APPELLATE CIVIL.

Before Mr. Justice Carr.

E. MYLNE
v.
T. KOIR.*

1928
Feb. 21.

Civil Procedure Code (Act V of 1908), *s.* 151 ; *O. IX, r.* 6 ; *O. XVII, rr.* 2 *and* 3—"*Appearance*" *of party, meaning of—Application of rule* 3—*Partial evidence led on both sides, effect of—Decree, when is* ex parte.

Defendant had led some evidence, the burden of proof being on him, when the case was adjourned by the Court to another date for further hearing. On this date the parties and defendant's witnesses were absent, but the pleaders on both parties were present. Defendant's pleader applied for an adjournment which being refused, he withdrew from the case. The Court examined two witnesses for the plaintiff and reserved judgment which later was delivered in plaintiff's favour and in which the merits of the case were discussed. Defendant applied to have the *ex parte* decree set aside but failed. He appealed to the District Court against the decree as also against the order on his application to set aside the decree. The District Judge dismissed the latter appeal on the ground that O. XVII, r. 2, of the Civil Procedure Code did not apply, but in the regular appeal he set aside the decree and remanded the case for further hearing and disposal on the merits, on the ground that rule 3 did not apply. The merits of the trial Court's judgment were not dealt with. Plaintiff alone appealed to the High Court

Held, that O. XVII, r. 3 can be applied only when the hearing has been adjourned at the instance of a party who subsequently makes the default. In the circumstances of the case and on the withdrawal of the defendant's pleader, rule 2 applied, and the case came under O. IX, r. 6. A plaintiff cannot obtain a decree, even though *ex parte*, without evidence. In this case the defendant had led some evidence, the burden of proof being on him, but the plaintiff was entitled to rebut such evidence. Notwithstanding therefore evidence being taken on both sides, the decision was an *ex parte* one under O. XVII, r. 2, read with O. IX, r. 6.

Maung Pway v. *Saya Pe*, 4 Ran. 408—*referred to*.

Foucar for the appellant.

Ochme for the respondent.

CARR, J.—The appellant was the plaintiff and the respondent was the defendant in Suit No. 38 of 1926 of

* Special Civil Second Appeal No. 747 of 1927 against the judgment of the District Court of Pegu in Civil Appeal No. 179 of 1927.

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the Subdivisional Court of Nyaunglebin. Issues had been framed in the suit and it was held that the burden of proof was on the defendant. Evidence was led and the evidence of the defendant himself had been recorded and one of his witnesses had been partly examined. The suit was then adjourned for further hearing not expressly on the application of either party. It came on again for hearing on the 11th of July 1927. On that date neither the plaintiff nor the defendant was present and the witnesses for the defendant also were absent, but the pleaders of both parties were present. The defendant's pleader applied for an adjournment which was rufused, and he then withdrew from the case. The Judge proceeded to examine two witnesses for the plaintiff and then reserved judgment. Judgment was actually passed on the 29th July and in it the merits of of the case were discussed. Judgment was given for the plaintiff. On the 4th August the defendant applied to set aside the *ex parte* decree. After hearing this application it was dismissed on the 13th September. The defendant then filed Civil Regular Appeal No. 177 of the District Court of Pegu against the *ex parte* decree. Later he filed Civil Miscellaneous Appeal No. 184 of the same Court against the order dismissing his application to set aside the *ex parte* decree. These two appeals were heard together by the District Judge who dismissed the appeal against the order refusing to set aside the *ex parte* decree on the ground that in the circumstances of the case Order XVII, rule 2, of the Civil Procedure Code did not apply. On the regular appeal, which is the one now before me, he set aside the judgment and decree of the Subdivisional Court and remanded the suit to the Court for further hearing and for disposal on its merits. The only ground on which this decision was based was that the Judge of the Subdivisional Court had, in fact, acted under Order XVII, rule 3, and that that rule did not

apply because the adjournments had not been made at the instance of the defendant himself. The merits of the judgment of the Subdivisional Court are not dealt with at all. The plaintiff alone has appealed and the defendant has not appealed or applied for a revision of the order of the District Court refusing to interfere with the refusal to set aside the *ex parte* decree.

It is, I think, now well settled law that Order XVII rule 3 can be applied only when the hearing has been adjourned at the instance of a party who subsequently makes the default. The authorities to this effect are so numerous and so strong that I cannot question this view of the rule. At the same time I should like to say that it appears to me to create a very undesirable position in which the Court is in effect at the mercy of the party in all cases when the adjournment has not been made at the instance of that party. It seems to me that it is extremely desirable that this rule should be amended ; but, for the present, I have to deal with it as it is and that being so I can only hold that the District Judge was right in holding that Order XVII, rule 3, was not applicable to the case.

