Arjun Singh

Vs

Mohindra Kumar & Ors.

Civil Appeal No. 768 of 1963

(CJI B.P. Sinha, A.K. Sarkar, N. Rajgopala Ayyangar JJ)

13.12.1963

JUDGMENT

AYYANGAR J. –

This is an appeal by special leave filed by a defendant whose application under O. IX, r. 13, Civil Procedure Code to set aside an ex parte decree passed against him has been dismissed as barred by res judicata.

To appreciate the points arising in the appeal it would be necessary to narrate the proceedings in three litigations between the parties. The ex parte decree that was passed against the defendant - who will hereafter be referred to as the appellant - and which he sought to be set aside in the proceedings which are the subject of the present appeal, was in Suit 134 of 1956 on the file of the Court of Second Civil Judge, Kanpur. But long before this suit was filed, the two other proceedings were already pending. The first of them was a Small Cause suit by one Phula Kuer who sought to recover from the appellant Rs. 750 on the basis that she and the appellant were partners and by an arrangement between them he agreed to pay her Rs. 150 per month for her share of the profits which he had failed to pay. This was suit 1023 of 1951 on the file of the Small Cause Court, Kanpur. The appellant entered on his defence and denied the partnership and his liability to pay the sum claimed. While this suit was pending, the appellant in his turn filed suit No. 20 of 1953 against Phula Kuer for fixing the fair rent of the premises in which he was carrying on the business, which Phula Kuer alleged was a partnership business, it being common ground that Phula Kuer was the owner thereof. While these two suits were pending Phula Kuer died on July 13, 1953 and thereafter one Rup Chand Jain filed suit 134 of 1956 already referred to. Rup Chand Jain died pending the appeal in the High Court and is now represented by his heirs who have been brought on record. It would however be convenient to refer to the respondents as the plaintiff.

Suit 134 of 1956 which was filed on May 19, 1956 repeated the allegation that Phula Kuer had entered into the partnership with the appellant under which she was entitled to get for her share Rs. 150 per month. This share of profits, it was alleged, had been paid to her up to October 14, 1950 and that thereafter the appellant failed to pay the same. The plaintiff claimed to be the next reversioner of Phula Kuer and on that basis claimed that a sum of Rs. 4,200 was due to him. Besides this, he alleged that the appellant had been using the building belonging to Phula Kuer in regard to which he was liable to pay rent which was claimed at Rs. 150 per mensem. The plaintiff also claimed that he was entitled to evict the appellant from the premises. In the result, the reliefs claimed in the suit were a money-decree for Rs. 9,390 on account of the items we have set out, and (2) eviction from the premises where the business was being carried on. Having regard to the contentions of the parties in the three suits, all of them were transferred by the District Judge, to the

court of the Second Civil Judge, Kanpur on August 4, 1956, and on August 23, 1956 the Civil Judge passed an order directing that the suits 20 of 1953 and 134 of 1956 be consolidated for joint hearing, the evidence led in Suit 134 of 1956 being treated as evidence in the other suit as well. On October 10, 1956 the appellant filed his written statement to Suit 134 of 1956 in which he put forward the case which he had already been asserting viz., (1) absence of any partnership relationship between himself and Phula Kuer, and (2) that he was in possession as a tenant and could not be evicted because the requisite statutory conditions to enable the plaintiff to claim eviction, were not satisfied. Needles to add that there were several other defences which he urged to which it is unnecessary to refer. Thereafter there were questions raised as regards the adequacy of the court-fee paid by the plaintiff in Suit 134 of 1956, applications by the plaintiff to amend the plaint etc. These took place during the year 1957. The issues were settled on February 28, 1958. We can pass over what transpired in the early part of 1958. Both the parties were attempting to effect a compromise and for that purpose the hearing was adjourned but the compromise was not finalised, and finally, on May 24, 1958 a joint application was made by the plaintiff and the appellant that two months' time may be granted to them to arrive at a settlement and that the trial which was fixed for May 28, 1958 may be adjourned for that purpose. The court, however, refused this application for the reason that the suit for the fixation of rent was of the year 1953. On the 28th there was again another application for adjournment and the court adjourned the trial by one day and fixed it for May 29, 1958, the order stating "If no compromise is filed the case would be taken up for final hearing". On 29th the plaintiff was present but the appellant was absent and the latters' counsel who was present reported that they had no instructions to conduct the case. Thereupon the court passed an order in Suit 134 of 1956 in these terms :

> "The plaintiff is present. Defendant is absent. Counsel for the defendants have no instructions. Case proceeds ex parte. Plaintiff examined Mohindra Kumar and closed."

