

(1925) 01 AHC CK 0012

Allahabad High Court

Case No: None

Jhunni Lal

APPELLANT

Vs

Natha

RESPONDENT

Date of Decision: Jan. 28, 1925

Hon'ble Judges: Sulaiman, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Sulaiman, J.

This is a first appeal from order which has been by the decree-holder and arises out of the following circumstances:

A mortgage decree for sale was obtained against Madan Lal who died subsequent to the decree. In his place Onkar Das, his brother and Natha Ram, his nephew, were brought upon the record as his legal representatives and heirs. There were, first certain objections filed by Onkar Das with which we are not concerned in this appeal. On the 15th of November 1922, Natha Ram filed certain objections purporting to be made u/s 47 and also under Order 21, Rule 58 of the Code of Civil Procedure. Notice was issued to the decree-holder, but the report of the process-server was that he refused to accept notice. The Court considered the service sufficient and ordered that ex parte proceedings should be taken. On the 24th February 1923, the objector got the objections amended as being exclusively u/s 47, and on that date the Court passed an ex parte order allowing the objections.

2. On the 28th February 1923 the decree-holder put in an application for setting aside the ex parte order, alleging that he had no notice of it, and also stating that the objection under Order 21, Rule 58 was not maintainable. The learned Judge has dismissed this application summarily, holding that Order 9, Rule 13 of the CPC does not apply to execution proceedings, and that therefore the application is not maintainable.

3. A preliminary objection is taken that no appeal lies before us. If the original objection had been one under Order 21, Rule 58 and had been allowed then objection that no appeal lies could have been entertained. But we have already pointed out that Natha Ram was brought upon the record as a representative of the deceased judgment-debtor. In his objection he set up his own right to the property, and therefore his objection must be taken to have come u/s 47. This was clearly held in the case of *Dulla v. Shib Lal* (1917) 39 All. 47 by a Bench of which one of us was a member. The objection being u/s 47, the order which was passed on the 24th of February 1923, though an ex parte one, amounted to a decree. u/s 2, Sub-clause (2) of the CPC a decree includes the determination of any question within Section 47. It follows, therefore, that Order 9, Rule 13 would in terms be applicable. The learned Judge was quite wrong in holding that the application for setting aside the ex parte decree was not maintainable. Even if Order 9, Rule 13, were not expressly applicable, the Court would have an inherent jurisdiction to review an order which had been passed ex parte provided of course sufficient cause is shown.

4. The learned advocate for the respondent contends that a contrary view has been expressed in the case of [Bharat Indu and Others Vs. Asghar Ali Khan](#), following the case of *Hari Charan Ghose v. Manmatha Nath Sen* (1913) 41 Cal. 1.

5. We may point out that the case before Calcutta High Court arose out of proceedings under Order 21, Rules 100 and 101, which were not execution proceedings. In the case decided by this Court the application for execution had been struck off on the ground that the decree-holder had failed to prosecute it with due diligence. The facts of that case, therefore, are quite different.

6. In the present case we have already held that the order of the 24th of February 1923, amounted to a decree, and that therefore, Order 9, Rule 13 was clearly applicable.

7. Instead of sending the case back to the Court below we have thought it convenient to dispose of the question of fact ourselves. On the one hand we have the sworn affidavit of the decree-holder that he had no notice of the date fixed. As against it there is the report and affidavit of the process-server. We find it difficult to believe that if the decree-holder was aware of the date and was actually present in the Court compound as alleged by the opposite party, he would have deliberately allowed the objection to be heard ex parte.

8. We accordingly hold that it is established that the decree-holder was ignorant of the date fixed and that he could not attend the Court on that day, and that sufficient cause has been shown for his non-appearance within the meaning of Order 9, Rule 13.

10. We accordingly allow the appeal and set aside the order of the lower appellate Court with the result that the ex parte decree dated the 24th of February 1923, is also set aside and the objections of Natha Ram are restored to the file, and we direct

that they should be disposed of according to law. Costs in both Courts will abide the event, including in this Court-fees on the higher scale.