
(1879) 05 AHC CK 0001

Allahabad High Court

Case No: None

Gulab Dai

APPELLANT

Vs

Jiwan Ram and Others

RESPONDENT

Date of Decision: May 26, 1879

Citation: (1880) ILR (All) 320

Hon'ble Judges: Robert Stuart, C.J; Pearson, J

Bench: Division Bench

Judgement

Pearson, J.

The lower Appellate Court's finding that the former suit was withdrawn by the plaintiff is, in our opinion, an incorrect construction of the fact. The fact is that she failed to deposit the talabana required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in the suit. The proper course for the Munsif to have pursued was to have proceeded with the suit on the date fixed for hearing and to have disposed of it in respect of the original defendants. Instead of so doing, he precipitately [320] dismissed it as against them for the default aforesaid, which did not apply to them, on a day previous to that fixed for the hearing, in reference to the provisions of Section 110, Act VIII of 1859, which were wholly inapplicable. Had they been applicable the order of dismissal would not have precluded the institution of a fresh suit within the period allowed by law. It is true that the provisions of Section 5,* Act XXIII of 1861, were also inapplicable to the circumstances, but the default for which the suit was dismissed by the Munsif was of the same nature as that contemplated by that section; and it is observable that the dismissal of a suit under that section does not preclude the institution of a fresh suit within the time allowed by the law of limitation. It would be hard to hold that the plaintiff should have been deprived of a right which she would have been free to exercise if her suit had been dismissed u/s 110, Act VIII of 1859, or Section 5, Act XXIII of 1861, not because she committed a greater fault than is punishable under those laws, but because the Munsif committed a strange irregularity which the Legislature had not anticipated

and for which it has not made any express provision. It would be more just and reasonable to apply the spirit of Section 7,⁺ Act XXIII of 1861, which has been re-enacted in Section 99 of the new Procedure Code. It is not found by the lower Appellate Court that the matter of the present suit is a res judicata. u/s 13 of that Code.

2. Accordingly we decree the appeal, and setting aside the lower Appellate Court's decree remand the case to it for disposal of the appeal on the merits, and direct that the costs of this appeal shall follow the event.

-----Foot Note-----

*[Procedure on discovery, on the day fixed for defendant to appear and answer, that usual notice has not been served in consequence of failure of plaintiff to deposit the cost of issuing the same.

Section 5: If on the day fixed for the defendant to appear and answer to a suit, it shall be found that the summons to the defendant has not been served in consequence of the failure of the plaintiff to deposit, within the time allowed, the sum required to defray the cost of issuing the summons, the Court may order that the suit be dismissed. Provided that no such order shall be passed, although the summons shall not have been served upon the defendant, of on the day fixed for the defendant to appear and answer he shall have entered an appearance by a pleader or by a duly authorized agent, when he is allowed to appear by agent, or shall be in attendance in person.]

+ [Procedure in case of dismissal of suit u/s 5.

Section 7: Whenever a suit is dismissed under the provisions of Section 5 of this Act, the plaintiff shall be at liberty to institute a fresh suit, unless precluded by the rules for the limitation of actions, or if the plaintiff shall satisfy the Court within the period of thirty days from the date of the order dismissing the suit, that there was a sufficient excuse for his not making the deposit required within the time allowed, the Court may order a fresh summons to issue upon the plaint already filed.]