APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921.

February 21.

JETHALAL GIRDHAR, AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3), APPELLANTS *v.* VARAJLAL BHAISHANKAR, AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 4, RESPONDENTS)*.

Decree—Ex-parte decree—Appeal—Power of remand—Civil Procedure Code (Act V of 1908), section 151, Order IX, Rule 13, Order XLI, Rules 23, 33.

When a suit was fixed for hearing, the pleader for the defendants presented an application for adjournment. The application was refused and the Court proceeded to hear the plaintiff's evidence *ex parte* and passed a decree. Defendants appealed. The appellate Court was of opinion that although sufficient reason had been shown for an adjournment, it had no power to remand except when the case came within Order XLI, Rule 23 of the Civil Procedure Code, 1908, and accordingly dismissed the appeal.

Held, setting aside the order of dismissal and directing a remand, that under the Code of Civil Procedure (Act V of 1908), the power of remand by the appellate Court could not be limited to the case described in Order XLI, Rule 23.

Krishna Ayyar v. *Kuppan Ayyangar*(1); *Ghuznavi* v. *The Allahabad Bank, Ltd.*(2); approved.

Parvatishankar Durgashankar v. *Bai Naval*(3); *Hummi* v. *Aziz-ud-din*(4); *Narottam Rajaram* v. *Mohanlal Kahandas*(5); considered.

MACLEOD, C. J.:—"It appears to me that the legislature in the present Code intended to free an appellate Court from the restrictions imposed on it by the Code of 1882 and to give it powers to make such orders as it might think fit that justice might be done."

PER SHAH, J.:—"I am of opinion that the lower appellate Court has the power to consider the question whether the suit was heard *ex parte* against the appellant on sufficient grounds.

"If the appellate Court is minded under the circumstances of a particular case to reverse the decree of the trial Court and to remand the suit to that Court for a retrial, it has power to do so. It may be that a case may

* Second Appeal No. 251 of 1920.

(1) (1906) 30 Mad. 54.
(2) (1917) 44 Cal. 929.
(3) (1892) 17 Bom. 733.
(4) (1916) 39 All. 143.
(5) (1912) 37 Bom. 289.

not fall within the scope of Rule 23, Order XLI, but the words of Rule 33, Order XLI as also the provisions of section 151 are wide enough to save the power of the appellate Court to make an order suited to the circumstances of the case or in the interest of justice, and if necessary to remand the suit for a retrial."

SECOND Appeal against the decision of R. S. Broomfield, District Judge of Ahmedabad, confirming the decree passed by M. N. Choksi, First Class Subordinate Judge of Ahmedabad.

Suit for specific performance.

One Jethalal (defendant No. 1) on behalf of the firm consisting of himself and defendants Nos. 2 and 3 borrowed Rs. 10,000 from the plaintiff. On the 30th November 1913 an agreement was made that if the money was not repaid within six months a deposit receipt of Rs. 10,000 in the New Shorrock Mills (defendant No. 4) was to be transferred from defendants to plaintiff. The money was not repaid within the period specified and though the defendants handed over the deposit receipt to plaintiff, they failed to get it transferred to his name and prevented him from drawing some of the commission falling due. Plaintiff brought a suit for specific performance of the agreement of 1913.

Defendants Nos. 1 and 2 put in a written statement in which they alleged that they only borrowed Rs. 9,439; that the agreement referred to was only an additional security and not meant to be carried out; that the deposit receipt was only pledged with plaintiff; that there had been partnership dealings between defendants and plaintiff and the latter ought to have sued for accounts.

The case was set down for hearing on 27th August 1917, postponements were then given for various reasons and finally the hearing came to be fixed on the

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5th February 1918. On that day plaintiff was present with his evidence. Defendants Nos. 1 to 3 were absent. Defendant No. 1 sent a telegram from Bombay to his pleader "Suddenly sick, cannot attend today ..... therefore take postponement." The pleader appeared and asked for postponement, which the Court refused, as there was no medical certificate and no cause shown. The pleader having no further instructions did not cross-examine plaintiff or take any further part in the proceedings. The Subordinate Judge disposed of all the issues on the evidence produced by the plaintiff and decreed the suit.

