

**Phani Bhusan Mukherjee Vs. Phani Bhusan Mukherjee and ors.**

**Phani Bhusan Mukherjee Vs. Phani Bhusan Mukherjee and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/857539](http://sooperkanoon.com/857539)

**Court :** Kolkata

**Decided On :** Apr-09-1956

**Reported in :** AIR1957Cal170,61CWN184

**Judge :** Lahiri, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rules 3 and 13 - Order 17, Rule 2

**Appeal No. :** Civil Revn. Case No. 937 of 1955

**Appellant :** Phani Bhusan Mukherjee

**Respondent :** Phani Bhusan Mukherjee and ors.

**Advocate for Def. :** Subodh Chandra Sen and ;Sudhanshu Kumar Hazra, Adv.

**Advocate for Pet/Ap. :** S.C. Das Gupta and ;S.P. Banerjee, Adv.

**Judgement :**

ORDER

**Lahiri, J.**

1. This Rule has been obtained by the plaintiff against an order of the 1st Munsif, Hooghly, in Misc. Judicial Case No. 1 of 1955 by which the learned Munsif has dismissed the plaintiff's application under Order 9, Rule 4 of the C. P. C. The suit

out of which this Rule arises was instituted by the plaintiff on the 23rd December, 1950 for a declaration of title to and recovery of possession of a certain sum of money due upon an award under the Land Acquisition Act. The plaintiff is a diety named Banlinga Shiva Thakur represented by his shebait, Shri Phani Bhusan Mukhopadhyay. After the completion of the preliminary stages, the suit was fixed for peremptory hearing on the 29th May, 1952 on which date the plaintiff attended the Court but the defendants were absent and the suit was taken up for ex parte hearing. The plaintiff shebait Phani Bhusan Mukherjee was examined and two documents were marked as Exs. 1 and 2. The plaintiff's claim was held by the Munsif to have been proved and an ex parte decree followed. This ex parte decree, however, was subsequently set aside on an application under Order 9, Rule 13 of the Code of Civil Procedure by an order dated the 3rd March, 1953. Thereafter on the 4th September, 1954, the suit was fixed for peremptory hearing on the 12th December, 1954. On the 12th December, 1954 both the parties were found absent on call; but an application was filed on behalf of the plaintiff to the effect that the plaintiff's pleader's clerk had committed a mistake in noting the date of hearing and the plaintiff, therefore, prayed for passing an ex parte decree upon the materials already on the record upon which an ex parte decree had been passed on the previous occasion and in the alternative the plaintiff prayed for adjournment of hearing of the case. The learned Munsif rejected both the prayers and dismissed the plaintiff's suit presumably under Order 9, Rule 3 of the Code of Civil Procedure. Thereupon the plaintiff filed an application under Order 9, Rule 4 alleging that there were two suits, viz., Title Suit No. 214 of 1952 and Title Suit No. 214 of 1950 in both of which the pleader engaged by the plaintiff appeared. The suit out of which this Rule arises is Title Suit No. 214 of 1950, but the pleader's clerk through mistake made a note in his diary that this suit had been fixed for hearing on the 4th December, 1954 although that was the date fixed for hearing of Title Suit No. 214 of 1952. The plaintiff further alleged that acting under the said mistake the clerk did not inform him and he was prevented from appearing and taking any steps whatsoever on the 2nd December, 1954. The diary of the clerk has been produced at the hearing of this case and it is Ex. 1(a). The entry in this diary shows that there was no mistake with regard to the date of hearing of this suit. The entry in the diary dated the 2nd December, 1954 shows that this suit was

correctly shown therein as fixed for peremptory hearing. Upon these materials the learned Munsif dismissed the plaintiff's application by an order dated the 22nd January, 1955 and against that order the plaintiff has obtained this Rule.

2. Mr. Das Gupta appearing in support of this Rule has raised two points before me. In the first place, he argues that there was some mistake in the diary of the pleader's clerk as a result of which he failed to inform the plaintiff about the correct date of hearing of the suit. On examining the material on record, I am satisfied that there is no substance in this point. I have examined Ex. I(a), which is a certified copy of the entry in the diary of the pleader's clerk dated the 2nd December, 1954. It shows that Title Suit No. 214 of 1950 was posted on the 2nd December, 1954 as fixed, for hearing on that date. Moreover the plaintiff was not in any way misled by any supposed mistake of the pleader's clerk because the pleader's clerk did not communicate the date of hearing to the plaintiff. The only letter written by the clerk to the plaintiff is dated the 7th December, 1954, on a date subsequent to the dismissal of the suit. The first point raised by Mr. Das Gupta accordingly fails.

