REVISIONAL CIVIL

Before P. C. Pandit, J.

KEHR SINGH,—*Petitioner.*

versus

SATBIR, ETC.,—*Respondents.*

C. R. No. 1061 of 1970.

March 9, 1971.

Code of Civil Procedure (Act V of 1908)—Order 9 rules 6 and 13 and Order 17, rules 1 & 3—Trial Court closing defendant's evidence on his default and ordering the Plaintiff to produce evidence—Such order—Whether under Order 17 rule 3—Ex parte decree passed after the closure of defendant's evidence—Application to set aside such decree—Whether lies under Order 9 rule 13.

Held, that under sub-rule (3) of rule 1 of Order 17 of Code of Civil Procedure, the words used are "the Court shall proceed with the suit forthwith" as distinct from the words "notwithstanding such default proceed to decide the suit forthwith" occurring in Order 17, rule 3 of the Code. Where the trial Judge after ordering the closing of defendant's evidence in a suit does not proceed to decide the suit forthwith but *proceeds* with suit by ordering the plaintiff to produce his evidence, the order is under Order 17, rule 1, sub-rule (3) of the Code and not under Order 17, rule 3.

(Para 9)

Held, that where the order closing evidence is passed under Order 17 rule 1(3), the remedy of the aggrieved party is under rule 2 of Order 17 and hence an application under Order 9, rule 13 of the Code to set aside the *ex parte* decree so passed, lies.

Petition under Section 115 C.P.C. for revision of the order of Shri R. L. Garg, Additional District Judge, Rohtak, dated 13th March, 1970 affirming that of Shri Tarlochan Singh, Sub-Judge Ist Class, Sonepat, dated 25th May, 1968 dismissing the application.

H. S. HOODA, ADVOCATE, for the petitioner.

RAMPAT DHAIYA, ADVOCATE, for the respondents.

JUDGMENT

PANDIT, J.—(1) On 14th October, 1966, Satbir Singh and others filed a suit against Kehar Singh, for the recovery of Rs. 2,155 on the basis of a *bahi* entry.

(2) The suit was resisted by the defendant, who pleaded that he had already made the payment.

(3) After the issues had been framed, the defendant was called upon to produce his evidence, because the onus was on him to prove the payment of the alleged amount. He examined himself on 1st August, 1967, as D.W. 1. Later on he was cross-examined on 20th November, 1967, on which date he also produced Risal Singh, D.W. 2. Since no other witness was present on that date, he was given last opportunity to produce his evidence on 27th November, 1967, subject to payment of Rs. 20 as costs, he having already availed of two opportunities for this purpose. On that date, he examined another witness Partap Singh, D.W. 3, and stated that he would produce two more witnesses, Dr. Sethi and one handwriting expert. At his request, the case was adjourned to 13th December, 1967, and he was also asked to pay Rs. 15 as costs. On that day, the order passed by the Court reads thus:

> "*Present* : Counsel for the parties.
> Plaintiff in person.
>
> Defendant is not present.
>
> Expert is not present. The defendant had undertaken to bring the expert along with him. Defendant has not paid the costs. Defendant's evidence is closed under Order 17 rule 3 C.P.C. Statement of defendant has already been recorded. For the evidence of the plaintiff to come up on 19th December, 1967. Witnesses be summoned."

(4) On 19th December, 1967, the plaintiff, with his counsel, was present and nobody appeared on behalf of the defendant and the Court ordered that *ex parte* evidence be recorded. Thereafter, four witnesses were examined by the plaintiff including himself. The statement of the counsel for the plaintiff was then taken and he closed his evidence. The case was then adjourned to 20th December, 1967, for arguments. On that day, arguments were heard and the Court fixed 21st December, 1967, for orders. The judgment was not ready on that date and the case was adjourned to 30th December, 1967, on which date the plaintiff's suit was decreed for Rs. 2,155. On that very day, the defendant filed an application for setting aside the

ex parte order made against him on 13th December, 1967. On the third day, that is, 1st January, 1968, he put in another application for setting aside the *ex parte* decree passed on 30th December, 1967.

(5) Both these applications were dismissed by the trial Court observing that the proper course for the defendant was to file an appeal against the decree, dated 30th December, 1967, which was passed on merits. For this, the learned judge relied on a decision of the Lahore High Court in *Lal Chand* v. *Kaka Ram and another* (1), where it was observed:

> "Where a Court has passed a decree on the merits purporting to act under Order 17, rule 3, the party against whom the decree is passed cannot treat it as an *ex parte* decree and appeal against the order refusing to set it aside, but he ought to prefer an appeal against the decree".

(6) Aggrieved by this decision, the defendant went in appeal before the learned Additional District Judge, Rohtak. He confirmed the order of the trial Judge and dismissed the appeal. During the course of his judgment, however, he observed that the trial Judge acted illegally in proceeding under Order 17, rule 3, Civil Procedure Code, when he passed the order, dated 13th December, 1967. The defendant has come here in revision.

