

should be set aside, and the suit decreed with costs in both Courts. I concur in the order of the learned Chief Justice with regard to the special costs:

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MRS. SOFAER
LEACH, J.

FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Leach, and Mr. Justice Spargo.

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Apl. 27.

Appeal—Ex parte decree against defendant set aside—Rehearing of suit—Plaintiff's suit dismissed—Appeal against decree—Ground of appeal against order setting aside ex parte decree—Error "affecting the decision of the case"—Order must affect the decision of the case on its merits—Civil Procedure Code (Act V of 1908), ss. 104, 105, O. 43, r. 1.

Where on the application of the defendant the trial Court sets aside an *ex parte* decree because it was satisfied that the defendant was prevented by sufficient cause from appearing, no appeal lies against such order. On the re-hearing of the suit if the defendant succeeds and the suit is dismissed the plaintiff in his appeal against the decree cannot question the propriety of the order setting aside the *ex parte* decree. The words in s. 105 of the Civil Procedure Code "affecting the decision of the case" mean affecting the decision of the case on its merits. An order setting aside an *ex parte* decree does not constitute an order affecting the decision of the case.

Athansa Rowther v. Ganesan, 47 M.L.J. 641; *Bhola Ram v. Arjan Das* I.L.R. 14 Lah. 361; *Chintamony v. Raghoonath*, I.L.R. 22 Cal. 981; *Dhondu v. Patwardhan*, I.L.R. 51 Bom. 495; *Gulab Kumear v. Thakur Das*, I.L.R. 24 All. 464; *Krishna Chandra v. Mohesh Chandra*, 9 C.W.N. 584; *Radha Mohan v. Abbas Ali*, I.L.R. 53 All. 612; *Tasadduk Husain v. Hayat-un-nissa*, I.L.R. 25 All. 280, referred to.

M. S. Mahomed v. The Collector of Toungoo, I.L.R. 5 Ran. 80, overruled *pro tanto*.

Gopala Chetti v. Subbar, I.L.R. 26 Mad. 604, distinguished.

Hay for the applicant. Once a Court sets aside an *ex-parte* decree and restores the suit for hearing, no other Court can question the order. Order 43, r. 1 (d) of the Code allows an appeal from an order refusing to set aside an *ex-parte* decree, but not from an order

* Civil Revision No. 299 of 1936 from the judgment of the District Court of Myaungmya in Civil Misc. Appeal No. 17 of 1936.

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allowing it. S. 104 of the Code deals with appealable orders. S. 105 allows an appeal against an order in an appeal from a decree provided it affects the merits of the case. See Sir Dinshah Mulla's Civil Procedure Code, 10th Ed. p. 348. An order setting aside an *ex-parte* decree does not affect the decision of the case on the merits. The ruling in *M. S. Mahomed v. The Collector of Toungoo* (1) is erroneous. The High Courts in India have held that an order under O. 9, r. 13, setting aside an *ex-parte* decree, is not an order that can be attacked in an appeal from the decree in suit. *Krishna Chandra v. Mohesh Chandra Saha* (2); *Chintamony Dass v. Raghoonath Sahoo* (3); *Sayama Bibi v. Mohanta* (4); *Dhondu v. Patwardhan* (5).

[LEACH, J. The High Court may restore an *ex-parte* decree set aside by the trial Court when it has acted without jurisdiction, e.g. when it has entertained a time-barred application to set aside the decree.]

That is so, see *Gopala Chetti v. Subbier* (6); and *Athamsa Rowther v. Ganesan* (7). In the Full Bench case of *Radha Mohan Dutt v. Abbas Ali Biswas* (8) the authorities were reviewed. *Gulab Kunwar v. Thakur Das* (9); and *Tasadduk Husain v. Hayat-un-nissa* (10) were approved, *Nand Ram v. Bhopal Singh* (11) was overruled and *M. S. Mahomed's* case was dissented from. See also *Sundar Singh v. Nighaiya* (12) and *Bhola Ram v. Arjan Das* (13).

D. C. Munsif for the respondent. *M. S. Mahomed's* case took the correct view. One is not justified in

(1) I.L.R. 5 Ran. 80.

