LETTERS PATENT APPEAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice LeRossignol.

1923

March 24.

SUNDAR SINGH (PLAINTIFF) Appellant,

versus

NIGHAIYA AND ANOTHER (DEFENDANTS) Respondents.

Letters Patent Appeal No. 189 of 1922.

Civil Procedure Code, Act V of 1908, section 105 and Order XLIII, rule 1 (d)—*order setting aside an* ex parte *decree—whether open to question in appeal from the decree.*

In this case the trial Court first decreed plaintiff's claim *ex parte* and some months later on an application by defendants set aside the *ex parte* decree, decided the case on the merits, and dismissed it. On appeal the District Judge held that, although the defendants' application was made after the period of limitation had expired, the lower Court had inherent power to set aside the *ex parte* decree. The plaintiff again agitated this question in second appeal and a Single Bench of the High Court rejected the appeal on the ground that the order setting aside the *ex parte* decree could not be questioned in second appeal.

Held, that the erroneous order referred to in section 105 of the Code of Civil Procedure must be an order affecting the decision of the case on its merits.

Tasadduq Hussain v. *Hayat-un-Nissa* (1), Pandit *Rama Kant* v. Pandit *Ragdeo* (2), *Mahtab Rai* v. *Kaman Lal* (3), *Fazal* v. Mst. *Hashmati* (4), *Chintamony Dassi* v. *Raghoonath Sahoo* (5), Mussammat *Kariman* v. *Forbes* (6), *Krishna Chandra* v. *Mohesh Chandra* (7), and *Niddha Lal* v. *Collector of Bulandshahr* (8), followed.

Gopala Chetti v. *Subbier* (9), not followed.

(1) (1903) I. L. R. 25 All. 280.
(2) 60 P. R. 1897 (F. B.).
(3) 51 P. R. 1899.
(4) 40 P. R. 1916.
(5) (1895) I. L. R. 22 Cal. 981.
(6) (1905) 8 Cal. L. J. 308.
(7) (1905) 9 Cal. W. N. 584.
(8) (1916) 35 I. C. 209.
(9) (1903) I. L. R. 26 Mad. 604.

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Nand Ram v. *Bhopal Singh* (1), *Hassan Ali Shah* v. *Salig Ram* (2), *Jagannatha* v. *Vathyar* (3), and *Motilal* v. *Nana* (4), distinguished.

Held consequently, that the order by the trial Court setting aside the *ex parte* decree in this case could not be questioned in appeal from the decree as it was not an order affecting the decision of the case on its merits.

Appeal under clause 10 of the Letters Patent from the judgment of Mr. Justice Harrison, dated the 30th June 1922.

KAHAN CHAND, for Appellant.

JAI GOPAL SETHI, for Respondents.

The judgment of the Court was delivered by—

LEROSSIGNOL J.—The suit out of which this appeal arises was first decreed *ex parte* on the 20th of April 1914. Some two months after an application for setting aside the *ex parte* decree was made and was accepted by the trial Court which proceeded to decide the suit on the merits and eventually dismissed it with costs. The plaintiff appealed to the District Judge and urged among other grounds that the trial Court's action in setting aside the *ex parte* decree was unjustifiable inasmuch as the application to set it aside was made long after the period prescribed by law, but the learned District Judge held that the trial Court had an inherent power to set aside the *ex parte* decree. The plaintiff in second appeal again agitated this question but the learned Judge in Chambers has dismissed his appeal on the ground that the correctness of an order setting aside an *ex parte* decree cannot be questioned in second appeal for if the order restoring the case to a hearing be erroneous such an error is not one affecting the decision of the case within the meaning of section 105 of the Civil Procedure Code.

(1) (1912) I. L. R. 34 All. 592.
(2) 125 P. R. 1892.
(3) (1914) 24 I. C. 782.
(4) (1892) I. L. R. 18 Bom. 35.

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Before this Court it is contended on behalf of the appellant that the orders referred to in section 105 of the Code refer to any erroneous order which affects the decision of a case whether on the merits or otherwise and he has referred us to the following authorities in support of his view:—*Nand Ram* v. *Bhopal Singh* (1), *Gopala Chetti* v. *Subbier* (2), *Hassan Ali Shah* v. *Salig Ram* (3), *Jagannatha* v. *Vathyar* (4) and *Moti Lal* v. *Nana* (5). An examination of these authorities will show that only the Madras ruling is strictly in point. The others are orders passed in revision. They do not discuss the point now before us and their general conclusion is that a revision in those cases should not be allowed because the petitioner would have an opportunity of securing redress at the time of appeal. The Allahabad decision does not refer to the ruling in *Tasadduq Hussain* v. *Hayat-un-Nissa* (6) and the Madras ruling devotes only a few words to the subject.

For the respondents' contention that the erroneous order referred to in section 105 of the Code must be an order affecting the decision of the case on its merits the balance of authority is overwhelming. The Punjab authority *Hassan Ali Shah* v. *Salig Ram* (3) has been overruled in Pandit *Rama Kant* v. Pandit *Ragdeo* (7) and *Mahtab Rai* v. *Kaman Lal* (8) whilst *Fazal* v. Mst. *Hashmati* (9) follows *Tasadduq Hussain* v. *Hayat-un-Nissa* (6). Then *Chintamony Dassi* v. *Raghoonath Sahoo* (10) has been followed in Mussammat *Kariman* v. *Forbes* (11), and in *Krishna Chandra* v. *Mohesh Chandra* (12). The authority of

(1) (1912) I. L. R. 34 All. 592.
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Tasadduq Hussain v. *Hayat-un-Nissa* (1) has been followed in *Niddha Lal* v. *Collector of Bulandshahr* (2).

Apart from authority we are moved by general considerations to hold that the point urged for the appellant is unsound. It will be observed that an order refusing to set aside an *ex parte* decree is appealable under Order XLIII, 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 this 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.

For these reasons we dismiss this appeal with costs.

C. H. O.

Appeal dismissed.

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(1) (1913) I. L. R. 35 All. 280. (2) (1916) 35 I C. 209.