Justice Carr.

RAJ CHANDRA DHAR
v.
MESSRS. K. D. O. C. RAY.*

Ex-parte decree, appeal from an—Relevancy or otherwise of the question of due service of summons—Proper course to question due service or propriety of proceeding ex-parte—Civil Procedure Code (V of 1908), Order IX.—Waiver of service.

Held 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 9 of the Civil Procedure Code.

Held further, that where a defendant puts in appearance, he must be taken to have waived the non-service of summons on him.

Jonardhan Dobey v. *Ramdone Singh*, 23 Cal., 738 ; *Hummi* v. *Aziz-ud-Din*, 39 All., 143—*followed.*

Sadhu Krishna Ayyah v. *Kuppan Ayyangar*, 30 Mad., 54—*dissented from.*

The facts of this appeal are fully stated in the judgment of the learned officiating Chief Justice reported below.

Lambert (senior)—for the Appellant.

Chari—for the Respondent.

YOUNG, OFFICIATING CHIEF JUSTICE.—The only arguments raised before us in this appeal were whether the appellant had been duly served with a summons,

* Civil First Appeal No. 311 of 1922.

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and whether this was material in a regular appeal from a decree.

The appellant appeals as the *Kirta* or manager of a joint Hindu family and claims that he was never rightly served.

The suit was brought against the individual members of this alleged family firm who were described as merchants carrying on business in partnership under the name and style of K. C. Dhar by their managing partner, Gour Chandra Dhar, who was a younger brother of the appellant.

The suit was filed on the 11th August 1921, and on the 20th September 1921, defendants 1 to 5 put in a written statement through the said Gour Chandra Dhar, who, it is not disputed, was duly served on behalf of himself and his brothers, as though the proceedings had been taken against the firm. On the 16th January, over four months after the summons was so served, and over three and half months since a written statement had been put in on behalf of defendants 1 to 5 by defendant 2, and after various steps had been taken in the case, the first defendant appeared by his agent, Personath Chowdhury, and his pleader, Rai Hpaw, and applied for an adjournment to file a written statement alleging that the five brothers had been sued in their own names, and yet the summons had been served on the second defendant alone and the written statement was filed by him alone, though he had no Power of Attorney to represent them in any Court of Law.

The trial Judge passed the following order on this application :— " This application is belated. Service was effected on G. C. Dhar as managing partner of the firm of K. C. Dhar under Order 30, Rule 3. The service on him is effectual. If the first and third to fifth defendants refrained from appearing in Court

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these four months, they have only themselves to blame. I decline to give another adjournment." Defendant's (first defendant's) agent and his pleader then left the Court, and the case proceeded *ex-parte* so far as defendants 1 to 5 were concerned, with the result that a decree was passed against defendants 1 to 5 and the suit was dismissed as against defendant No. 6. For the respondents, it was argued before us (*a*) that the summons was rightly served; (*b*) that it was immaterial whether it was rightly served or not; it being urged that the first defendant had appeared to ask for time and had thereby waived service, and that the real question was whether the Court was justified in refusing the application for time and in proceeding *ex-parte* and that this question, though it would have rightly found a place in an application to set aside the decree and restore the case, could not be considered in a regular appeal in which the only question was whether the evidence upon the record was sufficient to sustain the decree.

Obviously, this last contention must be considered first, as, if it is upheld, there is no advantage to be gained by considering whether the summons was duly served.

In the first place, I may say that I am clearly of opinion that the first defendant waived the question of service by appearing to ask for time, and that the only question is whether the Judge was right or wrong in refusing to grant time. The question whether this can be considered in an appeal from the decree, or only in a proceeding to set aside the decree and restore the case, has been the subject of conflicting decisions.

In *Jonardhan Dobey* v. *Ramdone Singh* (1) it was observed as follows :— " When a decree is passed

(1) (1896), 23 Cal., 738, 743.

