APPELLATE CIVIL.

Before Mr. Justice Heald, and Mr. Justice Cunliffe.

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Jan. 6.

M. S. MAHOMED
v.
THE COLLECTOR OF TOUNGOO.*

Civil Procedure Code (Act V of 1908), sections 99, 105 (1), Order 9, Rule 13—Whether order setting aside an ex-parte decree can be questioned in an appeal against the subsequent decree in the same suit—Whether order must affect the decision of case "on its merits"—"Sufficient cause" for absence in case of a Government servant.

At the instance of the appellant a reference was made to the District Court to enhance the compensation awarded to him by the Collector in a land acquisition case. The District Court enhanced the award after an *ex-parte* hearing. The Collector was served with notices of the case as to the date of hearing and also before the date of judgment. The Collector now applied to set aside the decree under Order 9, Rule 13 of the Civil Procedure Code alleging in his petition (without any affidavit) that his absence from the case was due to his being on tour and pressure of work. The Judge set aside the *ex-parte* decree and after hearing evidence confirmed the original award of the Collector. Appellant appealed to the High Court on the award and also contended that there was no sufficient cause for the District Court to set aside the original *ex-parte* decree and relied on section 105 (1) of the Civil Procedure Code. Respondent contended that no appeal lay against the order setting aside the *ex-parte* decree and relied on section 99 of the Code.

Held, 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, on the ground that the improper making of such an order involved an error, defect, or irregularity in an order affecting the decision of the case. Sections 99 and 105 (1) are not mutually destructive, and there is no need to read into section 105 the additional words "on the merits"

Held, by HEALD, J., that the Collector's unchallenged statement, though not supported by evidence or affidavit, that he was prevented by stress of Government work from attending the Court was a sufficient cause for his non-attendance and that in any case as the District Court had accepted it as sufficient cause, it was not proper for the High Court to interfere on appeal with such decision.

Held, by CUNLIFFE, J., that the District Court had no proper grounds or evidence before it to set aside the *ex-parte* decree and that therefore the appeal succeeded on the preliminary ground.

Held, on the merits of the case that the award of the Collector confirmed by the District Court on the rehearing of the case was fair and proper and therefore the appeal failed.

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* Civil First Appeal No. 225 of 1925 against the judgment of the District Court of Toungoo in Civil Miscellaneous No. 151 of 1924.

Ajudhia Parshad v. *Imam Ud Din*, 71 I.C. 587 ; *Gopala Chetti* v. *Subbier*, 26 Mad. 604 ; *Nand Ram* v. *Bhopal Singh*, 34 All. 592—*referred to.*

Sundar Singh v. *Nighaiya*, 6 Lah. 94 ; *Tasaddaq Husain* v. *Hayat-un-Nissa*, 25 All. 280—*dissented from.*

A. B. Banerjee—for Appellant.

Ormiston—for Respondent.

HEALD, J.—By Revenue (Land Acquisition) Department Notification No. 18, dated the 6th February 1924 the Local Government declared that certain lands, including lands belonging to the present appellant, M. S. Mahomed, were required for a public purpose, and directed the Subdivisional Officer, Pyu, as Collector under the Land Acquisition Act, to take order for the acquisition of the land.

The Collector awarded Rs. 4,746-8-0 to appellant for his land and appellant accepted that amount under protest and asked for a reference to the Court.

The Collector made the reference and on the 11th of March 1925 the Court issued notice to him informing him that the case would be heard on the 20th of March. That notice was served on the 17th of March. On the 20th of March the Collector was not represented and the hearing was adjourned to the 24th of March. On that date the Court examined appellant's witnesses and reserved orders. At the same time the Judge of the District Court wrote to the Deputy Commissioner, to whom the Collector as Subdivisional Officer was subordinate, pointing out that the Collector had failed to enter an appearance and that the case had been heard *ex-parte*. His intention in writing this letter was clearly to give the Collector an opportunity of applying to be heard before judgment was delivered. On the 20th of April the Judge issued notice that judgment would be delivered on the 21st, and he delivered judgment on the latter date, nearly a month after the *ex-parte* hearing.