But that is not sufficient for the decision of the question before me. It has been strongly contended for the appellant that Order 17, rule 2 does, in fact, apply to the case and, in my opinion, that is correct. The District Judge held that rule 2 did not apply because in effect there has been an appearance by the defendant's pleader. He relied on the case of *Palaniappa Chetty* v. *R.M.P.V.M. Muthu Chetty* (1). I note here that it is apparently an ineradicable habit of the Courts in this Province to prefer to be guided by decisions to be found in unauthorised publications rather than by those to be found in the authorised reports

(1) B.L.T. 67.

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of this Court. The District Judge's attention is directed to Act XVIII of 1875 under which decisions published in the Burma Law Times are not binding on him. In the case of *Maung Pway and one* v. *Saya Pe* (1), a different view was taken and it was held that where a pleader of the party merely applied for adjournment which was refused this could not be regarded as an appearance which would take the case out of the operation of Order 17, rule 2. I was one of the Bench which gave that judgment and I am of opinion that it is correct. Rule 2 of Order XVII must be read in a reasonable manner and common sense must be applied to its interpretation. If we are to hold that the mere appearance of a pleader who, after making an application for a remand which is refused, immediately withdraws from the case is an appearance which prevents the Court from applying rule 2 the effect will to be place the Court practically at the mercy of the pleader who appears in such circumstances. He can prevent the Court from making any progress with the case by merely refusing to continue to act for his client. Similarly, it would be possible for the party himself to appear when the case is called but to leave the Court immediately afterwards before any progress could be made with the case and thereby similarly to prevent the Court from proceeding with it. In addition to common sense section 151 of the Code might also very well be applied. That section recognises the inherent power of the Court to pass such orders as are necessary to prevent abuse of its process and in cases such as those instanced above I think that if the Court were to hold itself bound to stay proceedings in the case and yet were not entitled to deal with the case as provided for by rule 2, there would be a serious abuse of the process of the Court.

(1) (1926) 4 Ran. 408.

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My view in the circumstances of this case is that although the pleader did appear for the party in the first instance, as soon as he withdrew there was no longer any appearance for the defendant and, therefore, the defendant failed effectively to appear, and the Court was justified in acting under rule 2. The question arises whether in proceeding to take evidence of the plaintiff and later writing a considered judgment in the case the Court could be held to have acted under rule 3 and not under rule 2. In my opinion this course of action does not make the Court's judgment as one passed under rule 3. It is to be noted that under rule 2 the Court may proceed in the manner provided by Order IX which may be appropriate to the circumstances of the case before it. In this case it was the defendant who failed to appear and therefore it was rule 6 of Order IX which the Court had to apply ; that is, it had to decide the suit *ex parte*. It is well settled law in this Province, and I think in most, if not all, other provinces, that when a case is disposed of under Order IX, rule 6, the plaintiff must be required to prove his case and the ordinary practice is that when a suit is heard *ex parte* the evidence of the plaintiff and his witnessess is taken. In the present case it was held that the burden of proof was on the defendant and possibly the Court might have been entitled to decree the suit without taking any evidence for the plaintiff. But the defendant had, in fact, already given some evidence and it might well be that the plaintiff wished to rebut the evidence already given. In that case he certainly would have a right to do so and the fact that the Court took the evidence tendered by the plaintiff and subsequently decided the suit on the evidence actually before it for both sides would not prevent its decision from being an *ex parte* one under Order XVII, rule 2, read with Order IX, rule 6. In

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my view, therefore, Order XVII, rule 2, did apply and it cannot be said that the Subdivisional Court did not proceed under that rule. I am unable to agree with the District Judge that the Subdivisional Court could have acted only under rule 3 and therefore I must held that the District Court was wrong in allowing the respondent's appeal on the ground which he gave for doing so. Respondent, however, in his appeal before the District Court questioned the decision of the Subdivisional Court on the merits of the case and he was entitled to have those grounds of appeal considered by the first appellate Court. I therefore set aside the judgment and decree of the District Court and remand the appeal to that Court for further hearing and decision on its merits. The appellant will be granted a certificate for a refund of the court-fees paid on this appeal and the other costs of this appeal will be costs in the District Court and follow the result there. It is no doubt unfortunate that the District Judge has also dismissed the respondent's appeal from the order refusing to set aside the *ex parte* decree. That order, however, is not before me now and I can only leave the respondent and his advisers to take such action as may seem to them most appropriate if they wish to have the merits of that appeal considered.