The order concluded with the words "Judgment reserved". In the suit for the fixation of rent which was taken up for trial on the same date the order of the court ran :

"Plaintiff is absent. Defendant with his Counsel is present. Counsel for the plaintiff has no instructions. Suit is dismissed as per orders passed separately."

It is only necessary to add that the third suit - 1023 of 1951 - was on the same day also decreed ex parte.

On May 31, 1958 the appellant filed three applications in the three suits for setting aside the ex parte orders passed against him. The application in Suit 134 of 1956 was treated as the primary one and in support of it an affidavit was filed in which the appellant stated that after the talks for compromise had reached a decisive stage and when the appellant was making arrangements to implement that decision he got an attack of heat-stroke and was, therefore, unable to be present in Court when the case was called on the 29th - i.e. the day fixed for hearing. He, therefore, prayed that the order or direction to proceed ex parte passed against him in the two suits in which he was defendant may be set aside and he be given an opportunity to contest the suits. Needless to add that in suit 20 of 1953 which had been dismissed for default, the prayer was to set aside that dismissal. Notices were issued on these applications and the plaintiff filed a counter-affidavit in which he disputed the truth of the statement regarding the appellant's illness and prayed that the applications may be dismissed. He also suggested that if they were to be ordered it should be on certain terms. We should mention even at this stage that though the application filed on the 31st did not specify the particular provision of

law under which the jurisdiction of the Court was invoked, the parties and the court proceeded on the basis that in relation to suits 1023 of 1951 and 134 of 1956 they were applications under O. IX, r. 7 of the Civil Procedure Code. So far as the other proceeding was concerned - O.S. 20 of 1953 - it was undoubtedly an application for setting aside the dismissal of the plaintiff's suit for default and was filed under O. IX, r. 9 These three applications were disposed of by a common judgment of the Civil Judge on August 23, 1958 and the learned Civil Judge held that the story of the illness of the appellant which had been put forward as affording sufficient reason for not being present in court on May 29, 1958 was false. For this reason he refused to set aside the order dismissing the suit for default of suit 20 of 1953 in which judgment had already been delivered. In the other two suits 1023 of 1951 and 134 of 1956 he ordered the direction for the reservation of judgments to stand and fixed August 25, 1958 for the delivery of the judgments.

The appellant thereupon moved the High Court of Allahabad in revision against the order passed against the refusal of his application in suit 134 of 1956 alone and apparently obtained a stay of delivery of the judgment. This application was disposed of by the High Court on September 4, 1958 when the following order was passed :

"It is conceded that no ex parte decree has yet been passed. The only order passed is that the case shall proceed ex parte against the appellant. In view of the fact that no decree has yet been passed, the setting aside of the ex parte order was not absolutely necessary."

After referring to the decision of this Court in Sangram Singh v. Election Tribunal ([1955] 2 S.C.R. p. 1.) the learned Judge added :

> "It follows that, even though the ex parte order had been passed, the applicant could appear and take part in the case from the stage at which the ex parte order had been passed. The only thing he could not claim was to be relegated back to the old position as if he had not absented himself on the date fixed. In these circumstances, I think, no interference is called for with the order of the learned Civil Judge refusing to set aside the ex parte order. It will be open to the applicant to present himself on the date to which the case now stands adjourned and request the learned Civil Judge to allow him to participate in the proceedings from that state.
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> There is therefore no force in this application. It is rejected."

We are making this extract from the order for emphasising the fact that it appears to have been the common case before the High Court that the application of the appellant in Suit 134 of 1956 was under O. IX, r. 7 of the Civil Procedure Code and it was on that basis that the High Court approached the question and decided the revision petition.

Within 4 days of this order of the High Court and obviously acting in pursuance of the direction of the learned Judge the appellant made an application to the Civil Judge drawing his attention to the observations we have quoted and prayed :

> "That your Honour be pleased to hear the application and take the evidence of the applicant."