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The Collector took no action until the 18th of May when he filed an application that the *ex-parte* decree should be set aside under the provisions of Order 9, Rule 13. He admitted receipt of the notice, but said that he received it while he was out on tour and that he was unable to attend the Court on the date fixed through press of work. He also said that, not having a copy of the Land Acquisition Manual with him, he overlooked the provisions of Direction 48 of that Manual. He said further that when he received a communication from the Deputy Commissioner, presumably as a result of the Judge's letter to that officer, it was arranged that the Akunwun, that is the head of the Deputy Commissioner's Revenue Office, should appear before the Court, but the Akunwun, for some reason which does not appear, took no action. The Collector, who, it may be noted, was the successor in office of the Collector who made the award, said that an advocate had actually been instructed by the Burma Railways, for whom the land was being acquired, and that it was all along the intention of the Burma Railways to contest the case, and he asked that the *ex-parte* decree might be sent aside. No affidavit accompanied this application, and the only causes shown for the Collector's failure to enter an appearance were his being on tour when the notice was received and press of work.

On the Collector's application the Judge set aside the *ex-parte* decree, which had awarded appellant Rs. 7,714-10-0 instead of Rs. 4,868-6-0, and after hearing evidence, confirmed the Collector's original award.

Appellant appeals and one of his grounds of appeal is that the Judge was not entitled to set aside the *ex-parte* decree because he had before him no

evidence that there was sufficient cause for the non-appearance of the Collector.

Respondent's learned advocate replies that no appeal lies against an order setting aside an *ex-parte* decree, and that the propriety of such an order cannot be questioned in an appeal against the decree subsequently made in the case. In support of this view he refers us to the provisions of section 99 of the Code, which says that no decree shall be reversed or substantially varied in appeal on account of any error, defect, or irregularity in any proceedings in the suit not affecting the merits of the case.

Appellant on the other hand refers us to section 105 which says 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 a ground of objection in the memorandum of appeal.

Section 105 deals primarily with appeals from orders, and the meaning of the provision cited is that although no appeal may lie from a particular order as an order, nevertheless the propriety of that order may be questioned in an appeal from the decree in the suit in which the order was made if it affects the decision of the case. An order refusing to set aside an *ex-parte* decree is appealable as an order under Order 43, Rule 1 (*d*), but an order setting aside such a decree is not appealable either as an order or as a decree. But if an order setting aside an *ex-parte* decree is one of the orders contemplated by the latter part of section 105 (1) then it may be questioned in an appeal from the final decree in the suit and if it is found to have been wrongly made, it would seem to follow that that finding would warrant the setting aside of the subsequent decree and the restoration of the *ex-parte* decree which was wrongly set aside. Section 99

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seems to have been intended to deal with errors, defects or irregularities of procedure, such errors, defects or irregularities being presumably *ejusdem generis* with misjoinder of parties or causes of action, which do not affect the merits of the case, and if the alleged error, defect or irregularity of an order setting aside an *ex-parte* decree affects the decision of the case it would not fall within the purview of that section.

We have been referred to certain rulings in which the provisions of section 105 have been considered.

In the case of *Nand Ram* v. *Bhopal Singh* (1), cited by appellant, the question was whether or not the Court ought to interfere in revision with an order setting aside an *ex-parte* decree and one of the learned Judges said that "The remedy of the applicant was to attack the order in appeal from the decree . . . . . under section 105, Code of Civil Procecure."

On the other hand there is an earlier decision of a Bench of the same High Court in the case of *Tasaduq Husain* v. *Hayet-un-Nissa* (2) in which it was said "Section 588 (which for the purposes of this case may be regarded as corresponding to Order 43, Rule 1) of the Code of Civil Procedure, whilst allowing an appeal from an order under section 108 (now Order 9, Rule 13) refusing to set aside an *ex-parte* decree, does not allow an appeal from an order setting aside an *ex-parte* decree. From this we infer that it was the intention of the Legislature that an order setting aside an *ex-parte* decree shall be final. The learned advocate for the appellant referred to section 591 (now 105) of the Code, which provides that if any decree be appealed

(1) (1912) 34 All. 592. (2) (1903) 25 All. 280.

against, any error, defect or irregularity in any order not otherwise appealable, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. We agree with the rulings in *Chintamony Dassi* v. *Raghoonath Sahoo* (3) and *Golab Kunwar* v. *Thakur Das* (4), and hold that the words "affecting the decision of the case" must mean affecting the decision of the case on its merits, and that consequently an order setting aside an *ex-parte* decree does not come within the purview of the section."

In the case of *Gopala Chetti* v. *Subbier* (5) where an *ex-parte* decree had been passed against two defendants and had been set aside as against both on the application of one of them, and the plaintiff in appealing against the final decree in the suit claimed that the decree ought not to have been set aside as against the defendant who had not applied to have it set aside, a Bench of the High Court at Madras accepted the contention that as no appeal lay against the order setting aside the *ex-parte* decree, it was open to the appellant in appealing against the final decree in the case to object to such order as contrary to law, and said that as in their opinion in the circumstances of the case the decree passed *ex-parte* against the first defendant, that is the defendant who had not applied to have the decree set aside, ought not to have been set aside, they restored the original decree so far as it directed the first defendant to pay the amount decreed.

