(1914) 03 CAL CK 0018

Calcutta High Court

Case No: Appeal from Order No. 254 of 1913

Reajuddin Basunia and others		APPELLANT
	Vs	
Jiban Mohan Ray		RESPONDENT

Date of Decision: March 9, 1914

Judgement

1. This is an Appeal against the order of the Subordinate Judge of Rangpur rejecting an application to set aside a decree said to have been passed ex parte. The application was made under Or. 9, r. 13 of the Code of Civil Procedure. The decree sought to be set aside was passed under these circumstances. On the day the hearing of the case commenced both parties appeared. The case then proceeded from day to day. The Plaintiff in the course of 9 days examined 14 witnesses, who were cross-examined by the Defendants'' pleader, and then closed his case. The Defence pleader then began his case and examined one of the Defendants whose cross-examination not having been finished on the third day of his examination, the case stood adjourned to the next day when neither he, the witness nor the pleader of the defence appeared. The Subordinate Judge consequently noted the case for the defence as closed and proceeded to hear the argument of the pleader for the Plaintiff. There was no argument for the Defendants and the Subordinate Judge delivered his judgment decreeing the suit in Plaintiff''s favour. The Defendants made the application out of which this Appeal has arrisen for setting aside the decree alleging that it had been passed ex parte. The Subordinate Judge relying on the case Kader Khan v. Juggeshur Prasad I. L. R. 35 Cal. 1023 (1908) held that he had no power to set aside the decree under r. 13 of Or. 9 and that the Defendants remedy lay in a review or an appeal.
2. In this Appeal it has been argued for the Appellant that the decree was passed ex parte. The expression ex parte has not been defined anywhere in the Code nor does it appear to have been the subject of a judicial decision for its definition. Its accepted meaning however according to Wharton''s Law Lexicon seems to be "a proceeding by one party in the absence of he other." We may remark here that this accepted meaning does not help us in this case one way or the other. R. 6 of Or. 9 lays down

that where the Plaintiff appears and the Defendant does not appear when the suit is called on for hearing then if it is proved that the summons was duly served the Court may proceed ex parte. For correctly applying this Rule it is important to consider what constitutes "appearance" of the Defendant. The nature of the Defendant''s appearance in obedience to the summons is best explained by the language of the form, prescribed in the first schedule, App. B, for summons to a Defendant. That form directs the Defendant to appear in person or by pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions. The Defendant''s failure to appear in either of the ways specified would lead to the determination of the suit in his absence. The test of a Defendants "appearance" is whether such of the requirements of the summons as relate to appearance have or have not been fulfilled. In the present case the Defendants appeared by their pleader whose being furnished with due instruction cannot be doubted as he conducted the case for the defence up to the stage when he failed to attend the hearing of the case. Thus it cannot be said that the Subordinate Judge proceeded under r. 6 of Or. 9.

3. The provisions of Or. 9 by themselves do not apply to a case in which, the Defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in Or. 17 which deals with adjournments, R. 2 of that Order lays down that "where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Or. 9 or make such other Order as it thinks fit;" while r. 3 of the same Order lays down that "where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

4. The distinction between the two Rules is that the former Rule applies to hearing adjourned at the instance of the Court while the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted. A further distinction between the two rules has been pointed out in the case Mariannissa v. Ramkalpa I. L. R. 34 Cal. 235 (1907), that in a case where there are no materials on the record the proper procedure to follow would be that laid down in r. 2 (s. 157 of the former Code) but if there are materials on the record the Courts ought to proceed under r. 3 (sec. 158 of the former Court). Thus to apply the procedure laid down in rule 3 to a case there must be the presence of both the elements viz., (I) the adjournment must have been at the instance of a party and (2) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of r. 3.

5. The question in this appeal is whether the procedure of the Subordinate Judge on the default of the Defendants was under r. 2 or r. 3 of Or. 17. The hearing of the case was proceeding from day to day and the case stood over for the next day as the cross-examination of the witness had not been finished. The adjournment therefore was not at the instance of a party. In the circumstances we are of the opinion that on the default of the Defendants the Subordinate Judge proceeded under r. 2 to dispose of the suit in one of the modes directed in that behalf by Or. 9. That being our view we think, on the authority of the Full Bench decision in the case of Janardan v. Ramdhone I. L. R. 23 Cal. p. 738 (1896), that the Appellant''s application under r. 13, Or. 9 should have been entertained. The order of the lower Court is set aside. The Appeal is decreed. The Subordinate Judge will now proceed to consider if the Appellant can make out sufficient cause for the decree to be set aside. We assess hearing fee 4 gold mohurs.