

PART J
DISMISSALS IN DEFAULT AND EX-PARTE PROCEEDINGS

1. **General:-** Order IX of the Code deals with the appearance of parties and the consequences of non-appearance on the first hearing. Order XVII, Rule 2, Lays down that the non-appearance of a party on an adjourned hearing may lead to similar consequences.
2. **Default by parties:-** Order IX, Rule 3, provides that when neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.
3. **(a) Default by defendants:-** Order IX, Rule 6, provides that, if on the day fixed in the summons for the defendant to appear, and answer, the plaintiff appears and the defendant does not appear, and it is proved that the summons was duly served in sufficient time to enable the defendant to appear and answer on the day named in the summons, the Court may proceed to try the case ex-parte. As regards the requisite proof of service in such cases, Chapter 7-B, Volume IV, on "Service of Processes" may be referred to. Even in such cases, however, the plaintiff must prove this case to the satisfaction of the Court, before he can obtain a decree. The defendant, if he is observed, may apply under Order IX, Rule 13, for an order to set aside the ex-parte judgment at any period between the date of the judgment and the thirtieth day from the date of the decree or where the summons was not duly served, from the date on which he has knowledge of the decree (See Article 164, Schedule 1, of the Indian Limitation Act). The provisions of section 5 of the Indian Limitation Act 1908 have recently been made applicable to all applications for the setting aside of Ex- parte decrees and for restoration of suits under Order 9, Rules 4 and 9. These applications may, therefore, be admitted even after the period of thirty days if the applicant satisfies the court that he had sufficient cause for not making the application within such period. If he satisfies the Court that the summons was not "duly served", or that he was prevented by sufficient "cause" from appearing when the suit was called for hearing, the Court should set aside the order on such terms as to costs or otherwise as it may deem fit.

(b) Attention is drawn to Order IX, Rule 7, which lays down the procedure for setting aside exparte proceeding when the hearing of the suit has been adjourned exparte but no exparte decree has been passed.
4. **Default by plaintiff:-** Order IX, Rule 8, lays down that if the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order dismissing the suit, unless the claim is admitted wholly or in part, in which case the claim shall be decreed only to the extent to which it is admitted.
5. **Hasty dismissal not advisable:-** The above rules must be worked in a reasonable manner, otherwise they will result in a number of applications for setting aside orders passed in the absence of one or both parties. It is possible that a party may have temporarily gone away to call his counsel or to refresh himself and a person cannot be expected to be in constant attendance throughout the day. The court should to avoid hardship, lay aside the case where any party does not appear when the case is called. The case may be called again, later in the day after the other work has been finished or when both the parties turn up and the Court can conveniently take up the case that had been laid aside. If these rules are worked in a reasonable manner applications for restoration of suits or setting aside of ex parte orders would be reduced in number. Such applications generally lead to delay in the disposal of cases and waste a good deal of the time of the courts and the litigants.
6. **Hasty dismissal not advisable:-** The tendency to dismiss cases in default or to pass *exparte* orders in a hasty manner in order to show an increased out-turn is to be strongly depreciated and is not to be resorted to in any

case. The Presiding Officers should note down the time in their own hand when a case is dismissed in default or an order to proceed *ex parte* is passed.

7. **Order of "Dakhil Daftar" is irregular:-** There is a tendency for Presiding Officers of Civil Courts to pass orders that cases should be "dakhil daftar". This practice is incorrect. A Presiding Officer should invariably make it clear what the precise nature of the order is, i.e., whether the case is postponed or dismissed and the rule, if any, under which the order is passed should also be mentioned.
8. **Registration of suits:-** When a plaint is presented a suit is thereby instituted under Order IV, Rule 1, of the Code and the suit must forthwith be entered in the Register of Civil Suits (Civil Register No. 1) in accordance with Order IV, Rule 2.
9. **Procedure when the plaintiff is not present on the preliminary date:-** It is customary, when a plaint is presented, to fix a short preliminary date in order to permit the examination of the plaint. On this preliminary date the plaintiff is expected to appear to receive notice of the date fixed for the hearing of the suit. It sometimes happens that the plaintiff does not appear on this date and several cases have come to the notice of the Judges in which Courts have forthwith dismissed the suit in default by orders purporting to be made under Order IX.

This procedure is incorrect as it has been held that the preliminary date is not a date fixed for hearing and therefore, the provisions of Order IX do not apply. The correct procedure in such cases may be deduced from the Code and has been referred to in several rulings of the High Court. It is as follows:—

- (i) If the plaint is in order and process fee for the summoning of the defendant has been filed with the plaint, the Court should issue summons to the defendant and a notice to the plaintiff to appear on the date for which the defendant is summoned. If on that date the plaintiff does not appear in spite of the service of the notice on him, the suit can be dismissed under Order IX, Rules 3 or Rule 8 of the Code whichever is applicable.
- (ii) If the plaint is in order but process fee has not been filed with it, the Court should fix a date for the appearance of the defendant and issue notice to the plaintiff calling upon him to appear on that date and to deposit process fee by a specified date so that the defendant may be summoned. If on the date fixed it is found that no summons has issued owing to non-payment of process fees, or that the summons could not be served owing to late payment of process fees, the suit can be dismissed under Order IX, Rule 2. If process fee has been paid as directed, the other provisions of Order IX will apply.
- (iii) If the plaint is not in order and the defects are such as to entail its rejection under Order VII, Rule 11, the Court should record an order rejecting it. If it is to be rejected for failure to pay court fees, it will be necessary first to issue a notice calling on the plaintiff to make up the deficiency unless he has already been given time to do so (See also paragraph 7 of Chapter 1- C ante). In such cases the final order to be entered in Civil Register No. 1 is "plaint rejected."

If the defects in the plaint are not such as to call for its rejection under Order VII, Rule 11, the Court should proceed in accordance with the procedure outlined in sub-clauses (i) and (ii) above, the question of remedying the defects being taken up at the first hearing.