view of this conflict of decisions and in the light of the arguments urged in this case, and I am satisfied that the view we now take is the correct view.

Speaking for myself I regret the result for as a matter of fact this view is likely to unsettle some existing titles to immoveable properties. The decision in *Bhagwant's case*[1] was in 1889. In 1900 that part of the decision with which we are concerned was disapproved by the Privy Council. In spite of that *Bhagwant's case*[1] has been probably followed on this point in some cases in this Presidency, I mean cases which have not been reported. Then we come to the conflicting decisions to which I have already referred. I cannot say that the course of decisions has been uniform and long enough to invite the application of the doctrine of *stare decisis*.

I therefore concur in the order proposed by my Lord the Chief Justice.

Appeal allowed.

R. R.

[1] (1889) 14 Bom. 279.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

DAMU valad DIGA AND ANOTHER (HEIRS OF ORIGINAL PLAINTIFF), APPELLANT *v.* VAKRYA valad NATHU KUNBI (ORIGINAL DEFENDANT), RESPONDENT.*

1919. *December* 19.

Civil Procedure Code (Act V of 1908), Order XVII, Rule 2, Order IX, Rule 3, Order XXXII, Rule 3—Adjourned hearing—Plaintiffs' default—Non-appearance of defendant—Dismissal of suit—Fresh suit on the same cause of action.

* First Appeal No. 170 of 1918.

1919.

DAMU v. VAKRYA.

The plaintiffs filed a suit against several defendants, one of whom was a minor who was not represented in the suit as no guardian was appointed for him. At an adjourned hearing, the suit was dismissed for plaintiffs' default. The plaintiffs having again sued the minor defendant alone on the same cause of action :—

Held, that the dismissal of the first suit did not operate as a bar to the maintainability of the second suit since the order passed in the first suit was a nullity as between the plaintiffs and the minor defendant.

FIRST appeal from the decision of K. R. Natu, First Class Subordinate Judge at Dhulia.

Suit for declaration.

In 1915, the plaintiff filed a suit against two defendants praying for a declaration that the adoption of Vakrya was invalid. Vakrya, who was a minor, was subsequently made a party defendant to the suit. The Court appointed the Nazir of the Court as guardian *ad litem* of the minor defendant ; but as the plaintiff did not place the Nazir in possession of funds for defending the suit, the Court discharged the Nazir from guardianship. Time was then given to the plaintiff to find out another guardian. The plaintiffs failed to attend at an adjourned hearing. The original defendants were present ; and the Court dismissed the suit.

In 1917, the plaintiffs sued the minor defendant alone for a declaration that his adoption was invalid.

The trial Court was of opinion that the dismissal of the first suit should be taken to be under Order IX, Rule 8, of the Civil Procedure Code ; and that its dismissal barred the cognisance of the second suit on the same cause of action.

The plaintiffs appealed to the High Court.

M. V. Bhat, for the appellant :—The order made by the Court in the former suit falls under Order XVII, Rule 3 and not under Rule 2. Time had been granted to the plaintiff in that suit to suggest another guardian for the minor defendant No. 3 in that suit. Order IX

1919.

DAMU v. VAKKYA

has no application to such a case. I rely upon *Enatulla Basunia* v. *Jiban Mohan Roy*[1]. Even if it be held that the former suit was dismissed under Order XVII, Rule 2, the present suit is not barred by Order IX, Rule 9. The former suit was dismissed for default under Order IX, Rule 3 and not under Rule 8 of that Order. As no guardian had been appointed for the minor defendant he could not appear and plaintiff had also not appeared. So as between plaintiff and defendant No. 3 in the former suit, Order IX, Rule 3 applies.

In the former suit plaintiff made allegations against the natural father and the adoptive mother of defendant No. 3 in that suit. So the cause of action in that suit was different from the cause of action in the present suit where the adoptive boy alone has been sued. For this also Order IX, Rule 8 does not apply.

