1922.

GANGARAM BHIKU v. APUSAHEB.

chance of their being troubled by another suit filed by the other members of the family. We think, therefore, that the judgment of the Court below was right and the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

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

1922

March 16.

RATANBAI BHRATAR SHIVLAL LOHAR (ORIGINAL PLAINTIFF), APPLICANT *v.* SHANKAR DEOCHAND LOHAR (ORIGINAL DEFENDANT), OPPONENT*.

Civil Procedure Code (Act V of 1908), Order IX, Rule 8; Order XVII, Rules 2 and 3—Adjournment—Plaintiff absent at an adjourned date—Dismissal of suit—Practice.

It is necessary for the Courts to exercise extreme caution when on an adjourned date the parties or any of them fail to appear. Recourse should, in the first place, be had to Order XVII, Rule 2, and reference made to Order IX to ascertain the proper procedure to be followed; but even in cases where Order XVII, Rule 3, can be considered to apply, that is to say, where the case has been part-heard and an adjournment granted, it would not be in accordance with justice to refuse a party who has failed to appear on the adjourned date at the time fixed, but appears at a later hour, the chance of having the suit restored.

Shrimant Sagajirao v. *S. Smith*(1), relied on.

APPLICATION under Extraordinary Jurisdiction against the order passed by J. D. Dikshit, District Judge of Khandesh.

Ratanbai sued to recover money due on a bond passed by Shankar. The defendant admitted execution of the bond but denied receipt of consideration.

*Civil Extraordinary Application No. 265 of 1921.

(1) (1895) 20 Bom. 736 at p. 743.

The case was adjourned several times before the hearing of the suit commenced. At the last of such adjournments, the plaintiff did not appear or adduce evidence.

The Court dismissed the suit.

On the same day, the plaintiff's pleader applied to the Court to set aside the order of dismissal and to restore the suit to the file. The trying Judge, however, treated the order as falling under Order XVII, Rule 3, of the Civil Procedure Code, and referred the party to an appeal against the decree.

This order was, on appeal, upheld by the District Judge.

The plaintiff appealed to the High Court.

P. B. Shingne, for the appellant:—The trial Court should have restored the suit to the file. The order dismissing the suit does not purport to be one under Order XVII, Rule 3, of the Civil Procedure Code. Rules 2 and 3 of Order XVII must be read together. The provision in Rule 3 is stricter and should be confined to the case where the hearing of the suit has begun and there is default in appearance. In other cases the order should be under Rule 2: *Shrimant Sagajirao* v. *S. Smith*[1]. In this case the hearing of the suit had not commenced and the case will be governed by Order IX, Rule 3. This is also the view taken by other High Courts.

No appearance for the opponent.

MACLEOD, C. J.:—This suit was fixed for hearing for the 12th March 1920. Various adjournments were granted, the last of which was for the 24th July 1920. On that date when the case was called on the plaintiff was absent and the suit was dismissed. The

(1) (1895) 20 Bom. 736 at p. 743.

1922.

RATANBAI v. SHANKAR DEOCHAND.

same day the pleader appeared and presented an application for the restoration of the suit to the file. On the 23rd August this application was dismissed. The learned Judge said :-

"The applicant's pleader urges that the dismissal of the suit should be had to be under Order XVII, Rule 2, and Order IX, Rule 8, Civil Procedure Code, but it is clear that the Court has not dismissed the suit under the above provisions. The suit has been decided under Order XVII, Rule 3, because the plaintiff to whom time was given failed to produce the evidence, and the provisions of Order IX do not, therefore, apply. The plaintiff's only remedy is to appeal against the decree".

The plaintiff has obtained a rule from this Court on the 25th November 1921 calling on the defendant to show cause why the decision of the lower Court should not be reversed and a retrial of the suit directed. The decision of the learned Judge, if it were allowed to stand, would apply to every case in which there has been an adjournment before the trial of the case has actually commenced, to enable a party to produce his evidence, and the party does not appear on the adjourned date. We are constantly having cases in which the failure to distinguish between the provisions of Rule 2 and Rule 3 of Order XVII has caused injustice. That Order deals generally with "adjournments". Rule 1 gives the Court power to grant adjournments from time to time, provided that, when the hearing of evidence has once begun, the hearing of the suit should continue from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

Under Rule 2, 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 Order IX or make such other order as it thinks fit.

