ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908. *February* 11.

DHIRAJLAL PANACHAND AND ANOTHER, APPELLANTS, AND DEFENDANTS 4 AND 5, *v.* HORMUSJI EDULJI BOTTLEWALLA, RESPONDENT AND PLAINTIFF.*

Practice—Ex parte decree—Suit set down for hearing before the date fixed in the summons—Civil Procedure Code (Act XIV of 1882), sections 68, 69, 96, 100, 101, 112 and 113—High Court Rules Nos. 111 and 112.

It is not open to a plaintiff to obtain an *ex parte* decree before the returnable date mentioned in the summons.

THE plaintiff brought a suit against the defendants to recover such sums as he would have earned by commission under an agreement made between him and the defendants down to the date when the defendants' firm in Kobe was closed the plaintiff having been always ready and willing to perform his part of the said agreement down to the said time. In the alternative the plaintiff prayed that the defendants might be ordered to pay to the plaintiff such sum by way of damages for the breach of the said agreement as might seem just to the Court.

The defendants were summoned to appear on the 27th November 1907. In the margin of the summons it was stated that in default of the defendants filing a written statement and serving a copy on the plaintiff within four weeks from the service of the summons the suit would be set down to be heard *ex parte* and the defendants would be liable to have a decree or order passed against them. The first three defendants were not served with a summons but the fourth and fifth defendants were served on the 22nd August 1907.

On the 9th September the plaintiff's solicitors wrote a letter to the fourth and fifth defendants saying that they would apply for an *ex parte* decree on the 20th September if they were not furnished with a copy of the written statement before the 19th. On the 19th they again wrote a letter saying that unless the copy was furnished by the evening of the 20th they would apply

*Suit No. 655 of 1907; appeals Nos. 1512 and 1513.

to have the suit set down for an *ex parte* decree on the 23rd September.

An *ex parte* decree was, however, obtained on the 24th September. Mr. Justice Beaman gave judgment for the plaintiff and referred the matter to the Commissioner for taking accounts and for ascertaining the damages sustained by the plaintiff by breach of the agreement referred to above. The Court also ordered the fourth and fifth defendants to appear before the Commissioner with books and documents in their possession relating to the subject matter of the suit, and to pay the costs.

The fourth and fifth defendants moved the Court on the 10th October, 1907, to set aside the *ex parte* decree.

Mr. Justice Beaman delivered the following judgment :—

BEAMAN, J. :—I think looking to the language of Rule 111 and to the practice which has been established under it, a practice which is admitted by Mr. Setalvad and which has been advanced in favour of his arguments by the Honourable the Advocate General, there can be no doubt whatever as to what meaning has always been given to Rule 111 on the Original Side.

It is now contended by Mr. Setalvad that the practice is not warranted either by any section in the Code or by that Rule, and I must confess that I feel very grave doubt whether, if the matter had been duly argued, my conclusion upon that matter in the circumstances of the case would be and ought to be the same.

It seems to me that the procedure is exceedingly simple. For the Rule prescribes that after the summons is given to the defendant he must put in a written statement at any time before four weeks and when on the expiration of the four weeks the defendant has not complied with the requisition in the summons it is customary to apply to the Prothonotary who thereupon sets down the suit to be disposed of *ex parte*. All this seems to me perfectly clear and practically beyond controversy: namely that the expiration of the period is thus made by the practice of the Court to correspond with what in the mofussil under the language of the Civil Procedure Code is usually understood by the first hearing. And it also appears to me whether rightly or wrongly that the practice established is

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that failure to file a written statement amounts to a failure within the meaning of section 113, Civil Procedure Code.

