

APPELLATE CIVIL

Before Mehar Singd and P. C. Pandit, JJ.

TARA CHAND AND ANOTHER,—Appellants.

versus

KABUL CHAND AND OTHERS,—Respondents.

F.A.O. No. 94-D of 1963

1964
July, 21st.

Code of Civil Procedure (Act V of 1908)—Order IX Rule 6—High Court Rules and Orders, Volume I, Chapter 1-K—Rule 4—Court closed on a day fixed for hearing—Ex parte proceedings—Whether can be taken against defendants who do not appear on the next working day.

Held, that rule 6 of Order IX of the Code of Civil Procedure makes it quite clear that it is only when the suit is called for hearing and the defendant who has been duly served does not appear that the Court may proceed against him *ex-parte*. It is settled that the word 'hearing' means a hearing on which either evidence is taken or arguments are heard or questions relating to the determination of the suit are considered which would enable the Court finally to come to an adjudication of the same. Although in the present case October 30, 1962, for which date defendants 4 and 6 were served in the suit to appear and answer, was a date of hearing within the rule just referred to, but that was declared a public holiday, and the hearing of the suit could not be taken up on that date. In such a contingency Rule 4 of Chapter 1-K of the High Court Rules and Orders, Volume I, provides that the case shall be deemed to have been automatically adjourned to the next working day. That adjournment cannot possibly be for a hearing and in default of the defendant's non-appearance the Court cannot proceed *ex-parte* against such a party according to rule 6 of Order IX of the Code of Civil Procedure.

First Appeal under Order 43, Rule 1 (d), C.P.C., from the order of Shri D. R. Khanna, Sub-Judge, 1st Class, Delhi, dated the 7th May, 1963, dismissing the application of defendants Nos. 4 to 8 and ordering the Commissioner to file his report by 23rd May, 1964.

DAYA KISHAN, ADVOCATE, for the Petitioner.

HARNAM DASS, ADVOCATE, for the Respondents.

JUDGMENT.

MEHAR SINGH, J.—This appeal arises out of a Mehar Singh, J. partition suit by Kabul Chand plaintiff, against Lachmi Narain and 9 others, defendants, 1 to 10, for partition of joint property. The suit was instituted on September 29, 1962. The date of hearing was October 30, 1962, for which excepting defendant 3, all the remaining defendants were served. October 30, 1962, was declared a holiday. On October 31, 1962, the next working day of the Court, defendant 6 appeared but the remaining defendants, who had been served for October 30, 1962, did not appear and were proceeded with *ex parte*. On a subsequent date of hearing defendant 6, was absent and an order was made taking proceedings *ex-parte* against him. Meanwhile the presiding officer was transferred. On January 3, 1963, the new presiding officer took charge and the case was adjourned to January 28, 1963, for service of defendant 3. On this date defendants 1, 2 and 5 appeared and admitted the claim of the plaintiff. Defendant 3; in spite of service, not having appeared was proceeded with *ex-parte*. Subsequently the plaintiff's evidence was recorded and on February 13, 1963, a preliminary decree for partition was made as against those who had admitted the claim of the plaintiff on merits and as against others *ex-parte* because proceedings against them had been taken *ex-parte*. Some 10 days after, that is on February 23, 1963, defendants 4 and 6 moved an application for setting aside the *ex parte* decree obviously on the ground that they had no notice of the hearings of the suit after October 30, 1962, had been declared a holiday. The learned trial Judge dismissed, this application on May 7, 1963, and this is an appeal against that order by defendants 4 and 6.

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The question for decision is whether October 30, 1962, having been declared a holiday and defendants 4 and 6 having been served to appear and answer for that date, the non-appearance of defendant 4 on the next day, that is to say on October 31, 1962, justified the trial Court in making an order taking *ex-parte* proceedings against him in the suit ? The rule relevant for this purpose is rule 4 in Chapter 1-K of Volume I of the Rules and Orders of this Court, and the parts here material read thus—

“On the occurrence of unanticipated holiday or in the event of the presiding officer of a Court being absent owing to sudden illness or other unexpected cause, all cases fixed for the day in question shall be deemed to have been automatically adjourned to the next working day when the presiding officer is present and it shall be the duty of the parties or their counsel (but not of witnesses) to attend Court on that date.

Whenever possible the presiding officer should, as soon as may be, fix fresh dates in cases fixed for the date which is declared a holiday or for which he has obtained leave, and issue notices to the parties, their counsel and witnesses of the fresh dates fixed.”

