

**(1923) 05 AHC CK 0040****Allahabad High Court****Case No:** None

Ram Charan Lal

APPELLANT

Vs

Raghbir Singh and Others

RESPONDENT

**Date of Decision:** May 9, 1923**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 17 Rule 2

**Citation:** AIR 1923 All 551 : (1923) ILR (All) 618**Hon'ble Judges:** Sulaiman, J; Lindsay, J**Bench:** Division Bench**Final Decision:** Disposed Of

### **Judgement**

Lindsay and Sulaiman, JJ.

This is a plaintiff's appeal arising out of a suit for possession of certain property.

2. It appears that the property in question was sold by Musammat Reoti Kunwar, on the 29th of November, 1916, to one Chandan Singh. The case for the plaintiff was that Musammat Reoti Kunwar had no authority to sell this\property as she had only the estate of a Hindu widow.
3. Chandan Singh is dead and is represented on the record by his sons and grandsons.
4. The defence put up to the suit was that Musammat Reoti Kunwar was full owner of the property under a will executed by her husband in her favour.
5. We have to deal, in the first instance, with the history of the suit in the trial court.
6. It seems quite clear that after the plaint had been filed summonses were issued to the defendants and 8 date was fixed for the first hearing and for framing of issues.

7. It is not disputed that the defendants all combined to file a written statement embodying the defence to which we have just alluded. Issues were framed and a date was fixed some months ahead for final disposal of the case, the parties being directed to have their evidence in court upon the date so appointed.

8. The ease came up before the Additional Subordinate Judge on the 3rd of September, 1920. On that date one of the defendants Raghbir Singh (defendant No. 1) was present, in court. The pleader who appeared for the defendants was also present. He informed the court that he had no instructions to defend the case. Raghbir Singh asked the court to adjourn the ease for certain reasons and the court made an order that if Raghbir Singh would deposit a sum of Rs. 100 in two hours, an adjournment would be allowed. This order was not complied with by the defendant Raghbir Singh.

9. The defendant Dambar Singh, who is defendant No. 4, was absent on this date.

10. What happened then was this. "The Subordinate Judge took the evidence which had been produced by the plaintiff and as there was no evidence on behalf of the defendant, he disposed of the case at once, coming to findings upon all the issues which had been framed. The result of his proceedings was that he gave the plaintiff a decree for possession and for mesne profits.

11. After this decree had been passed Dambar Singh, who was absent on the date on which the suit was decided, appeared before the successor in office of the Subordinate Judge who had decided the case, and made an application to have the decree set aside, the application being treated as one under order IX, Rule 13.

12. Dambar Singh supported his application by an affidavit alleging that on the date in question he had been ill and unable to attend the court and to enforce the presence of his witnesses.

13. Notice having been issued to the plaintiff, the latter filed a counter affidavit. The Subordinate Judge, after considering the affidavits tendered by both parties, came to the conclusion that the former decree should be set aside and exercised his power for that purpose. After the decree had been set aside, certain evidence which was put forward by the defendants was received on the record and the result was that the second judgment was passed in favour of the defendants. The final judgment dismissed the plaintiff's suit with costs to the defendants. The plaintiff now appeals and the first point which has been raised on his behalf is that the court below was not, competent to set aside the earlier decree under the provisions of Order IX, Rule 13.

14. We have, in the first place, to consider what was the state of affairs when the Subordinate Judge passed his judgment on the 3rd of September, 1920.

15. It seems clear from what has already been set out that on that date lie had before him a case which fell within the purview of Order XVII, Rule 2.

16. We think it is right to say that there can, strictly speaking, be no ex parte proceedings against any defendant who has entered an appearance and filed a defence. That, to our mind, is clear from the provisions of Order IX. Order XVII, Rule 2, applies to the particular case where the hearing of the suit had been adjourned and where, on the adjourned date, the parties or any of them fail to appear.

17. In that case Order XVII, Rule 2, enables the court, if it so chooses, to deal with the case as being one under Order IX or to make such other order as it thinks fit.

18. It has to be considered here that there is nothing in the judgment of the 3rd of September, 1920, to indicate that the Additional Subordinate Judge was dealing with the case under Order IX. No mention of the provisions of Order XVII, Rule 2, or of Order IX is made in the judgment, and the contention, therefore, is that the decision was really a "decision on the merits and that the decree which was based upon this judgment could not be set aside by an application made under Order IX, Rule 13.

19. There has been a great deal of conflict of judicial decisions regarding the interpretation of the provisions of Orders IX and XVII. We have, however, to notice a decision of a Bench of this Court which is reported in *Phul Kuar v. Hashmat-ullah Khan* ILR (1915) All. 460. It was there held that on the proper interpretation of Order XVII, Rule 2, a court cannot pass a judgment on the merits under cover of the words "make such other order as it thinks fit." The learned Judges of the Court were of opinion that the "other order" here referred to could only mean an order for further adjournment.

20. In the present case no order for further adjournment was made and a judgment was in fact delivered, and it seems to us, therefore, that under the view of law taken by the learned Judges of this Court, it must be deemed that the Additional Subordinate Judge was in reality taking action under Order IX and that his judgment and decree should be treated as ex parte proceedings. If that is so, then there can be no doubt that Dambar Singh was entitled to apply to the court under Order IX, Rule 13, to have this ex parte decree set aside. We agree with the view of law which was taken by a Bench of the Calcutta High Court in *Enat-ullah Basunia v. Jiban Mohan Roy* ILR (1914) Cal. 956. [Their Lordships then discussed the merits of the case and dismissed the appeal, but without costs as the respondents were not represented.]