Applications of the same type were filed in the other suit - 1023 of 1951 - also. He dismissed the applications for the reason that since the appellant's prayer for being relegated to the original position had been rejected by him and also by the High Court in revision, it must be taken to have

been finally settled that the appellant could not lead evidence because the final hearing of the two suits was over. The only proceeding in which the appellant could participate was in hearing the judgment and therefore, he added, "the applicant is now entitled only to hear the judgment". On the same say - September 25, 1958 - the judgment which had already been prepared was delivered. The judgment read :

"Both the suits are decreed with costs ex parte with interest at 6% etc."

To set aside this ex parte decree thus passed against him on September 25, 1958 the defendant filed an application under O. IX, r. 13. Obviously, the factual ground upon which the relief was sought, viz., that there was reasonable or sufficient cause for the appellant's absence from Court on May 29, 1958 was the same as had been set out by him in the application which he had filed on May 31, 1958. This was opposed by the plaintiff who, besides repeating the challenge regarding the truth of the illness, raised three legal objections of a preliminary nature. Some of these have been upheld by the Civil Judge and the High Court but each one of them was sought to be supported before us by Mr. Pathak for the respondents. They were : (1) that the finding recorded in the earlier application filed on May 31, 1958 in suit 134 of 1956 that there was not sufficient cause for non-appearance on May 29, 1958 operated as res judicata in the petition filed under O. IX, r. 13 and was a bar to the re-inquiry of the same question on the merits; (2) the finding in the application to set aside the dismissal for default of suit 20 of 1953 which had become final operated was a bar to the trial of the same question in the application under O. IX, r. 13 in suit 134 of 1956; and (3) that the decree in suit 134 of 1956 was not in reality an ex parte decree but was a decree on the merits within O. XVII, r. 3, Civil Procedure Code and hence the remedy of the appellant was only by way of an appeal against the decree and he could not come in by way of an application under O. IX, r. 13. The learned Civil Judge upheld the first preliminary ground of objection and dismissed the application. The appellant thereupon filed an appeal to the High Court and the learned Judges likewise held that any inquiry into the question whether the appellant had sufficient cause for non-appearance on May 29, 1958 was barred by res judicata by reason of the decision of the same matter in the earlier proceeding under O. IX, r. 7. It is from this judgment of the High Court that the present appeal has been brought by special leave under Art. 136 of the Constitution.

Before proceeding to deal with the arguments addressed to us by Mr. Setalvad - learned counsel for the appellant, it would be convenient to mention a point, not seriously pressed before us, but which at earlier stages was thought to have considerable significance for the decision of this question viz., the difference between the words "good cause" for non-appearance in O. IX, r. 7 and "sufficient cause" for the same purpose in O. IX, r. 13 as pointing to different criteria of "goodness" or "sufficiency" for succeeding in the two proceedings, and as therefore furnishing a ground for the inapplicability of the rule of res judicata. As this ground was not seriously mentioned before us, we need not examine it in any detail, but we might observe that we do not see any material difference between the facts to be established for satisfying the two tests of "good cause" and "sufficient cause". We are unable to conceive of a "good cause" which is not "sufficient" as affording an explanation for non-appearance, nor conversely of a "sufficient cause" which is not a good one and we would add that either of these is not different from "good and sufficient cause" which is used in this context in other statutes. If, on the other hand, there is any difference between the two it can only be that the requirement of a "good cause" is complied with on a lesser degree of proof than that of "sufficient cause" and if so, this cannot help the appellant, since assuming the applicability of the principle of res judicata to the decisions in the two proceedings, if the court finds in the first proceeding, the lighter burden not discharged, it must afortiori bar the consideration of the same matter in the later, where the standard of proof of that matter is, if anything, higher.

As it is the first of the preliminary objections which we have set out earlier that has formed the basis of the decision against the appellant, both by the learned Civil Judge as well as by the High Court, we shall first take that up for consideration. The courts below have approached this question in this form. Order IX, r. 7 reads :

> "7. Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs, or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

If an application is made under this provision and the Court considers that there is not any good cause for the previous non-appearance and proceeds further with the suit and ultimately it results in an ex parte decree, can the Court in dealing with the application to set aside the ex parte decree under O. IX, r. 13 reconsider the question as to whether the defendant had a sufficient cause for non-appearance on the day in regard to which the application under O. IX, r. 7 had been filed ?