The scope of this rule came for consideration before Bhandari, C.J., in *Dhapan v. Ram Saran* (1), in which the facts were exactly similar to the facts of the present case and the learned Chief

Justice after observing that the language of the rule is by no means clear for it provides only that if the presiding officer of the Court is unable to attend Court on a particular date all cases fixed for that date shall be deemed to have been automatically adjourned to the next working day, proceeded to hold that "the rule does not require that all cases which are adjourned shall be heard on the next working day. All that it requires is that the parties or their counsel shall attend Court on the next day, if possible, so that the next date of hearing should be fixed in their presence". The learned Chief Justice found support for this conclusion from the second paragraph of this rule. He, therefore, proceeded to accept the revision petition before him directing the first appellate Court to hear the appeal, disposed of *ex-parte* on merits. In *Mutwal Chand v. Abdul Qadeer and others*, Civil Revision No. 315-D of 1957, decided on February 22, 1961, this question came for consideration of R. P. Khosla, J. It appears that *Dhapan's* case was not referred to before the learned Judge. The facts were again somewhat similar to the facts of the present case. The learned Judge did not discuss the matter but merely observed that he was satisfied that the party claiming to have the *ex parte* order set aside under order IX, rule 13 of the Code of Civil Procedure was not entitled to that relief. So that this case is not of substantial assistance in answering the present question.

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These two cases were referred to before my learned brother P. C. Pandit, J., when this appeal first came for hearing before him and noting the conflict of opinion, he referred this appeal to a larger Bench. This is how this appeal comes for hearing before us.

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In order IX of the Code of Civil Procedure, sub-rule 1(a) of rule 6 provides—

“(1) where the plaintiff appears and the defendant does not appear when the suit is called for hearing then—

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

It is apparent that it is only when the suit is called for hearing and the defendant who has been duly served does not appear that the Court may proceed against him *ex-parte*. It is settled that the word ‘hearing’ means a hearing on which either evidence is taken or arguments are heard or questions relating to the determination of the suit are considered which would enable the Court finally to come to an adjudication of the same. Although in the present case October 30, 1962, for which date defendants 4 and 6 were served in the suit to appear and answer, was a date of hearing within the rule just referred to, but that was declared a public holiday, and the hearing of the suit could not be taken up on that date. Rule 4, as reproduced above, enjoins that in such a contingency the case shall be deemed to have been automatically adjourned to the next working day. But that adjournment is for what purpose? It cannot possibly be for a hearing for the very first paragraph of the rule enjoins the parties or their counsel to appear on the next working day but not the witnesses. Suppose in a case witnesses had been summoned for a particular date of hearing, which is somehow suddenly declared a holiday, then the witnesses are not required by the rule to be present on the next working day following the date of the holiday. If it was a date of hearing

of the case, this statement in the first paragraph of the rule would not have appeared and like the parties or their counsel, the witnesses would also have been enjoined to appear on that day in Court, somewhat in the same manner as if they were in the position of witnesses bound down to appear on the following day. There is nothing that stops a rule directing the appearance of witnesses on the next working day in such circumstances, the rule says to the contrary. This is clear indication of the intention of the framers of the rule that 'the next working day' in the first paragraph of rule 4 is not a hearing of the case that comes to be adjourned because the previous days for which it was set down for hearing was declared a holiday. The learned Chief Justice, to my mind, if I may say so with respect, made a correct approach in obtaining assistance from the second paragraph of this rule, according to which paragraph if the presiding officer proceeds on leave or the case should happen to be fixed on a declared holiday, then it is the duty of the presiding officer of the Court to issue notices to parties, their counsel and witnesses of the fresh date of hearing fixed in the case. The second paragraph deals with a somewhat, though not exactly the same or similar situation as the first paragraph. It gives a cue to the intention of the framers of the rule, that it was not in their contemplation that when an adjournment of a case comes to take place in the circumstances referred to in the first paragraph of the rule, on default of the defendant's non-appearance, the Court may proceed *ex-parte* against such a party according to rule 6 of order IX of the Code of Civil Procedure.

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I, therefore, agree with the opinion of the learned Chief Justice in *Dhapan's case* that when in the circumstances and contingency as referred

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to in the first paragraph of rule 4 defendant does not appear on 'the next working day' after the previous day has been declared a holiday the case is not taken up by the Court for hearing and an order proceeding *ex-parte* against such a defendant cannot be made. In this view this appeal by defendant 4 obviously succeeds with the result that the decree in question is set aside and the suit goes back to the trial court for trial and disposal on merits. The position of defendant 6 is not exactly the same for he absented himself on a subsequent date, but this is a partition suit and the setting aside of preliminary partition decree against one defendant has obviously the effect of opening up the whole of the case for trial and disposal. So defendant 6 also has the benefit of the order in this appeal. In the circumstances of the present case the parties are left to bear their own costs in this appeal. The parties are, through their counsel, directed to appear in the trial Court on August 17, 1964.

Pandit, J.

PREM CHAND PANDIT, J.—I agree.

B.R.T.

FULL BENCH

Before Mehar Singh, Prem Chand Pandit and

P. D. Sharma, JJ.

PARBHU AND OTHERS,—*Appellants.*

versus

GIRDHARI AND OTHERS,—*Respondents.*

Regular First Appeal No. 134 of 1962

1964

July, 28th.

Court Fees Act (VII of 1870)—S. 7 (iv) (c) as amended by the Court Fees (Punjab Amendment) Act (XXXI of 1953) and Article 17 (iii) & (vi) of Schedule II—Suit for a declaration that the preliminary and final decrees passed in a previous suit for partition were null and void