In a recent case, *Sundar Singh* v. *Nighaiva* (6), a Bench of the Lahore High Court took the contrary view. In that case the trial Court first decreed the plaintiff's claim *ex-parte*. The defendants applied to

(3) (1895) 22 Cal. 981.
(4) (1902) 24 All. 464.
(5) (1923) 26 Mad. 604.
(6) (1925) 6 Lahore 94.

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have the decree set aside and the Court set it aside and ultimately dismissed the plaintiff's suit. That dismissal was confirmed on appeal but a second appeal was filed in the High Court. That appeal was heard by a single Judge of the Court who held that the order setting aside the *ex-parte* decree could not be questioned because, even if the order restoring the case to a hearing was erroneous, the error was not one affecting the decision of the case within the meaning of the section 105 of the Civil Procedure Code. A further appeal was then filed under the Letters Patent, and the Bench before whom that appeal was heard said "It will be observed that an order refusing to set aside an *ex-parte* decree is appealable under Order 43, Rule 1 (*d*), but no appeal is granted from an order accepting an application to set aside an *ex-parte* decree, and we cannot think it was the intention of the Legislature that an erroneous order accepting an application to set aside the *ex-parte* decree should be assailable in appeal except in so far as it affected the decision of the case on the merits. The reason for the discrimination between an unsuccessful and a successful application is obvious, for an unsuccessful application precludes a thorough exploration of the merits of the case whereas a successful application enables the points in litigation to be decided on the merits, the ideal goal of all litigation."

On the other hand in an equally recent case of the same High Court *Ajudhia Parshad* v. *Imam Ud Din* (7) another Bench seems to have held that an order under Rule 9 (2) of Order 22 of the Code, which provides for the setting aside of an order of abatement or dismissal if it is proved that the party

(7) 71 Indian Cases 587.

in default was prevented by any sufficient cause from continuing the suit, is an order affecting the decision of the case within the meaning of section 105 of the Code.

In this state of the authorities, it seems clear that we must decide for ourselves whether in our opinion the making of an order setting aside an *ex-parte* decree in a case, where there was nothing before the Court except the mere application of the party, to satisfy it that that party was prevented by any sufficient cause from appearing, is or is not an error, defect or irregularity in an order affecting the decision of the case.

I am unable to avoid the conclusion that it is such an error defect or irregularity, since it results in the setting aside of the actual decision in the case, and I find it difficult to read into section 105 the additional words "on the merits" which the learned Judges who decided in the contrary sense seem to have read into it.

I would therefore hold 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, on the ground that the improper making of such an order involves an error, defect or irregularity in or an order affecting the decision of the case.

The question then arises whether or not the order was in fact improperly made. The Collector stated expressly in his application that he "was unable to attend Court on the date fixed through press of work." Appellant filed a written objection in which he said that "the petition does not disclose any reasonable cause or a shred of excuse for re-opening the matter." He did not traverse the Collector's statement of fact and in effect he

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said that the fact stated was not "sufficient cause" for setting aside the decree. He did not complain of the absence of an affidavit, and there is no suggestion in the Judge's order setting aside the decree that appellant or his advocate suggested at that time that an affidavit was necessary. The question raised seems to have been whether or not press of work was "sufficient cause" for the Collector's failure to appear, and the Judge held that it was. It must be admitted that proof of the facts alleged in support of applications to set aside *ex-parte* decrees is ordinarily given either by oral testimony or by affidavit. In this case there was neither oral evidence nor an affidavit and the question before us thus narrows itself down to this. "Is the bare statement of the applicant sufficient to satisfy the Court that the applicant was prevented by sufficient cause from appearing, in a case where the material statement of fact made in the applicant's application is not traversed by the opposite party and where the applicant is known to the Court to be the Collector and a responsible officer of Government?" I am of opinion that in such a case the mere statement is sufficient. The matter to which I attach importance is that the Collector's statement of fact was not denied. The reason why it was not denied was doubtless that the Collector was a person of whom it could not reasonably be suggested that his statement of fact was untrue, and if appellant accepted it as true and argued merely that the fact stated was not sufficient cause, I see no reason why the Court also should not accept it as true.

I am therefore of opinion that in the circumstances of this case the Judge was entitled to accept the Collector's statement that he was prevented by press of work from attending the Court as proof of

sufficient cause within the meaning of Order 9, Rule 13, and I would add that, if he was not so entitled, the error, defect or irregularity in his procedure in accepting the Collector's statement made in an application instead of in an affidavit, although it may not be an error, defect or irregularity which comes within the absolute bar of section 99, would not in my opinion be an error, defect or irregularity of procedure which in the circumstances of the case would warrant our interfering in appeal with the Judge's decision on the question whether or not there was sufficient cause for the Collector's failure to appear.