That the question of fact which arose in the two proceedings was identical would not be in doubt. Of course, they were not in successive suits so as to make the provisions of s. 11 of the Civil Procedure Code applicable in terms. That the scope of the principle of res judicata is not confined to what is contained in s. 11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits. In this connection we were referred to what this Court said in Satyadhyan Ghosal v. Sm. Deorajin Debi ([1960] 3 S.C.R. 590.) where Das Gupta, J. speaking for the Court expressed himself thus :

> "The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or on a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again........................... The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

Mr. Pathak laid great stress on this passage as supporting him in the two submissions that he made : (1) that an issue of fact or law decided even in an interlocutory proceeding could operate as res judicata in a later proceeding, and (2) that in order to attract the principle of res judicata the order or decision first rendered and which is pleaded as res judicata need not be capable of being appealed against.

We agree that generally speaking these propositions are not open to objection. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being res judicata in later proceedings. Similarly, as stated already, though s. 11 of

the Civil Procedure Code clearly contemplates the existence of two suits and the findings in the first being res judicata in the later suit, it is well-established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable. One aspect of this question is that which is dealt with in a provision like s. 105 of the Civil Procedure Code which enacts :

> "105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
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> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

It was this which was explained by Das Gupta, J. in Satyadhayan Ghosal's case ([1960] 3 S.C.R. 590.), already referred to :

> "Does this, however, mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again ?............ It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order."

If the correctness of the order of the Civil Judge in disposing of the application filed by the appellant on May 31, 1958 were questioned in an appeal against the decree in the suit, these principles and the observations would have immediate relevance. But it is not as if the distinction here drawn between the type of interlocutory orders which attain finality and those that do not, is of no materiality in considering whether a particular interlocutory order is of a kind which would preclude the agitation of the same question before the same court in further stages of the same proceeding. Dealing with the decisions of the Privy Council in Ram Kirpal Shukul v. Rup Kuari (11 I.A. 37.), Bani Ram Nanhu Mal (11 I.A. 181.), and Hook v. Administrator-General of Bengal (48 I.A. 187.) which are the leading cases in which the principle of res judicata was held applicable to different stages of the same proceedings, Das Gupta J. observed ([1960] 3 S.C.R. 590 at pp. 602-03.) :

> "It will be noticed that in all these three cases, viz., Ram Kirpal Shukul's case, Bani Ram's case and Hook's case, the previous decision which was found to be res judicata was part of a decree. Therefore though in form the later proceeding in which the question was sought to be raised again was a continuation of the previous proceeding, it was in substance, an independent subsequent proceeding. The decision

> of a dispute as regards execution it is hardly necessary to mention was a decree under the Code of Civil Procedure and so in Ram Kirpal's case and Bani Ram's case, such a decision being a decree really terminated the previous proceedings. The fact therefore that the Privy Council in Ram Kirpal Shukul's case described Mr. Probyn's order as an 'interlocutory judgment' does not justify the learned counsel's contention that all kinds of interlocutory judgments not appealed from become res judicata, Interlocutory judgments which have the force of a decree must be distinguished from other interlocutory judgments which are a step towards the decision of the dispute between parties by way of a decree or a final order."

It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under O. IX. r. 7 would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to "set the clock back" does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the rule of res judicata does not apply it would not follow that on every subsequent day on which the suit stands adjourned for further hearing the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle or res judicata. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent, nay would be bound to take those into account and make an order conformably to the facts freshly brought before the court.

This leads us to the consideration of the nature of the court's direction under O. IX, r. 7 the nature of

that interlocutory proceeding-with a view to ascertain whether the decision of the Court under that provision decides anything finally so as to constitute the bar of res judicata when dealing with an application under O. IX, r. 13, Civil Procedure Code. To sum up the relevant facts, it is common ground that the suit - 134 of 1956 had passed the stages up to r. 5 of O. IX. Order IX, r. 6 applies to a case where a plaintiff appears and the defendant does not appear when the suit is called on for hearing. Order IX, rule 6 provides, to quote the material part :

> "Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then -
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> (a) if it is proved that the summons was duly served, the court may proceed ex parte; ...."