P. V. Kane, for the respondents :—The former suit was dismissed under Order XVII, Rule 2 and not under Rule 3. The position of Order XVII in the scheme of the Code and the words of Rule 3 of that Order indicate that the Court may act under that Rule only when there are materials before the Court to decide the suit. A decision presupposes an issue raised on the rival contentions of parties. In the present case neither party had given any evidence. No guardian had been appointed for the minor defendant on the day on which the suit was adjourned, nor had issues been framed. The Calcutta case relied upon by the appellant rather helps me. I rely upon *Chandramathi Ammal* v. *Narayanasami Aiyar*[2]. Therefore the former suit was dismissed under Order XVII, Rule 3. Hence Order IX has to be looked to. The dismissal must be taken to be under Rule 8. Here two out of the three defendants actually appeared and plaintiff did not appear. The third defendant could not appear owing to the default

(1) (1914) 41 Cal. 956. (2) (1909) 33 Mad. 241.

1919.

DAMU v. YAKUYA.

of the plaintiff in suggesting a proper guardian. But the suit must be taken as one, and as some of the defendants had appeared, the dismissal was under Rule 8. If it be urged that the word "defendant" in Rule 8 means all the defendants where there are more than one, then the same interpretation must be placed on the word "party" in Rule 3, Order IX. It cannot be said that all the parties had not appeared on the day the suit was dismissed. So Rule 3 would not apply. Therefore at the most it may be contended that there is no provision in the Civil Procedure Code for what happened in this case. But plaintiff is the only person to blame for what has happened and so he should not be allowed to take advantage of his own default. Order IX, Rule 8 makes the nearest approach to the facts of this case.

Further, the causes of action in both the suits are identical. The only material question in both suits is whether the minor defendant was validly adopted and the evidence is the same in both the suits: see *Sonu valad Khushal* v. *Bahinibai*[1].

Bhat, in reply.

C. A. V.

CRUMP, J.:—The only question for our decision is whether the lower Court has rightly held that this suit is barred by the decision in Suit No. 185 of 1915 of the same Court. That the present plaintiff is the representative in interest of the plaintiff in that suit is not denied. The then defendants were three in number, and the present defendant was one of them. The question is what is the nature of the order disposing of that suit and what is its effect. The terms of the order made clearly show that the Judge who made that order

[1] (1915) 40 Bom. 351.

1919.

DAMU v. VAKEVA.

dismissed the suit for plaintiff's default. The order was made at an adjourned hearing and the Court must be taken to have acted under Order XVII, Rule 2, and to have based its order on the provisions of Order IX. It was argued that Order XVII, Rule 3 applied but that is not so. The terms of the Order show that the suit was dismissed on account of plaintiff's default and on no other ground. The decision in *Chandramathi Ammal* v. *Narayanasami Aiyar*[a] appears to contain a correct exposition of the relative scope of sections 157 and 158 of the Code of Civil Procedure of 1882, and that decision is equally applicable to Rules 2 and 3 of Order XVII. As Order XVII, Rule 2 applies we must refer to Order IX for the authority to dismiss the suit.

So far as the first two defendants were concerned Order IX, Rule 8 clearly applies. They were present and plaintiff was absent. But they are not parties now and the question is how the case stands as between plaintiff and defendant No. 3. I find it difficult to follow the lower Court in holding that for the purposes of Rule 8 of Order IX it is sufficient if one or some of several defendants appear. It is necessary, as I read the law, to take the case of each defendant on its own merits. Here the order itself is merely one dismissing the suit, and so far as the present defendant is concerned may be referred to Order IX, Rule 3 just as readily as to Order IX, Rule 8. In the one case a subsequent suit is barred in the other it is not barred. In the case of several defendants the consequences of an order of dismissal need not necessarily be the same against all. The present defendant was absent and *prima facie* therefore the order of dismissal as between him and the plaintiff would not bar a subsequent suit.

But there is a further fact which requires consideration. The present defendant was (and is) a minor. In

[a] (1909) 33 Mad. 241.

1919.