On appeal the District Judge was of opinion that the first defendant should have been granted an adjournment since sufficient reason for his absence on the 5th February was shown and that if an application had been made under Order IX, Rule 13 the Court might have set aside the decree but he could not accede to the defendant's application to set aside the decree and direct a re-hearing for the following reasons :—

"Defendants contented themselves with appealing against the decree as it stood and they ask, as I have said, that this Court should set aside the decree and direct a re-hearing on the ground that the trial Court was wrong in proceeding to decide the suit *ex parte*. I think it is not open to the appeal Court to do this, see *Parvatishankar* v. *Bai Naval*, 17 Bom. 733. Other High Courts have taken a different view (see *Krishna Ayyar* v. *Kuppan Ayyangar* 30 Mad., 54, F. B.; *Habib Bakhsh* v. *Baldeo*, 23 All., 167). But the law in this Presidency remains as stated in the first named case."

Defendants appealed to the High Court.

G. S. Rao, for the appellant.

G. N. Thakor, for respondent No. 1.

MACLEOD, C. J. :—The plaintiff filed this suit in the Court of the First Class Subordinate Judge of Ahmedabad, claiming certain relief from the defendants with regard to a deposit receipt for Rs. 10,000 of which he claimed to be the owner. The case came on for hearing

on the 5th of February 1918. The pleader for the defendants Nos. 1 to 3 presented an application to the Judge for an adjournment on the ground that the 1st defendant had gone to Bombay as his son was affected by plague and as he fell ill there, he could not come. That application was refused and the Court proceeded, after hearing the plaintiff's evidence, to pass a decree on the 16th February 1918 in favour of the plaintiff. The result was that the case was heard *ex parte* without hearing the evidence of the defendants although their pleader was present.

The defendants then had three remedies : they might have applied to the trial Judge to set aside the *ex parte* decree under Order IX, Rule 13 ; they might have applied for a review ; or they could appeal under section 96. They chose to appeal. One of the grounds of the appeal was that the lower Court should have granted the adjournment asked for and not proceeded with the hearing of the case. The learned appellate Judge was of opinion that the first defendant should have been granted an adjournment since sufficient reason for his absence on the 5th February was shown and that if an application had been made under Order IX, Rule 13 the Court might have set aside the decree, especially as defendants Nos. 2 and 3 were minors. He considered that if the defendants, without making any such application to the trial Court, appealed against the decree as it stood and asked the appellate Court to set aside the decree and direct a re-hearing on the ground that the trial Court was wrong in proceeding to decide the suit *ex parte*, the appellate Court could not accede to that application. He relied on a decision of this Court in *Parvatishankar Durgashankar* v. *Bai Naval*[1]. The defendant in that

[1] (1892) 17 Bom. 733.

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case had applied for an adjournment on the ground that she was ill and had not been able to file her written statement. The Court granted a month's adjournment. On the appointed day the defendant applied for a further adjournment which the Court rejected and proceeded to hear the case, passing a decree for the plaintiff. The defendant appealed and the District Judge reversing the decree remanded the case for trial, on the ground that the defendant's application for adjournment ought to have been granted. On appeal it was held, discharging the order of remand, that the suit having been tried on the merits, and not on a preliminary point, the District Judge could not remand the case under section 562, but ought to have proceeded under sections 568 and 569 of Act XIV of 1882. That decision was dissented from by the High Court of Madras in *Krishna Ayyar* v. *Kuppan Ayyangar*[1]. The Full Bench there decided that the appellate Court can remand a case when it reverses an order refusing to set aside an *ex parte* decree. It seemed to the learned Chief Justice anomalous to hold that there was no such power when the appellate Court allowed an appeal against a decree upon the ground that there ought not to have been an *ex parte* decree against the defendant.