This is the provision under which the Civil Judge purported to act on the 29th of May. And then comes O. IX, r. 7 which reads :

> "Where the Court has adjourned the hearing of the suit ex parte and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

On that very date the court took evidence of the plaintiff and reserved judgment. In other words, the hearing had been completed and the only part of the case that remained thereafter was the pronouncing of the judgment. O. XX, r. 1 provides for this contingency and it reads :-

> "The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or, as soon thereafter as may be practicable, on some future day; and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders.

Two days after the hearing was completed and judgment was reserved the defendant appeared and made the application purporting to be under O. IX, r. 7. And it is the dismissal of this application that has been held to constitute a bar to the hearing of the application under O. IX, r. 13 on the merits.

The scope of a proceeding under O. IX, r. 7 and its place in the scheme of the provisions of the Code relating to the trial of suits was the subject of consideration in Sangram Singh v. Election Tribunal ([1955] 2 S.C.R. p. 1.). Dealing with the meaning of the words "The Court may proceed ex parte" in O. IX, r. 6(1)(a) Bose J. speaking for the Court said :

> "When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an ex parte order. Of course the fact that it is proceeding ex parte will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an ex parte decree or other ex parte order which the court is authorised to make. All that rule 6(1)(a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties."

Dealing next with the scheme of the Code, the learned Judge pointed out that the manner in which the Court could thereafter proceed i.e., after r. 6(1)(a) was passed would depend upon the purpose for which the suit stood adjourned, and proceeded :

> "If it is for final hearing, an ex parte decree can be passed, and if it is passed, then O. IX, r. 13 comes into play and before the decree is set aside the Court is required to make an order to set it aside. Contrast this with r. 7 which does not require the setting aside of what is commonly, though erroneously, known as 'the ex parte order'. No order is contemplated by the Code and therefore no order to set aside the order is contemplated either." (italics ours)

And referring to the effect of the rejection of application made under O. XI, r. 7, he added :

> "If a party does appear on the day to which the hearing of the suit is adjourned, he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing. But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order IX. r. 7 makes that clear. Therefore, unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in."

That being the effect of the proceedings, the question next arises what is the nature of the order if it can be called an order or the nature of the adjudication which the court makes under O. IX, r. 7. In its essence it is directed to ensure the orderly conduct of the proceedings by penalising improper dilatoriness calculated merely to prolong the litigation. It does not put an end to the litigation nor does it involve the determination of any issue in controversy in the suit. Besides, it is obvious that the proceeding is of a very summary nature and this is evident from the fact that as contrasted with O. IX, r. 9 or O. IX, r. 13, no appeal is provided against action of the court under O. IX, r. 7. "refusing to set back the clock". It is, therefore, manifest that the Code proceeds upon the view of not imparting any finality to the determination of any issues of fact on which the court's action under that provision is based. In this connection reference may be made to a decision of a Division Bench of the Madras High Court in Sankaralinga v. Ratnasabhapati (21 I.L.R. Mad. 324.). The question arose on an appeal to the High Court by the defendants against whom an ex parte decree had been passed on March 30, 1895. Previous thereto they had put in petitions supported by affidavits under s. 101 of the Civil Procedure Code of 1882 corresponding of O. IX, r. 7. to set aside "an ex parte order," accept their written statements, and proceed with the suit on the merits. The ground alleged for the relief sought was that they were not duly served with summons. This application was rejected by the Court. Thereafter, after an ex parte decree was passed, they again filed another application under s. 108 under the then code, corresponding to the present O. IX, r. 13. The ground put forward was again the same, namely that the summons was not properly served. The district Judge having dismissed the application under s. 108 (O. IX, r. 13), the defendants preferred an appeal to the High Court. On behalf of the plaintiffs-respondents the contention was raised by Mr. Bhashyam Ayyangar-learned Counsel-that the application to set aside the ex parte decree under s. 108 was incompetent because the same question has already been decided against the defendant when he filed the aplication under s. 101. The Court composed of Subramania Iyer & Benson JJ. said, "the contention at first sight may seem to be reasonable, but having regard to the very wide words 'in any case' used in s. 108 we are unable to hold that the defendant was not entitled to make an application under section 108." There have been other decisions in which a similar view has been held and though the provisions of the Code corresponding to O. IX, r. 7 and O. IX, r. 13 have been in force for over a century from 1859, there has not been a single case in which the plea of res

judicata such as has been urged in the appeal before us has been upheld. On the other hand, we might point out that an exactly similar objection of res judicata was expressly raised and repelled in Bhaoo Patel v. Naroo (10 C.P.L.R. 45.) in a decision rendered in 1896 in which reliance was placed on a case reported in 8 Cal. 272.