In this case the facts upon which the present motion is made are simple and present no difficulty. For it appears that the period to file the written statement was to expire on or about the 19th September, and, therefore, after that time the present defendants would have been liable to have their suit set down at any subsequent date for disposal *ex parte*. This, however, was not done but the attorneys for the plaintiff went rather out of their way to make sure that the defendants were apprised of what was going on and sent two notices on the 9th and 19th September intimating to them that an application would be made to have the suit put down for *ex parte* decree on the 23rd September. Therefore, when the suit was set down on the 24th September although that did not happen to be the day for which notice had been given the position still remained the same, that is to say, the plaintiff had put the defendants on their guard that the matter would come up to be disposed of *ex parte*. Therefore, the suit was open for *ex parte* hearing as against them with the result that they now come before the Court again with a motion to have that *ex parte* decree set aside. Mr. Setalvad has argued that the terms of section 113, Civil Procedure Code, have been sufficiently fulfilled in the present case by the circumstances which are set forth in the affidavit and on which he has based his arguments. It is contended that one of the defendants knew only on the day on which it was intimated to him that the *ex parte* decree was going to be made, but as a matter of fact no proceedings were taken on that date and the *ex parte* decree was really made on the 24th September. If, therefore, these defendants had already two notices and were aware of the practice of the Court, as they ought to have been, they would have seen that their suit would be set down for an *ex parte* decree. This they fail to do and after the *ex parte* decree has been made they seek the indulgence of the Court on the ground that they had been prevented. Mr. Setalvad in support of his argument has cited *Somayya* v. *Subbamma*[1] but I feel great difficulty in adopting its principle. It seems to me whether

(1) (1903) 26 Mad. 599.

a case is good or bad on its merits, that has very little to do with the procedure under section 108. The Court has to look to one thing and one thing only whether the summons was served and whether if served the party had sufficient cause for his non-attendance. There may possibly have been something special in the circumstances of that case which induced the Judges of the Madras High Court to put a very liberal interpretation on the words "sufficient cause". But the practice which they seem to affirm appears to me altogether unsound and likely to introduce practically unlimited and unnecessary complications in administering the section. Sitting as I do without much experience on this side of the Court I do not give effect to the suggestion that the practice of this Court is not warranted by the law. I believe the practice is well established.

For these reasons I think that the motion must be dismissed with all costs and the *ex parte* decree allowed to stand.

The fourth and fifth defendants preferred an appeal.

Setalvad for the appellants:—

We submit that the suit was improperly put down for an *ex parte* decree on the 24th September, and that we showed sufficient cause for not appearing.

You can't pass an *ex parte* decree except on the day fixed for the hearing: see Civil Procedure Code, sections 68, 69, 96 and 108.

Refer to Rules 111 and 112. Rule 111 only provides for the filing of a written statement. Rule 112 provides that in default of a written statement the suit is to be set down as undefended.

The direction in the margin of the summons is not warranted by the Code or Rules unless it only means that the suit will be set down for an *ex parte* decree on the day fixed for the hearing. There is nothing in Forms 117 and 118 of the Code as to the four weeks or as to an *ex parte* decree in default of a written statement. Then we had sufficient cause for not appearing. The suit was against five partners of whom three were not served at all. All the papers were with them. The first notice we got from the plaintiff was his solicitor's letter of 9th September 1907 warning us that they would apply to have the suit set down on

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the board of the 20th instant for an *ex parte* decree. This was not done. Then came his attorneys' letter of 19th September 1907 saying they would apply to have the suit set down for an *ex parte* decree on the 23rd instant.

The suit was not set down on the 23rd but on the 24th. This notice reached the fourth defendant on the 23rd.

So there was really no notice to my client. There must be proper notice if the suit is to be set down. When we applied to Beaman, J., to set aside the *ex parte* decree we tried to show we had a *bonâ fide* defence; we indicated our chief points.

We rely on *Somayya* v. *Subbamma*[1].

