

(1921) 12 PAT CK 0008
In the Patna High Court
Case No : Mis. App. No. 284 of 1919

Damodar Das

APPELLANT

Vs

Raj Kumar Das

RESPONDENT

Date of Decision : 15-12-1921

Acts Referred:

Citation : (1921) 12 PAT CK 0008

Judgement

Dawson Miller, C.J.—The suit out of which this appeal arises was instituted by the plaintiffs in the Court of the District Judge of Darbhanga on the 21st February 1918, claiming to remove the defendant from the mahantship of the Pakhrani Asthal on the ground that he was unfit and incompetent to exercise that office. During the pendency of the suit a Receiver was appointed by the Court and put in possession of the properties which the defendant claims as his own. The defendant being deprived of the control of the estate and unable to obtain from the Receiver sufficient money to conduct his defence was, according to his case, unable to be represented at the trial, and on the 28th August 1919, the District Judge, after hearing evidence and arguments for the plaintiffs, passed a decree against the defendant in his absence. On the 20th September, 1919, the defendant applied under Order IX, rule 13 of the CPC to have the decree set aside and the case restored for hearing on the ground that the refusal of the District Judge to direct the Receiver to advance him funds to conduct his defence was sufficient ground for his non-appearance. The learned District Judge, without serving notice of the application upon the plaintiffs, dismissed the defendant's petition on the ground that he was personally present at the hearing and was therefore not prevented from appearing when the suit was called on for hearing within the meaning of Order IX, rule 13.

2. From that order the defendant preferred an appeal to the High Court. The appeal came before a Division Bench of the Court on the 21st April last. The learned Judges who heard the appeal came to the conclusion that the defendant did not appear at the hearing and that he had sufficient ground for non-appearance. The reasons accepted by the learned Judges for arriving at that

conclusion were that the District Judge had refused to order the Receiver of the defendant's estate to put him in possession of an adequate sum to defend the suit, and that the Receiver had not even paid the defendant his subsistence allowance, and, in consequence, the defendant was not ready to proceed with the case on the 11th August, the date fixed for the trial, his non-appearance being in the circumstances justified by sufficient cause. They then ordered that the order refusing to set aside the ex parte decree and restore the suit should be set aside, but as the application under Order IX, rule 13, had been dismissed by the District Judge without serving notice on the plaintiffs, the court, on having its attention drawn to the matter, did not set aside the decree or restore the case for hearing, which would have prejudiced the plaintiffs' rights without giving them a chance of appearing and adducing evidence on the question for consideration under Order IX, rule 13. What the Court did was, after setting aside the order, to remand the case to the Court of the District Judge for a finding on the issue "was the defendant prevented by sufficient cause from appearing when the suit was called on for hearing ?", and they directed the Judge to return his finding to the High Court within three weeks and the appeal to be put up again for hearing after the record had been received back from the District Court. No direction was given to the District Judge to pass any orders upon the application before him and it will be observed at once that this form of procedure was likely to cause some embarrassment when the case came back after remand. The order of the 20th September, had been set aside, and the District Judge was not asked to make any fresh order on the matter referred to him which could be the subject of a fresh appeal, but merely to come to a finding on an issue. The only order from which any appeal could be brought again before this Court was the order of the 20th September, but that order was already set aside.

3. With great respect to the learned Judges, it appears to me that the course adopted was irregular and should be avoided in future. The proper course after vacating the order of the 20th September, was to remand the case, with such direction as to the law as they thought fit, to the Court of the District Judge, for a re-hearing of the application under Order IX, rule 13, in the presence of both parties, directing the Judge to come to a finding on the evidence and to make an order either refusing or allowing the application. The matter could then come up to the High Court on appeal from the new order if the unsuccessful party should be so advised. As it is, the learned District Judge, after hearing the parties and considering their evidence, has determined the issue submitted to him in favour of the defendant, holding that the defendant did not appear and had sufficient cause for non-appearance, but no order was passed by him nor indeed could he do so under the terms of the order of remand.

4. The appeal has now been restored to the list for further hearing, as provided in the remand order, and in the absence on Circuit of one of the learned Judges who remanded the case it has come before this Bench. The defendant is still nominally the appellant as the only order under appeal is that of the 20th September, 1919, which has already been set aside; and he contends that it is