In the circumstances we consider that a decision or direction in an interlocutory proceeding of the type provided for by O. IX, r. 7, is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under O. IX, r. 13. The latter is a specific statutory remedy provided by the Code for the setting aside of ex parte decrees, and it is not without significance that under O. XLIII, r. 1(d) an appeal lies not against orders setting aside a decree passed ex parte but against orders rejecting such an application, unmistakably pointing to the policy of the Code being that subject to securing due diligence on the part of the parties to the suit, the Code as far as possible makes provision for decisions in suits after a hearing afforded to the parties.

So far as the case before us is concerned the order under appeal cannot be sustained even on the basis that the finding recorded in disposing of an application under O. IX, r. 7 would operate as res judicata when the same question of fact is raised in a subsequent application to set aside an ex parte decree under O. IX, r. 13. This is because it is not disputed that in order to operate as res judicata, the court dealing with the first matter must have had jurisdiction and competency to entertain and decide the issue. Adverting to the facts of the present appeal, this would primarily turn upon the proper construction of the terms of O. IX, r. 7. The opening words of that rule are, as already seen, 'Where the Court has adjourned the hearing of the suit ex parte'. Now, what do these words mean ? Obviously they assume that there is to be "a hearing" on the date to which the suit stands adjourned. If the entirety of the "hearing" of a suit has been completed and the Court being competent to pronounce judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX, r. 1, there is clearly no adjournment of "the hearing" of the suit, for there is nothing more to be heard in the suit. It was precisely this idea that was expressed by the learned Civil Judge when he stated that having regard to the stage which the suit had reached the only proceeding in which the appellant could participate was to bear the judgment pronounced and that on the terms of rules 6 & 7 he would permit him to do that. If, therefore, the hearing was completed and the suit was not "adjourned for hearing", O. IX, r. 7 could have no application and the matter would stand at the stage of O. IX, r. 6 to be followed up by the passing of an ex parte decree making r. 13 the only provision in order IX applicable. If this were the correct position, it would automatically follow that the learned Civil Judge would have no jurisdiction to entertain the application dated May 31, 1958 purporting to be under O. IX, r. 7, or pass any order thereon on the merits. This in its turn would lead to the result that the application under O. IX, r. 13 was not only competent but had to be heard on the merits without reference to the findings contained in the previous order.

Mr. Pathak while not disputing that if the application filed on May 31, 1958 was incompetent at the stage it was filed, the order passed by the Civil Judge would not bar the consideration on the merits of the later application to set aside the ex parte decree, sought to get over this obvious situation by a submission that even if O. IX, r. 7 was inapplicable the court had an inherent jurisdiction saved by s. 151 C.P. Code to entertain the application outside the specific statutory provision and that it must be taken that the appellant invoked that jurisdiction and that Court being thus competent to grant or refuse the relief followed the latter alternative in the circumstances of the case and that consequently the proceedings before the Court were not incompetent and that the order passed on the application dated May 31, 1958 was therefore with jurisdiction.