(2) 9 C.W.N. 584.

(3) I.L.R. 22 Cal. 981.

(4) I.L.R. 52 Cal. 472.

(5) I.L.R. 51 Bom. 495.

(6) I.L.R. 26 Mad. 604.

(7) 47 Mad L.J. 641.

(8) I.L.R. 53 All. 612.

(9) I.L.R. 24 All. 464.

(10) I.L.R. 25 All. 280.

(11) I.L.R. 34 All. 592.

(12) I.L.R. 6 Lah. 94.

(13) I.L.R. 14 Lah. 361.

reading into a section words which are not there. In s. 105 the words "on the merits" do not occur and the Indian cases went wrong in importing these words into the section. If the Legislature wanted these words to be part of that section it would have said so. Compare s. 99 of the Code.

The order setting aside an *ex parte* decree does not conclude the case. But it does affect the decision of the case, though not on the merits. Such an order can be made the basis of attack in an appeal from the final judgment. *A. S. Chettiar Firm v. F. T. Veerappa Chettiar* (1). The decision in the Allahabad case is difficult to understand when it says that the order itself cannot be challenged but any defect or irregularity in the order can be. On the other hand see *Gopala Chetti v. Subbier* (2); *Lachhman Singh v. Nanian* (3); *Ram Autar Tewari v. Deoki Tewari* (4).

ROBERTS, C.J.—This case was a suit for rent brought by the present respondent as plaintiff against one Yeik Lee, and at the hearing in the Township Court the defendant did not put in an appearance owing to a delay occasioned by some business connected with the municipal licence of his pawn shop. Subsequently, in the circumstances of the case, the Township Judge permitted the *ex-parte* decree which he granted in the defendant's absence to be set aside: and there is no dispute that under Order XLIII, rule 1, no appeal can lie against this order. But when the re-hearing came on the defendant succeeded and there was a decree dismissing the suit, and the plaintiff appealed against this decree, and it is contended that in the appeal against this decree the order setting aside the *ex-parte* decree can be set aside.

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(1) I.L.R. 13 Ran. 239.

(2) I.L.R. 26 Mad. 204.

(3) (1929) A.I.R. Lab. 174.

(4) I.L.R. 37 All. 456.

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By section 104 of the Civil Procedure Code appeals lie from orders specified therein and from no other orders save as otherwise expressly provided in the body of the Code, and by section 105 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.

Now, an order setting aside an *ex-parte* decree does not, in my opinion, constitute an order affecting the decision of the case : it is an order securing that the case shall be re-heard upon its merits, and when one comes to look at the authorities in connection with this matter it is seen that there is a weight of authority in support of this view.

In the case of *Gulab Kunwar v. Thakur Das* (1) it was held that an order re-admitting an appeal which was dismissed for default under the old section 556 was not appealable, and that the meaning of the words "affecting the decision of the case" is that it must be shown that the error, defect or irregularity has affected the decision of the case upon its merits.

Again in *Tasadduk Husain v. Hayat-un-nissa* (2) it was held that an order under section 108 setting aside an *ex-parte* decree was not an order affecting the decision of the case, that is to say, upon the merits.

The Allahabad authorities culminate in the decision of *Radha Mohan Dutt v. Abbas Ali Biswas* (3) which is a Full Bench authority to the same effect.

We have had cited to us a decision of the Rangoon High Court—*M. S. Mahomed v. The Collector of Toungoo*

(1) (1902) I.L.R. 24 All. 464.

(2) (1903) I.L.R. 25 All. 280.

(3) (1931) I.L.R. 53 All. 612.

(1), and I observe that that case was expressly dissented from in the Allahabad case which I have just cited.

The authorities in Calcutta have followed upon the same lines. In *Krishna Chandra Goldar v. Mohesh Chandra Saha* (2) Woodroffe J. pointed out that the reason why an order made under section 108 had been held not to affect the merits of the case is that the order does not determine the merits but merely ensures a re-hearing on the merits. See also *Chintamony Dass v. Raghoonath Sahoo* (3).

This decision is in conformity with the Bombay case of *Dhondu Narayan Shet Sonar v. Waman Govind Patwardhan* (4) and also with *Bhola Ram v. Arjan Das* (5).