net open to us to call in question an order already made by a court of collateral jurisdiction, or, in other words, that we cannot now restore the order of the 20th September, 1919, even if we should be satisfied that that order was rightly made and that the finding of the District Judge on remand was not justified either in law or upon the facts, as the effect of so doing would be to set aside the order of this Court of the 21st April which we have no power to do. If this contention must prevail there is nothing more to do but to set aside the decree and restore the case for hearing without considering any argument that may be put forward by the respondents (plaintiffs). The learned Government Pleader on behalf of the respondents contends that this cannot have been the intention of the learned Judges who made the order of remand on the 21st April and that, notwithstanding the wording of that part of their order which set aside the order of the 20th September, 1919 we ought to treat it as if the final decision had been kept open until the finding of the District Judge on remand had been received back. There is some justification for this view from the fact that the order of the 21st April, did not finally dispose of the appeal before the High Court. It set aside the previous order refusing to restore the case but left the decree in the plaintiff's favour still standing, and whether that decree should be set aside and the case restored are matters still to be determined. It seems to me that the intention of the learned Judges was to reserve their final decision on this question until after the plaintiffs had an opportunity of appearing and calling evidence before the District judge and then either to complete their order by setting aside the decree or to refrain from doing so. We, therefore, agreed to hear the arguments of the learned Government Pleader on behalf of the respondents. He contends that the decree should not be set aside or the case restored for hearing. His first point is that as the defendant was present in Court, at least on one of the three days when the case was heard, there was an appearance by him within the meaning of Order IX rule 1 of the Civil Procedure Code, so that the provisions of rule 13 of that Order are not applicable to the case. The word "appearance", however, as used in the Code has, in my opinion, a well recognised meaning, and implies that the party is present at the trial either in person or through a pleader properly authorised on his behalf or through a recognised agent under Order III, rule 1, or through a co-party under Order I, rule 12, but in either case the party or the person authorised on his behalf must be present for the purpose of conducting the case. The mere presence of the party unless he is there for that purpose is not an appearance within the meaning of the rules nor does the presence of his pleader who has been instructed to represent him on previous occasions constitute an appearance unless he is instructed to represent him on the occasion in question and attends for that purpose. In the present case the trial took place on the 11th, 12th, and 13th August, 1919. On the 11th the defendant's pleader appeared and asked for an adjournment which was refused. He renewed the application on the following day stating that he had no instructions from his client to cross-examine the plaintiff whose evidence had been taken on the 11th. His application was again refused. The pleader took no part in the trial on either day and the defendant

who was apparently present on one of the days was not there for the purpose of conducting his case and the learned Judge stated that the case would proceed ex parte. After further evidence on behalf of the plaintiffs and after hearing arguments on their behalf the trial concluded on the 13th and judgment was reserved. On the 28th judgment was delivered and a decree was passed in the plaintiffs' favour with costs on the ex-parte scale. It is clear from this short statement of the facts that there was no appearance at the trial from first to last on behalf of the defendant and in my opinion the provisions of Order IX, rule 13, apply.

5. Some discussion arose as to the exact rule under which the District Judge disposed of the suit, viz., whether under Order IX, rule 6, which provides for non-appearance of the defendant when the suit is called on for hearing, or under Order XVII, and if under Order XVII, whether under rule 2 or rule 3 of that Order. It is immaterial whether the case was one falling under Order IX, rule 6, or Order XVII, rule 2, because in either case the procedure is the same where the defendant fails to appear at the first hearing whether that first hearing takes place on the day fixed in the summons under Order IX, rule 1, or at a later date to which the hearing may be adjourned. It would appear, however, that Order IX, rule 6, contemplates a hearing of the suit on the day fixed in the summons for the defendant's appearance, whereas Order XVII, rule 2, contemplates a hearing of the suit at some later date to which it has been adjourned. In either case, I think what is contemplated in these two rules is the procedure on the first day on which the hearing of the suit, as distinguished from interlocutory proceedings, takes place, it is urged, however, on behalf of the respondents that the case is one falling not under rule 2 but under rule 3 of Order XVII in which case the only remedy is by way of appeal or review and not by restitution of the suit. I am unable to accede to this contention. Rule 3 of Order XVII does not contemplate a case of default in appearance but a case in which a party who has appeared and has been given time to do some act in further prosecution of his case has failed to do so within the time allowed. The Court may in such a case proceed with the suit notwithstanding the default and the decision is not ex parte; but in all cases where there is default of appearance at all events at the first hearing whether on the original date fixed in the summons or on some later date to which that hearing is adjourned, the modes of disposing of the suit directed by Order IX apply and the decision is ex-parte. This is subject of course to the special provisions prescribed in Order IX, rule 7. In the present case the defendant did not appear at all either at the first hearing or subsequently. It is unnecessary, therefore, to consider whether when a party has once appeared, either personally or through his pleader or other representative, to conduct his case at the first hearing, and has subsequently withdrawn from the suit or failed to appear further, the decision afterwards come to, must be regarded as ex parte. I apprehend that in such a case the decision would be one inter partes [See *Kader Khan v. Juggeswar Prasad Singh* (1908) 35 Cal. 1023 and *Jasoda Dassi v. Rameshwari Dassi* (1911) 14 Cal. L. J. 603=13 I. C. 374] but I wish to express

no opinion on this point as in the view, I take, there never was an appearance by the defendant and the question does not arise. In my opinion, the provisions of Order IX, rule 13, were properly applied.

6. The only other question raised is whether on the facts stated there was sufficient cause for the defendant's failure to appear. The learned Judges who remanded the case thought that the facts disclosed, which are not in dispute, were sufficient cause for the defendant's non-appearance; and, after considering the matter further, I am not prepared to differ from the conclusion at which they arrived. The appeal will be allowed, the decree of the District Judge will be set aside and the case restored to his file for hearing.

7. Coutts, J.

8. I agree.