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ex-parte against a defendant, a remedy by appeal is now always open to him by section 540 of the Code of 1882 as amended by Act VII of 1888 (section 96 of the present Code). But 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 proceedings or is based on evidence so weak that even though unrebutted it is insufficient to sustain the decree. In the great majority of cases in which a defendant having a good defence has had an *ex-parte* decree passed against him, the disadvantage he labours under is that he has not been able to substantiate his defence by evidence before the Court. Upon the record as it stands the *ex-parte* decree may be unassailable but if the defendant has an opportunity (which he was prevented from having owing to some sufficient cause) of placing upon the record evidence which he could have adduced to substantiate his defence, no such decree should have been passed. The remedy in such a case cannot be by way of appeal which must ordinarily proceed upon the record as it stands."

On the other hand, it has been decided by a Full Bench of the Madras High Court in *Sadhu Krishna Ayyah* v. *Kuppan Ayyangar* (2) that when a suit is decided *ex-parte*, an Appellate Court to which an appeal from the decree is preferred under section 540 of the Code of Civil Procedure (section 96 of the present Code), has jurisdiction to reverse the decree of the Lower Court on the ground that such Court was wrong in proceeding to decide the case *ex-parte* and remanded the suit for re-hearing, referring to the Calcutta *dicta* as *obiter*. "I think," said the Chief Justice "it must be taken that the legislature

(2) (1907) 30 Mad., 54.

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by accident or design has given a right of appeal, apart from the merits, against an order, on the ground that the defendant was not in default in failing to appear, and against an *ex-parte* decree, also apart from the merits, on the same grounds."

The same question also came up in appeal for decision before the Allahabad High Court before Richards, C. J. and Banerji, J. in *Hummi* v. *Aziz-ud-Din* (3) and was answered in the opposite way, Richards, C. J., observing as follows :— "In my opinion once the Munsiff had made the decree in the absence of the defendants he must be deemed to have passed his decree *ex-parte* and if the defendants complained that the decree should not have been passed in their absence, their only remedy was to apply to have it set aside and the case restored. They could no doubt challenge the decree by way of appeal upon the ground that the evidence which the plaintiff had adduced was not sufficient to justify the decree, but they were not entitled in an appeal from the decree to go into any question connected with their non-appearance at the hearing."

I have no doubt but that under Order 17, Rule 2, the suit must be deemed to have been decided *ex-parte*, and that the provisions of Order 9 applied, and that the defendant could have applied to set aside the decree, and the question whether he should have succeeded would depend on the question when he became aware of the suit. But is he confined to this relief, or can he use his grievance as a ground of appeal in an ordinary appeal from the decree ?

I must say that I prefer the reasoning of the Calcutta and Allahabad High Courts and consider that, in an appeal from a decree, the only question

(3) (1917) 39 All., 143.

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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 summons is the subject matter not of an appeal from the decree but of the special proceeding under Order IX.

In this case, it was not contended that the evidence, as it stood, was insufficient to support the decree, and, in the view I take, we are not concerned with the question whether, but for the refusal of the learned trial Judge to grant time, that evidence would have been subject to cross-examination and been supplemented by evidence on the other side.

I would accordingly dismiss the appeal with costs.

CARR, J.—I concur.

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Jan. 23.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne and Mr. Justice Carr.

MAUNG PE GYI AND FOUR

v.

HAKIM ALLY.*

Sale with an option to repurchase within a certain period—Amount of repurchase money left blank in the document—Oral evidence to fill in the blank—Evidence Act (I of 1872) Section 93 and proviso 1 to section 92—Specific Relief Act (I of 1887), section 31—The document, a deed of mortgage by conditional sale—Transfer of Property Act (IV of 1882), section 58 (c)—Presumption as to the amount of repurchase money, when not specified.

Where a deed of sale of land contained a clause by which the purchaser undertook "to re-sell the land to the vendor at his request within three years for Rs. . . . ," *held* that the omission to insert the amount of the price for repurchase was attributable to either an oversight of both parties and was tantamount to a common or mutual mistake or to an intentional omission by the purchaser on whose instructions the deed was prepared for subsequently taking advantage of the omission as against his vendor and would amount to fraud on

* Civil First Appeal No. 60 of 1923 against the decree of the District Court of Myaungmya in Civil Regular No. 9 of 1922.