In *Hummi* v. *Aziz-ud-din*[2], the defendants against whom an *ex parte* decree had been passed first filed an application for re-hearing which was rejected. Then they appealed against the decree to the District Judge who dismissed the appeal. In second appeal it was held that the defendants might and should have appealed against the rejection by the Munsiff of their application for a re-hearing ; but they had no right in their appeal from the decree to raise any question, as to their non-appearance in the Court of first instance. It may be that the fact that the defendants had in the first

(1) (1906) 30 Mad. 54. (2) (1916) 39 All. 143.

instance applied for a re-hearing influenced the Court in coming to the conclusion it did. Now the learned District Judge was of opinion that in appeal against the *ex parte* decision under section 96, Civil Procedure Code, the appellate Court could not deal with the question whether the lower Court was right in proceeding *ex parte*. The only ground on which the decree could be challenged in appeal was that the evidence which the plaintiff had adduced was not sufficient to justify the decree. It seems to me that the question really in this case has been unduly narrowed by considering that the appellate Court had power to remand the case only if it came within Order XLI, Rule 23. If there was no power to remand unless the lower Court had disposed of the suit upon a preliminary point, then undoubtedly the appellate Court could not have any power to set aside the decree of the lower Court and direct a re-trial because in the opinion of the appellate Court the lower Court was wrong in refusing the adjournment. It appears to me that would be taking a narrow view indeed of the powers of an appellate Court. However limited such powers were by the Code of 1882, there are certain new sections in the Code of 1908 which enable the Judges to take a wider view of their powers and prevent them from being restricted to the particular powers granted by particular sections. Order XLI, Rule 33, gives an appellate Court power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. Section 151 of the Code of Civil Procedure gives the Court power to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. This question with regard to the power of remand of an appellate Court was dealt with in *Ghuznavi* v. *The Allahabad*

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Bank, Ltd.[1] It was held that the power of remand under section 107 of the Civil Procedure Code was limited to the case described in Order XLI, Rule 23, but nothing in that section restricted in any manner the application of the principle of inherent power recognized by section 151 of the Code. The learned Chief Justice at page 937 says :—"In my judgment, therefore, the powers of the appellate Court as regards remand are not restricted to the case specified in Order XLI, Rule 23, but the Court, by reason of its inherent jurisdiction...may order a remand in cases other than the case specified in Order XLI, Rule 23, if it be necessary for the ends of justice."

This question was also dealt with by the Bombay High Court in *Narottam Rajaram* v. *Mohanlal Kahandas*[2]. It was held, setting aside the order of remand, that an appellate Court could remand a case to the trial Court only when the latter had disposed of the suit upon a preliminary point and the decree was reversed on appeal. Section 151 appears to have been referred to in the argument, and I do not think it can be inferred from the judgment that the learned Judges would not have had recourse to that section if they thought that the ends of justice required it. At page 294 Mr. Justice Batchelor says: "As to section 151, which Mr. Thakor relied upon, we think that it has no relevance to the present argument. It was not, in our opinion, necessary for the ends of justice to withdraw the decision of the case from a Court of higher jurisdiction and to hand it over to a Court of lower jurisdiction."

That decision, therefore, must be read in the light of the particular facts of the case. An order refusing an adjournment may form a ground of appeal at whatever

[1] (1917) 44 Cal. 929. [2] (1912) 37 Bom. 289.

stage of the hearing it may have been made and if the appellate Court comes to the conclusion that an application for an adjournment had been wrongly refused, it clearly has the power to set aside the decree and order a re-trial. If it has not sufficient material before it to decide whether an adjournment should have been granted, it has the power under Order XLI, Rule 27, to allow additional evidence to be produced.

If, however, there has been no appearance at all and consequently no application for an adjournment has been made, it would be difficult for an appellate Court to deal with the case except on the merits. If the defendant instead of exercising his right to apply to the trial Court for a re-trial chooses to appeal, it might well be said that he has no right to ask of the appellate Court to allow him to produce evidence to account for his absence in the trial Court. Still I should not like to say that in no circumstances could an appellate Court exercise its discretion in his favour. It appears to me that the Legislature in the present Code intended to free an appellate Court from the restrictions imposed on it by the Code of 1882 and to give it powers to make such orders as it might think fit that justice might be done.

The appellate Court in this case certainly expressed an opinion that defendant No. 1 having produced a medical certificate from a Bombay doctor to the effect that he was laid up with fever for three days from 2nd February 1918 had sufficiently explained his absence. But the plaintiff is still anxious to contest the question in the appellate Court, so that we must leave that question still open to be decided.