(7) Taking up the order, dated 13th December, 1967, the trial Court, in my view, was not right in observing that the defendant's evidence was closed under Order 17, rule 3, Code of Civil Procedure. That provision reads:

> "Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, 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."

(8) Since the learned Judge did not proceed to decide the suit forthwith after closing the defendant's evidence, this rule could not

(1) A.I.R. 1927 Lah. 562(1).

be made applicable. The provision of law applicable to such a situation would be order 17, rule 1, sub-rule (3), Code of Civil Procedure, added by this Court. That rule says—

"Subject to the provisions of Order 23, Rule 3,

(1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them and may from time to time adjourn the hearing of the suit.

(2) * * *.

(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1), the Court shall proceed with the suit forthwith."

(9) It would be noticed that under sub-rule (3) of rule 1, the words used are "the Court shall *proceed* with the suit forth with" as distinct from the words "notwithstanding such default proceed to *decide* the suit forthwith" occurring in Order 17, rule 3. In the present case, the trial Judge, as I have already said, did not proceed to *decide* the suit forthwith on 13th December, 1967, but he *proceeded* with the suit forthwith by ordering that the plaintiff should produce his evidence on 19th December, 1967. The order of the trial Court passed on 13th December, 1967, should have been under Order 17, rule 1, sub-rule (3), Code of Civil Procedure. Be that as it may, that order was revisable by this Court alone. In so far as that order had been made in the presence of the counsel for the parties, it could not be said that it was made *ex parte*, with the result that no application for setting aside an *ex parte* order was competent. Therefore, the application filed by the defendant on 30th December, 1967, for that purpose was misconceived and rightly rejected by both the Courts, though they have not given these reasons.

(10) Coming to the second application filed by the defendant on 1st January, 1968, for setting aside the *ex parte* decree made on 30th December, 1967, it would be noticed that the order passed on 19th December, 1967, would be strictly under the provisions of Order 17, rule 2 read with Order 9, rule 6, Code of Civil Procedure, Order 17, rule 2 reads thus:

"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."

Relevant part of Order 9, rule 6 is as under:—

"(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*.

* * * *".

(11) That being so, the decree that was passed on 30th December, 1967, was *ex parte* against the defendant. The remedy for getting rid of the *ex parte* decree was by making an application under Order 9, rule 13, Code of Civil Procedure. The Courts below had erred in law in observing that the application filed by the defendant for setting aside the *ex parte* decree was not competent and the only remedy available to him was to file an appeal against the decree.

(12) On this point, the learned Additional District Judge observed—

"However, the fact remains that the trial Court passed the decree purporting to act under Order 17, rule 3, C.P.C. though, as stated above, these provisions could not be attracted. The fact remains that a decree on merit was passed and no appeal against the decree has been filed. Therefore, despite my feeling that the procedure adopted by the learned trial Court was erroneous and the decree passed on merits was to all intents and purposes an *ex parte* decree, I am helpless in giving relief to the present appellant, in view of Lahore ruling mentioned above."

(13) After having found that the trial Court erroneously acted under Order 17, rule 3, Code of Civil Procedure, and further that the decree passed on 30th December, 1967, was to all intends and purposes an *ex parte* decree, the learned Judge, in my view, had erred in law in holding that the defendant should have filed an appeal against it and that an application for setting aside the same was not competent.

(14) So far as the ruling in *Lal Chand's case* (1), on which reliance has been placed by both the Courts below, is concerned, it is enough to say that the learned Additional District Judge had himself observed that the report of that case was a very short one and it could not be gathered therefrom as to whether any adjournment had been granted after an order under Order 17, rule 3, Code of Civil Procedure, was passed. Moreover, it was clearly mentioned therein—"There can be no doubt that the trial Court decided the suit on the merits under order 17, rule 3, Civil Procedure Code.....". In the present case, however, I have already held above that the order, dated 13th December, 1967, was in reality under the provisions of Order 17, rule 1, sub-rule (3) and not under Order 17, rule 3, Code of Civil Procedure.

(15) In view of what I have said above, I would partly accept this revision, set aside the orders of Courts below and direct the trial Court to dispose of the application, dated 1st January, 1968, filed by the defendant for setting aside the *ex parte* decree, dated 30th December, 1967, on merits. In the circumstances of this case, however, I will leave the parties to bear their own costs throughout. Parties have been asked to appear before the trial Court on 5th April, 1971.

K. S. K.

REVISIONAL CIVIL

Before P. C. Pandit, J.

BEHARI LAL ETC.,—*Petitioners*

versus

SHMT. KAUSHALYA DEVI,—*Respondent.*

C. R. No. 1050 of 1970.

March 10, 1971.

Code of Civil Procedure (Act V of 1908)—Section 115 and Order 41, rule 1—Punjab High Court Rules and Orders—Volume V, Chapter I-A—Rule 7—Revision petition under section 115—Copy of the trial Court's judgment—Whether has to be filed along with it—High Court—Whether can exempt the filling of such copy under Order 41 rule 1.