We have had cited to us the case of *Gopala Chetti v. Subbier* (6), but I am of opinion that this case merely lays down that where the Subordinate Court has acted in a sense contrary to the law its proceedings can be attacked in revision, and a study of the case shows that it is no real authority for the respondent's contention. The whole of the authorities on this point were reviewed by Wallace J. in the Madras case of *Athamsa Rowther v. Ganesan* (7). The learned Judge points out that a number of authorities proceed upon the principle that when the setting aside of the order has re-opened the hearing of the suit on the merits, the propriety of the setting aside of the order cannot be attacked in an appeal in the suit. He adds however that the cases do not go beyond that or lay down that in no case can the propriety of an order setting aside an *ex-parte* decree be challenged in an appeal against a decree finally passed in the suit, and he cites the former Madras case of

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(1) (1927) I.L.R. 5 Ran. 80.

(2) 9 C.W.N. 584.

(3) (1895) I.L.R. 22 Cal. 981.

(4) (1927) I.L.R. 51 Bom. 495.

(5) (1932) I.L.R. 14 Lah. 361.

(6) (1903) I L.R. 26 Mad. 604.

(7) 47 M.L.J. 641.

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Gopala Chetti v. Subbier (1) as an instance in which the *ex-parte* decree was properly set aside.

I am of opinion that in this case there is no ground for saying that the order setting aside the *ex-parte* decree should be interfered with: and Mr. Munsif in his argument has been constrained to admit that if his view is right the decision in *Radha Mohan Dutt v. Abbas Ali Biswas* (2) must be a wrong one. In my opinion it is clear that the words "affecting the decision of the case" mean affecting the decision of the case on its merits, and I do not think that to give this construction to those words it is right to say one is adding words to the Statute.

Accordingly this application in revision will be allowed, and the case will be remitted to the appellate Court to decide the appeal upon the other points raised. Costs ten gold mohurs.

SPARGO, J.—I agree and have nothing further to add.

LEACH, J.—The Court is empowered by Order IX, rule 13 of the Code of Civil Procedure to set aside an *ex-parte* decree if it is satisfied that the summons was not duly served or that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. If the Court rejects an application made under this rule the defendant has a right of appeal. This right is expressly given by Order XLIII, rule 1 (d): but that order gives no right of appeal to the plaintiff if the defendant's application is successful. In view of the very emphatic terms of section 104 of the Code and the omission to insert in Order XLIII a clause giving the plaintiff a right to appeal against an order setting aside an *ex-parte* decree it seems to me clear that the Legislature never intended that there should be an appeal in such a case, and this can well be understood.

(1) (1903) I.L.R. 26 Mad. 604.

(2) (1931) I.L.R. 53 All. 612.

It is only right that a defendant should be allowed to state his case if the trial Court is satisfied that he was unaware of the proceedings or that he was prevented by sufficient cause from appearing when the suit was called on for hearing.

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The learned Judges who decided *M. S. Mahomed v. The Collector of Toungoo* (1) were of the opinion that section 105 (1) of the Code gave the appellate Court power to restore an *ex-parte* decree in a case like the present one when it had seisin of the matter as the result of an appeal from the decree passed after the hearing on the merits. I am unable to accept this as being the correct interpretation of the section. It differs from a long list of decisions of Indian High Courts. There may be circumstances which would entitle an appellate Court to restore an *ex-parte* decree which has been set aside by a trial Court. It is not necessary for the purpose of this appeal to consider them, but I have at the moment in mind the cases of *Gopala Chetti v. Subbier* (2) and *Athansa Rowther v. Ganesan* (3). In the present case the *ex-parte* decree was set aside by the trial Court because it was satisfied that the defendant was prevented by sufficient cause from appearing, and, in my opinion, the Code of Civil Procedure gives no right of appeal in such a case.

I agree that the application for revision should be allowed and the case remitted to the learned Assistant District Judge to decide the appeal on the other points raised.

(1) (1927) I.L.R. 5 Ran. 80.

(2) (1903) I.L.R. 26 Mad. 604.

(3) 47 M.L.J. 641; (1924) M.W.N. 884.