The order dismissing the appeal is set aside and the lower appellate Court is directed to come to a finding

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on the question, whether the defendant could show sufficient reasons for his absence in the trial Court on the 5th February 1918. On the finding on that question it will depend whether the appellate Court should set aside the decree of the trial Court and direct a new trial or confirm the decree of the lower Court. Costs costs in the appeal.

SHAH, J. :—I concur in the order proposed. I desire to state briefly the reasons for the view which I take of the questions of law which have been argued in this appeal.

The first question that arises is whether the appellate Court has power in an appeal from an *ex parte* decree to deal with the question whether the refusal to adjourn the case on the application of the defendant against whom the suit proceeded was for sufficient reasons or not. In this case the defendant against whom the suit is decided *ex parte* has not availed himself of the remedy provided by the Code by way of an application to set aside the *ex parte* decree under Order IX, Rule 13. The question arises with reference to the power of the appellate Court, when that remedy is not resorted to. The position may be quite different where the party appealing has already availed himself of the remedy by way of an application to set aside the decree and has failed in those proceedings on the merits. But in a case where he has not resorted to that remedy provided by the Code, can he question the correctness of the *ex parte* decree on the ground that the refusal to adjourn the case was not proper? It seems to me that it is open to him to raise that question in the appeal from the *ex parte* decree. On that point I accept the view of the Full Bench in *Krishna Ayyar* v. *Kuppan Ayyangar*[1]. Undoubtedly the observations in *Hummi*

(1) (1906) 30 Mad. 54.

v. *Aziz-ud-din*[1] are against this view. These observations were made with reference to a case in which the party appealing had already exhausted his remedy by way of an application to set aside the *ex parte* decree. The observations, however, are perfectly general and so far as they go are in favour of the contention urged on behalf of the plaintiffs. But that opinion, if it is to be taken without relation to the facts of the case, is opposed to the decision of the Madras High Court, to which I have already referred. With due respect I prefer the opinion of the Madras High Court. That opinion, so far as the power of the appellate Court is concerned, is in entire consonance with the decision in *Parvatishankar Durgashankar* v. *Bai Naval*[2]. In form that decision relates to the nature of the order which the lower appellate Court may make; but by necessary implication the decision either accepts or acquiesces in the view that the appellate Court has the power to consider whether the adjournment was properly refused or not. To that extent, the decision is in accordance with the opinion of the Madras High Court. I am clearly of opinion that the lower appellate Court had the power to consider the question whether the suit was heard *ex parte* against the appellants on sufficient grounds.

The second question relates entirely to the form of the order which the appellate Court may make, in case it is satisfied that the grounds for proceeding *ex parte* were not sufficient. That Court may reverse the decree and send back the case to the trial Court for a re-trial, or may send down issues and call for findings and may direct further evidence to be recorded under Order XLI, Rules 25 and 27. That of course is, generally speaking, a matter within the discretion of the Court. But it is argued on behalf of the plaintiffs that the Court has no

[1] (1916) 39 All. 143 [2] (1892) 17 Bom. 733.

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power to remand except under Rule 23. I do not think, however, that if the appellate Court is minded under the circumstances of a particular case to reverse the decree of the trial Court and to remand the suit to that Court for a re-trial, it has no power to do so. It may be that a case may not fall within the scope of Rule 23, Order XLI. But the words of Rule 33, Order XLI, as also the provisions of section 151 are wide enough to save the power of the appellate Court to make an order suited to the circumstances of the case or in the interest of justice and, if necessary, to remand the suit for a re-trial. The decision in *Narottam Rajaram* v. *Mohanlal Kahandas*,[1] which has been relied upon by Mr. Thakor, does not necessarily conflict with this view. The facts, with reference to which the power of remand by the appellate Court was considered, were materially different; and while, in that particular case, the remand order made was held to have been beyond the powers of the appellate Court, that decision cannot be read as laying down a general rule that except under Rule 23, Order XLI, there is no power in the appellate Court to make an order of remand if it considers it proper to do so, or necessary for the ends of justice to do so. The question whether the case should be remanded for re-trial or whether an order under Rule 25 of Order XLI, would meet the requirement of the case must be determined by the appellate Court with reference to the facts of each case.

Order set aside.

J. G. R.

[1] (1912) 37 Bom. 289.