On this submission, which we might mention has been urged for the first time in this court, the first question that arises is whether the Court has the inherent jurisdiction which learned counsel contends that it has. For the purpose of the discussion of the question in the context of the relevant provisions of the Code, it is unnecessary to embark on any detailed or exhaustive examination of the circumstances and situations in which it could be predicated that a Court has the inherent jurisdiction which is saved by s. 151 of the Civil Procedure Code. It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates. We shall confine our attention to the topic on hand, namely applications by defendants to set aside ex parte orders passed against them and reopen the proceedings which had been conducted in their absence. Order IX, r. 1 requires the parties to attend on the day fixed for their appearance to answer the claim of the defendant. Rule 2 deals with a case where the defendant is absent but the Court from its own record is apprised of the fact that the summons has not been duly served on the defendant in order to acquaint him with the proceedings before the Court. Rule 2 contains a proviso applicable to cases where notwithstanding the absence of service of summons, the defendant appears. Rule 3 deals with a case where the plaintiff alongwith the defendant is absent when the suit is called on and empowers the Court to dismiss the suit. Rule 5 deals with a case where the defendant is not served properly and there is default on the part of the plaintiff in having this done. Having thus exhausted the cases where the defendant is not properly served, r. 6(1)(a) enables the Court to proceed ex parte where the defendant is absent even after due service. Rule 6 contemplates two cases : (1) The day on which the defendant fails to appear is one of which the defendant has no intimation that the suit will be taken up for final hearing for example, where the hearing is only the first hearing of the suit, and (2) where the stage of the first hearing is passed and the hearing which is fixed is for the disposal of the suit and the defendant is not present on such a day. The effect of proceeding ex parte in the two sets of cases would obviously mean a great difference in the result. So far as the first type of cases is concerned it has to be adjourned for final disposal and, as already seen, it would be open to the defendant to appear on that date and defend the suit. In the second type of cases, however, one of two things might happen. The evidence of the plaintiff might be taken then and there and judgment might be pronounced. In that case O. IX, r. 13 would come in. The defendant can, besides filing an appeal or an application for review, have recourse to an application under O. IX, r. 13 to set aside the ex parte decree. The entirety of the evidence of the plaintiff might not be concluded on the hearing day on which the defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. On the terms of O. IX, r. 7 if the defendant appears on such adjourned date and satisfies the Court by showing good cause for his non-appearance on the previous day or days he might have the earlier proceedings recalled - "set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. EVen in such a case he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial, only he cannot claim to be relegated to the position that he occupied at the commencement of the trial. Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and O. IX, r. 7 and O. IX, r. 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus, provision has been

made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice. Mr. Pathak however, strenuously contended that a case of the sort now on hand where a defendant appeared after the conclusion of the hearing but before the pronouncing of the judgment had not been provided for. We consider that the suggestion that there is such a stage is, on the scheme of the Code, wholly unrealistic. In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit : (1) Where the hearing is adjourned or (2) where the hearing is completed. Where the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that O. XX, r. 1 permits judgment to be delivered after an interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by O. IX, r. 7 is passed the next stage is only the passing of a decree which on the terms of O. IX, r. 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under O. IX, r. 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of O. IX, r. 7. We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated May 31, 1958 purporting to be under O. IX, r. 7 and that consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petition under O. IX, r. 13 filed by the appellant.

There is one other aspect from which the same question could be viewed. O. IX, r. 7 prescribed the conditions subject to which alone an application competent under the opening words of that rule ought to be dealt with. Now, the submission of Mr. Pathak if accepted, would mean to ignore the opening words and say that though specific power is concerned when a suit is adjourned for hearing, the Court has an inherent power even when (a) it is not adjourned for that purpose, and (b) and this is of some importance, when the suit is not adjourned at all, having regard to the terms of O. XX, r. 1. The main part of O. IX, r. 7 speaks "of good cause being shown for non-appearance" on a previous day. Now, what are the criteria to be applied by the Court when the supposed inherent jurisdiction of the Court is invoked. Non-constant it need not be identical with what is statutorily provided in r. 7. All this only shows that there is really no scope for invoking the inherent powers of the Court. Lastly, that power is to be exercised to secure the neds of justice. If at the stage of r. 7 power is vesteed in the Court and after the decree is passed O. IX, r. 13 becomes applicable and the party can avail himself of that remedy, it is very difficult to appreciate the ends of justice which are supposed to be served by the Court being held to have the power which the learned counsel says must inhere in it. In this view it is unnecessary to consider whether to sustain the present submission the respondent must establish that the court was conscious that it lacked specific statutory power and intended to exercise an inherent power that it believed it possessed to make such orders as may be necessary for the ends of justice.

It was next urged that even if the application under O. IX, r. 7 in respect of suit 134 of 1956 was incompetent having regard to the stage which the hearing of that suit reached when that application was made, still the order passed in suit 20 of 1953 in the application made for the restoration of that suit under O. IX, r. 9 was competent and that the order passed on that application operated as res judicata to the maintain-ability of the application under O. IX, r. 13 in respect of suit 134 of 1956. We consider that there is no substance in this submission. The ground urged for applying the rule of res judicata was that the Court had, at an earlier stage, ordered the joint trial of the three suits - 1023 of 1951, 20 of 1953 and 134 of 1956 and that as the three suits were thus linked together, the application made for the restoration of suit 20 of 1953 constituted a finding by a competent Court that there was no good or sufficient cause for the non-appearance of the appellant in court for any