I would therefore disallow the first ground of appeal.

As the appeal has so far been heard only on the questions of law raised on the first ground of appeal a further hearing on the other grounds will be necessary.

CUNLIFFE, J.—In this appeal a preliminary point of law arises.

The appellant was the owner of land in the Toungoo District. The respondent is the Collector of Toungoo. The appellant's land was compulsorily acquired by Government. Compensation was awarded. A reference was put forward by the appellant to the District Judge to enhance the said compensation. The District Judge altered the award of the Collector from Rs. 4,868-6-0 to Rs. 7,714-10-0. He did so at an *ex-parte* hearing. He recorded in his judgment that there was no appearance either on the part of the Collector or the Burma Railways Company, Limited, although the Collector was duly served with notice. Subsequently, the learned Judge set aside his *ex-parte* decree on the application of

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the Collector and after that at a third sitting heard evidence put forward by the Collector and restored the original award.

This is an appeal from the decision to restore the award confirmed by the learned Judge and it is argued that on this appeal upon the merits an appeal also lies against the setting aside of the *ex-parte* decree and the decision to re-hear.

Order 9, Rule 13 deals with the setting aside of an *ex-parte* decree. The rule in question states that the Court may do so if it is satisfied that the summons was not duly served or that the applicant was prevented by any sufficient cause from appearing when the suit was called on for hearing. It has already been noted that the summons was duly served. There was no evidence before the learned Judge either by oral testimony or affidavit to show that the Collector was prevented by any, much less sufficient, cause from appearing to support the award at the first hearing.

The question to be decided is whether we are competent to hear an appeal against the decision to re-hear and to set aside the *ex-parte* award in a general appeal upon the merits. Section 99 of the Civil Procedure Code runs as follows :—"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court." And section 105, sub-section (1) runs :—"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."

It is manifestly impossible that these two sections should be considered as mutually destructive. Rather, in my view, should section 105 be looked on as being supplementary to section 99.

There appears, however, to be a considerable conflict of judicial opinion as to the exact interpretation of section 105 when applied to an appeal against an order setting aside an *ex-parte* decree under Order 9, Rule 13. It is admitted without demur that such an appeal is contemplated by the section, but certain High Courts, Allahabad and Calcutta for instance, have considered that an appeal of this kind should only be entertained when the order setting aside the *ex-parte* decree affects the decision of the case "on its merits." On the other hand, the High Court of Madras does not consider that such a limitation is intended by this section. The reasons which apparently actuated the view which limited the power of appeal are on the grounds of public policy. For example, in the case of *Sunder Singh* v. *Nighaiva and another* (1), Le Rossignol, J., said that unless the limited view was taken it precluded a thorough exposition of the merits of the case which was the ideal goal of all litigation.

I am unable to appreciate this interpretation. It necessitates the importation of words into a section of a statute by implication which to my mind is always dangerous. I can see no reason why if a Judge in the Court below has acted unjudicially in setting aside an *ex-parte* decree and has wrongly applied Order 9, Rule 13 this Court has not the power to reverse his decision. There seems to be an idea that quite apart

(1) (1925) 6 Lahore 94.

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from the provisions of Order 9, Rule 13 there is an inherent right in any Court to set aside an *ex-parte* decree. In my view, that is not so, but even if there was an inherent right, I am perfectly sure that no Court is justified in exercising an inherent right without proper grounds or proper evidence. In the appeal before us as I have stated earlier in my judgment, there was no material whatever before the learned Judge to take the course that he did under Order 9, Rule 13. In my view we have a right and a statutory right to deal with this question under section 105. In the circumstances, I think this appeal succeeds on the preliminary point raised and the order of the learned Judge restoring the case on the application of the Collector by means of setting aside his former *ex-parte* decree should be reversed. The appeal, therefore succeeds and there must be judgment for the appellant with costs.

[The appeal was further proceeded with on the merits of the case. On the evidence their Lordships held that the Collector's award, confirmed by the District Court at the rehearing of the case was fair and proper and the evidence of the appellant for a higher value was entirely unconvincing. It was only evidence of offers which were alleged to be refused—a commonplace of land acquisition cases. None would want to buy such a large area of 16 acres to build a mill on paddy land which had no frontage on any road or creek and was cut off from the railway by a considerable area of paddy land belonging to other owners. The appeal was accordingly dismissed.]