DAMU v. VAKRYA.

the previous suit he was at the time represented by a proper guardian *ad litem*, the Nazir of the Court. At the date when the suit was dismissed the Nazir's appointment had terminated and no guardian had been appointed. A minor defendant is a party to a suit in the eye of the law, but without the appointment of a guardian it was not possible for him to appear. It was in fact, owing to the absence of any guardian that the suit stood adjourned. The Nazir's appointment was cancelled because the plaintiff failed to furnish him with funds as directed by the Court, but the suit was not dismissed owing to plaintiff's failure in this respect. At the date of the dismissal there was no guardian and the minor defendant was not, therefore, represented. Now the provisions of Order XXXII, Rule 3 are imperative, and without complying with those provisions the Court could not make any decree as between the plaintiff and the minor defendant. As between these parties, therefore, any order is (in my opinion) a nullity. And the second suit cannot therefore be barred.

I would, therefore, reverse the decree of the lower Court and remand the suit for a disposal on the merits. Costs to be costs in the cause.

SHAH, J. :—I concur in the order proposed by my learned brother.

The facts connected with the previous suit filed by Devchand and his son Diga in 1915 have been accurately stated in the judgment of the lower Court. It is clear on those facts that the order dismissing the suit for default is referable to Order XVII, Rule 2 and not to Rule 3 of that order. By the provisions of Rule 2, the order must be taken to have been made under Order IX, Rule 8 as regards defendants Nos. 1 and 2 in that suit, who were present on the date of the order.

The important question is as to what is the effect of that order on the present suit. In order to determine that it is necessary to consider whether the adopted boy was effectively made a party to the suit of 1915. On the admitted facts I am of opinion that he was really not a party to that suit at all at the date of its dismissal. He was joined as defendant No. 3 to the suit, but the first guardian for the minor proposed by the plaintiffs in that case was not accepted by the Court. Ultimately the Nazir of the Court was appointed the guardian *ad litem* of the minor. But in consequence of the plaintiffs in that suit having failed to supply the necessary funds to the Nazir, his appointment as the guardian *ad litem* was cancelled by the Court. The suit was then adjourned to enable the plaintiffs to propose another guardian. They proposed Laxmibai the then defendant No. 2, but she refused to act as such. On the date of the dismissal of the suit in fact there was no guardian of the minor for the suit, as required by the Code of Civil Procedure, and it was not possible for the minor to appear on that day. Under those circumstances I am of opinion that really he was not a party to the suit at all on the day: and it is clear that no order binding on the minor could have been made in the suit. The order of dismissal must be held to be an order made on the footing that the only defendants in that suit were defendants Nos. 1 and 2 (i.e., the natural father and the adoptive mother of the adopted boy). On this footing I think that the previous suit is no bar to the maintenance of the present suit. Order IX, Rule 9 provides that the plaintiffs shall be precluded from bringing a fresh suit in respect of the same cause of action. The order of dismissal affects the parties to the suit and cannot be held to apply to a fresh suit which is filed against the adopted boy who was not a party to that suit. It is urged for the respondents that

1919.

DAMU v. VAKRYA.

the rule refers to the same cause of action and does not require that the parties to the fresh suit should be the same in order that the bar created by the Rule may take effect. No authority is cited in support of this proposition; and I am not prepared to hold that the Rule bars a suit against a person, who was not a party to the suit dismissed for default under Rule 8.

Apart from that consideration, I am not satisfied that the cause of action in the present suit is the same as that in the previous suit. The previous suit was against the natural father and the adoptive mother of the adopted boy. Any order in that suit could not have affected the adopted boy. No doubt the principal allegation in the plaint related to the invalidity of the adoption. But there were further allegations made against the defendants in that suit, which were personal to themselves as to their fraudulent and deceitful acts and intent. The relief was claimed against them only. Even assuming that the allegations other than those relating to the invalidity of the adoption were not material, I am unable to hold that the cause of action against the adoptive mother and the natural father, if any, is the same as that against the adopted boy. In the present suit neither the natural father nor the adoptive mother is a necessary or a proper party; and though there may be apparent similarity between the two causes of action, and though the ground covered by the evidence necessary to prove the material allegations in both the suits may be common to a large extent, I feel clear that the cause of action, if any, against the natural father and the adoptive mother is quite distinct from that against the adopted boy.

I am, therefore, of opinion that Rule 9 is no bar to the present suit.

Decree reversed.

R. R.