Raikes for the respondent:—

Section 108 of the Civil Procedure Code contains the grounds upon which an *ex parte* decree may be set aside, one of which is if the defendants are *prevented* by any *sufficient* cause from appearing *when the suit is called on for hearing*. We submit that the appellants showed no cause whatever which prevented them from appearing on the 24th September. On the contrary their conduct showed that they had no intention at all of appearing and that it was an afterthought afterwards when they did think of appearing. This will appear from the following reasons:—(1) They did not even file their appearance. (2) They did not apply for copy of proceedings. (3) They took no notice of the letters of 27th April 1907 and 13th July 1907, which threatened proceedings against them and the other defendants. (4) Their attorneys did not reply to our letters of 2nd and 5th September. (5) They took no action whatever on our letter of 9th September nor did they apply for an extension of time to file their written statement. (6) No notice was taken of our letter of 19th September although defendant 5 admits receiving it.

The appellants attempted to evade the wording of section 108 by relying on the case of *Somayya* v. *Subbamma*[1], but what was really decided in that case was (see page 603) that provided there was just and resonable cause for restoring a case to the file the merits of the case formed an important element, so that if

(1) (1903) 26 Mad. 599.

there was no just cause the merits alone would not justify the Court in granting the application and *vice versa* if there was no case on the merits, but even if there was a just and good cause the Court would not restore the case.

In the present case it is submitted for the reasons above stated that not only the appellants were not prevented by a sufficient cause, but that there was no cause at all, why they should have behaved as they did.

The respondent was not bound to give any notice at all having regard to the order endorsed on the margin of the summons giving distinct notice to the appellants that in the event of their failing to file their written statement within four weeks from the service of the writ of summons this suit would be set down to be heard *ex parte*.

The practice of allowing a plaintiff to have a suit set down on the board for an *ex parte* decree on the *expiry* of the four weeks allowed for filing the written statement if no written statement is filed before that period has been in vogue for about 50 years and is warranted by the Rules of the High Court.

JENKINS, C. J.—We are of opinion that having regard to the summons and what is therein stated it was not open to the plaintiff to obtain a decree before the returnable date. We think that this conclusion is not only required by the terms of the summons but is in accordance with the provisions of the Code with which the Rules are consistent in this respect. At the same time the plaintiff has followed a course which has been permitted by the office for a great number of years and it would be hard to cast upon him costs of this appeal.

So the order we make as to the costs will be that all costs of the suit and appeal up to this date, including the costs of the motion, will be costs in the cause as between the plaintiff and defendants 4 and 5.

We set aside the decree that has been passed againt defendants 4 and 5.

This order is in both the appeals.

Attorneys for the appellants: *Messrs. Mutubhai, Jamietram & Madan.*

Attorneys for the respondent: *Messrs. Kanga & Patell.*

B. N. L.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1904. *August* 17.

AGA SHERALLI VALAD AGA FAIZALLI AND OTHERS (ORIGINAL DEFENDANTS), PETITIONERS, APPELLANTS, *v.* BAI KULSUM KHANAM (ORIGINAL PLAINTIFF), OPPONENT, RESPONDENT.*

1908. *February* 12.

Mahomedan Law—Shia branch—Descendants of paternal uncles and aunts—Stirpital succession.

The heirs by consanguinity under the Shia Law of inheritance fall into three classes. In the first class are, first the parents, and secondly children and other lineal descendants. In the second class there are first grandparents and ascendants and secondly brothers and sisters and their descendants. And in the third class come paternal and maternal uncles and aunts of the deceased and his parents and their descendants.

Succession in the third class, like that in the first and second class, is *per stirpes* and not *per capita*.

APPLICATION for review of judgment in second appeal No. 102 of 1904 decided by Jenkins, C. J., and Batchelor, J., on the 17th August 1904.

The second appeal was preferred from the decision of H. L. Hervey, District Judge of Surat, varying the decree of L. P. Parekh, First Class Subordinate Judge.

The plaintiff sued to recover from the defendants by partition her share consisting of 6 annas and $4\frac{4}{5}$ pies in the rupee in the estate of one Nurjahan Khanam *alias* Fatma Khanam, deceased. The plaintiff and the three defendants stood in equal degree of relationship to the deceased. The plaintiff was a descendant of the paternal uncle of the deceased and defendants 1 and 2 of

*Civil application No. 562 of 1904 for a review of judgment.