3. The second point raised by Mr. Das Gupta is to the effect that under the provisions of Order 17, R. 2 of the Code of Civil Procedure, the Court has a discretion to proceed either under any of the provisions of Order 9 or to adjourn the hearing of the suit to another date and in a case like the present one, where there are materials on the record which, if uncontradicted, would entitle the plaintiff to a decree, the Court should be held to have exercised its discretion improperly if the suit is dismissed for default. Reliance was placed for this proposition upon a decision of Fazl Ali J. in the case of *Chamak Lal Mondal v. Manji Mandal*, AIR 1929 Pat 248 (A). In that case the learned Judge observed as follows:

'It is clear from the language employed in Order 17, Rule 2 that it is not obligatory on the Court to proceed in each case in the manner directed by Order 9 and to dismiss the case for default. Rather the Court should in each case exercise a discretion as to whether it should proceed under Order 9 or make some other order. It has been held that the discretion exercised improperly if the suit is dismissed for default when the plaintiff has at an earlier hearing made a definite case which, if uncontradicted, would entitle him to a decree.'

This case is undoubtedly an authority for the proposition that the Court should adjourn the suit to a future date under the provisions of Order 17, Rule 2 if there are materials on the record which would entitle the plaintiff to get a decree. There are, however, two grounds upon which I hold that the principle of this decision will not apply, to the facts of this case. In the first place, the present case, is not a case which comes under the provisions of Order 17. Rule 2 of Order 17 applies to a case where 'on any day to which the hearing of the suit is adjourned', the parties or any of them fail to appear. In my opinion, this opening sentence makes it clear that Order 17 will come into operation only when the hearing of the suit has commenced but it is adjourned as a part-heard suit to a future date. In the present case, 2nd December, 1954 was the first date of hearing of the suit after the setting aside of the ex parte decree. But Mr. Das Gupta contended that the fact that the suit had been fixed for hearing on the 2nd December, 1954 by the order of the Court dated the 4th September, 1954 shows that the suit is a part-heard suit. I am entirely unable to accept this contention. On the 4th September, 1954 the only order that was passed by the Court is this:

'Fix 2-12-54 for peremptory hearing -- Parties to come ready.'

Nothing was done by the parties or nothing was done by the Court which could be regarded as commencement of the hearing of the suit. I am, therefore, compelled to hold that the 2nd December, 1954 was the first date of hearing of the suit. It is well known that the provisions of Order 17 apply when there is default of appearance at an adjourned hearing, whereas Order 9 lays down the procedure to be followed on the appearance or non-appearance of the parties at the first hearing. In the Patna case (A) upon which reliance was placed by Mr. Das Gupta there could be no doubt that the hearing of the suit had already been commenced and therefore the provisions of Order 17 did apply in that case. In the case before me Order 17 has no application with the result that the only course open to the Court was to follow the procedure laid down by Order 9.

4. The second ground for which I hold that the Patna decision does not apply to the facts of this case is that in the Patna case (A) some evidence was recorded and the report of a Hand-writing Expert was received by the Court. But in the case

before me there were no materials upon which the Court could pass an ex parte decree in favour of the plaintiff. Mr. Das Gupta has argued that the materials which were before the Court at the time of passing an ex parte decree on the 29th May, 1952 could also be utilised for the purpose of passing another ex parte decree on the 2nd December, 1954. I am also unable to accept this argument as correct, I have already stated that the ex parte decree was set aside by an order dated the 3rd March, 1953. The effect of the order setting aside the ex parte decree is that all proceedings subsequent to the stage of the defendant's non-appearance on the 29th May, 1952 would no longer bind him. In other words, as the defendant's non-appearance was condoned by the setting aside of the ex parte decree, the evidence which was recorded in his absence will not also be admissible against him. For these reasons I am unable to hold that the Court had any material upon which it could have passed an ex parte decree on the 2nd December, 1954.

5. If the present case does not come under the provisions of Order 17, Rule 2, there can be no escape from the conclusion that it is governed by Order 9, Rule 3 and under the provisions of that rule, the Court had a discretion to dismiss it for default, as it actually did.

6. For the reasons given above, I have reached the conclusion that the petitioner has not been able to make out any ground for my interference and as such this Rule must be discharged with costs.