suit on May 29, 1958. The suits were, no doubt, ordered to be tried jointly in the sense that the evidence recorded in one suit was to be treated as evidence in the other suits also, suit 134 of 1956 being treated as the main suit in which evidence was recorded, but that affords no basis for the contention that every application made in one suit for the relief which is pertinent only to that suit must be treated as an application made in every other suit. Thus, for instance, in the present case if no application were made for the restoration of suit 20 of 1953 which had been dismissed for default it could hardly be contended that because of the application made in suit 134 of 1956 it would serve the purpose of an application for the restoration of that other suit Similarly, if an application had been made for the restoration of suit 20 of 1953 and the Court found that there was sufficient cause for setting the dismissal aside that would by itself hardly be a ground for setting aside the ex parte decree in suit 134 of 1956. These features are sufficient to demonstrate that the circumstance that the suits were being tried jointly has no bearing on the matter now in controversy and that so far as regards the ex parte orders in the three suits each had to be considered independently and had to be disposed of also independently notwithstanding that the same grounds might have sufficed for the relief prayed for in the independent applications. There is another aspect from which this matter could be viewed. The point at issue in the application under O. IX, r. 9 filed to set aside the dismissal for default in suit 20 of 1953 was whether the plaintiff had sufficient cause for his non-appearance "when the suit was called on for hearing" (vide O. IX, r. 9). 'The suit called on for hearing' in that rule obviously refers to suit 20 of 1953. A decision, therefore, that there was no sufficient cause for the non-appearance of the plaintiff in that suit would not be eadem questio with the matter which arose for decision when the application under O. IX, r. 7 was made in suit 134 of 1956 notwithstanding that the facts upon which that issue depended was similar and possibly identical. This is a further reason why we are unable to accept the submission of learned counsel.

The last of the points that was urged by Mr. Pathak was that the decree that was actually passed in suit 134 of 1956 was not in reality an ex parte decree but one on the merits. It was urged that the proceeding on May 29, 1958 satisfied the conditions of O. XVII, r. 3 and not O. XVII, r. 2. There are several reasons why this submission is entirely without substance. In the first place, during the entire proceeding right up to the hearing of the present application which was made under O. IX, r. 13 the Court as well as both the parties proceeded on the basis that the decree was passed ex parte. The order sheet on May 29, 1958 we have extracted earlier contained a direction by the Court that the case will proceed ex parte for the reason that counsel for the defendant reported no instructions. And it must be noticed that by that date the entire hearing was over. The application that was made to set aside this order to proceed ex parte was filed on the basis that the previous hearing was ex parte and was contested by the respondent on the same basis. The order of the High Court in revision on September 4, 1958 proceeds on the same basis. When finally judgment was pronounced by the Civil Judge in suit 134 of 1956 it expressly stated that it was a decree ex parte. In the face of these circumstances there should be overwhelming evidence of the proceedings not being ex parte if the respondent is to succeed in his present plea. In order that the decree passed was one under O. XVII, r. 3 which is the submission of Mr. Pathak the opening words of that rule must be satisfied. That rule 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."

In regard to this the Civil Judge stated :

> "The ground on which this objection is based is that 29.5.58 was the date adjourned at the instance of the defendant-applicant. I do not think, that this ground has any force. It appears from the record that on 28.5.58 the cases were adjourned to 29.5.58 on a joint application of the parties to the effect that a compromise would be filed. It was not, therefore, an adjournment sought by the defendant alone; moreover, that application was made by him in his own suit No. 20 of 1953 and the other two suits had also naturally to be adjourned as all the three of them were consolidated. The adjournment of those two suits, therefore, cannot be said to be at the instance of the defendant."

Learned counsel was unable to point any flaw in the fact here stated. It would, therefore, follow that the terms of O. XVII, r. 3 were not attracted at all and that suit 134 of 1956 was decreed not on merits but really ex parte as had been expressly stated by the learned Civil Judge when he passed that decree.

In the result, the appeal is allowed and the application filed by the appellant under O. IX, r. 13 for setting aside the ex parte decree passed in suit 134 of 1956 is remanded to the trial Judge for disposal on the merits in accordance with law. The appellant will be entitled to his costs throughout. The cost incurred after this remand will be provided for by the Courts below.

Appeal allowed.

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