Order IX deals with "appearance of parties and the consequence of non-appearance". In all the cases which come under Order IX, the party against whom a decree or order is passed in default of his appearance, can apply to the Court to have the *ex parte* decree or order set aside on the ground that he can show sufficient cause for his non-appearance. Ordinarily, then, if a case appears on the Board on an adjourned date for hearing, and there is default of appearance on the part of both or either of the parties, the Court must refer to Order IX, so as to ascertain the proper procedure to be followed, and there is no necessity whatever to have any recourse to Order XVII, Rule 3.

In this case the hearing of the suit had not commenced, and, therefore, as it was the plaintiff who was in default, and there was no evidence to support his case, the suit should have been dismissed under Order IX, Rule 8.

Rule 3 of Order XVII is certainly somewhat unfortunately worded, as it may be construed as being applicable to every case in which an adjournment has been granted to a party because he has not been ready with his evidence, whether the trial has commenced or not. It would not make much difference if there were not authorities to the effect that if the case is decided under Rule 3, the only remedy of an aggrieved party is by way of appeal or review. There seems to be a direct conflict between Rule 2 and Rule 3, because Rule 2 deals with any kind of adjournment which can be ordered under Rule 1, and gives the Court power to dispose of the suit as directed by Order IX in default of appearance of the parties or any of them. If the plaintiff appears and the defendant does not appear, the Court can pass a decree *ex parte* on the merits of the case as appearing from the plaintiff's evidence. If the plaintiff is absent

1922.

RATANBAI v. SHANKAR DEOCHAND.

and the defendant appears the Court shall dismiss the suit except in so far as the plaintiff's claim is admitted.

In either case the suit is disposed of or decided, but the party in default can apply to have the *ex parte* decree or order set aside on showing cause. If then there is a default in appearance after an adjournment, ordinarily Order XVII, Rule 2, will apply, and there is no necessity to have recourse to the stricter provisions of Rule 3 unless the hearing of the action has already commenced. I think Rule 3 was only intended to apply to such cases, as otherwise this strange result would follow. If a case is adjourned by consent without any reason being given, and the plaintiff does not appear on the adjourned date, the suit will be dismissed and he can apply to have the *ex parte* decree set aside. If, however, the adjournment is granted on the ground that the plaintiff is not ready with his evidence and the plaintiff does not appear on the adjourned date, his suit will be dismissed; but he can only appeal or ask for a review. The ground for appeal or review will be exactly the same, viz., that he had sufficient cause to account for his non-appearance, and again if he succeeds the result will be the same. There will be a rehearing. If the hearing of the action has actually commenced it is another matter, though again the result of an appeal may be that the lower Court is directed to continue the case from the point where the plaintiff or the defendant, as the case may be, made default. It is necessary, therefore, for the Courts to exercise extreme caution when on the adjourned date the parties or any of them fail to appear. They should in the first place have recourse to Order XVII, Rule 2 rather than Rule 3, and even in cases where Rule 3 can be considered to apply, that is to say, where the case has been part-heard and an adjournment granted, it would not be in

accordance with justice to refuse a party who has failed to appear on the adjourned date at the time fixed, but appears at a later hour, the chance of having the suit restored. Generally I should like to point out that a party who has failed to appear at the time fixed for the hearing, if the equity of the case demands it, certainly should have an opportunity of satisfying the Court that he had sufficient cause for not appearing. Otherwise much delay is caused before a decision is arrived at on the merits. (See *Shrimant Sagajirao* v. *S. Smith*[1].) The rule must be made absolute, and we send back the case for trial on the merits. Costs costs in the cause.

SHAH, J. :—I agree.

Rule made absolute.

J. G. R.

[1] (1895) 20 Bom. 736 at p. 743.

APPELLATE CIVIL.

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

RASUL VALAD MALIK PINJAR (ORIGINAL PLAINTIFF), APPELLANT *v.* AMINA KOM HANIF AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1922. *March* 16.

Indian Limitation Act (IX of 1908), Schedule I, Articles 165, 181—Execution of decree—Property recovered in excess—Application by judgment-debtor for possession—Limitation.

Where, in execution of a decree, the decree-holder recovers property in excess of the decree, an application by the judgment-debtor to recover possession thereof is governed by Article 181, and not by Article 165, of the Indian Limitation Act, 1908.

* Second Appeal No. 147 of 1921.