

**(1868) 12 CAL CK 0010**

**Calcutta High Court**

**Case No:** Miscellaneous Special Appeal No. 997 of 1868

Tara Chand Ghose

APPELLANT

Vs

Anand Chandra Chowdhry

RESPONDENT

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**Date of Decision:** Dec. 12, 1868

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### **Judgement**

Macpherson, J.

That the lower Appellate Court has erred in allowing these decrees to be set off, the one against the other, I have no manner of doubt. For the decrees are not "Cross-decrees between the same parties," within the meaning of Section 209 of Act VIII of 1859, or indeed in any other sense. Even if the facts were as stated by the Judge, I think the decision at which he arrived would be quite wrong, for so long as the parties on the record are different, it is impossible to say that the decrees are "cross-decrees between the same parties," whatever may be the position of trust or benamiship which exists among any of the parties. But the record shows clearly that the facts are not as stated by the Judge, and that it is not the case that "Bhagwan obtained a decree against Anand."

2. The facts, stated accurately, are as follows: Haran Mehaldar and Ramjiban Mehaldar held a decree against Anand Chandra Chowdhry and Madhusudan Mittra. Haran and Ramjiban sold a 15-anna share of their rights as decree-holders to Chandranath Dutt, who thus became jointly interested in the share as decree-holders. Subsequently the interest of Chandranath became vested in Bhagwan, who thereupon, jointly with Haran and Ramjiban, held the decree against Anand and Madhusudan.

3. One Jagat Chandra Chowdhry, the son of Anand, held a decree against Bhagwan.

4. Shamacharan Ghose also had a decree against Bhagwan, and, in execution of that decree, the right, title, and interest of Bhagwan, as one of the holders of the decree against Anand and Madhusudan, was sold, and was purchased by the present appellant, Tara Chand.

5. Tara Chand having thus placed himself in Bhagwan's position as one of the holders of the decree against Anand and Madhusudan, applied to have the decree executed. Thereupon Anand applied to have the decree held by Jagat Chandra against Bhagwan set off as a "cross-decree between the same parties" u/s 209<sup>1</sup> of Act VIII of 1859, upon the ground that his son Jagat Chandra really held that decree against Bhagwan merely benami for him, Anand.

6. The parties to the decrees were not the same in any possible sense, and if Anand and Bhagwan had been the only parties to the one suit, and Jagat Chandra and Bhagwan had been the only parties to the other, I should still have held that the decrees could not be set off u/s 209, whether Jagat was or was not merely a trustee or a benamidar for Anand. I say nothing of the very special circumstances in this case, which also tend towards the same conclusion. But the respondent contends that no appeal will lie.

7. On the 31st of March 1868, the Subordinate Judge of Jessore held that the decrees could not be set off. On the 9th of June, the Zilla Judge reversed this decision, the appeal being heard *ex parte*, as the respondent did not appear. Subsequently an application was made for a re-hearing, which was rejected by the Judge on the 1st of August. Thereupon the special appeal now before us was brought, being an appeal from the decision of the 9th of June. It is argued that u/s 37 of Act XXIII of 1861,<sup>2</sup> a rule similar to that provided by Section 119<sup>3</sup> of Act VIII of 1859, in the case of applications for the re-hearing of a suit which has been disposed of *ex parte*, should be applied; and that as u/s 119 no appeal will lie from a judgment passed *ex parte* against a defendant who has not appeared, so in the present case no appeal will lie. But section 119 is inapplicable. Section 37 of Act XXIII in no way indicates in what cases appeals will lie. It merely relates to the powers which the Appellate Court can exercise when they are dealing with appeals, i.e., when an appeal does lie, and is before the Court. It appears to me that the sections of the CPC which apply, are Sections 346, 347, and 372.

8. Section 346 enacts that if the appellant fails to appear, his appeal shall be dismissed for default; and that if the respondent fails to appear, the appeal shall be heard *ex parte* in his absence. Section 347 provides that if an appellant whose appeal has been dismissed for want of prosecution applies (within thirty days from the date of the dismissal) for the re-admission of the appeal, the Courts may re-admit it. But nothing is said as to re-hearing the case upon the application of the respondent against whom an *ex parte* decree has been passed. No provision is made for any re-hearing in the latter case; nor is it declared that there shall be no appeal from the *ex parte* decision of the Appellate Court. Then comes Section 372, which says that "unless otherwise provided by any law for the time being in force, a special appeal shall lie from all decisions passed in regular appeal," &c. An *ex parte* decree is none the less a "decision passed in regular appeal," because *ex parte*, and it is nowhere provided by any law that there shall be no appeal from a decree

because ex parte.

9. I am, therefore, of opinion that a special appeal does lie from an ex parte decision passed by an Appellate Court in regular appeal.

10. The present appeal arises out of an order made in execution of a decree, but, under Sections 11<sup>4</sup> and 38<sup>5</sup> of Act XXIII of 1861, the ordinary rule of procedure applicable to civil suits before final judgment will apply. I think this appeal will lie, and that the decision of the lower Appellate Court ought to be reversed with costs, and that the original order of the Subordinate Judge declaring that these decrees cannot be set off u/s 209 ought to be affirmed.

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Cross-decrees.	Sec. 209:--If there be cross-decrees between the same parties for the payment of money, execution shall be taken out by that party only who shall have obtained a decree for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum, and if both sums shall be equal, satisfaction shall be entered upon both decrees.
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The above rules shall apply to decrees sent to a Court for execution as well as to decrees in the same Court.

Whenever a suit shall be pending in any Court against the holder of a decree of such Court, by the person or persons against whom the decree was passed, the Court may, if it appear just and reasonable to do so, stay execution of the decree either absolutely or on such terms as it may think just, until a decree shall be passed in the pending suit.

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Appellate Court to have same powers as Courts of original jurisdiction.	Sec. 37:--Unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits.
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No appeal from judgment passed ex parte or by default.	<p>See. 119:--No appeal shall lie from a judgment passed ex parte against a defendant who has not appeared or from a judgment against a plaintiff by default for non-appearance. But in all cases in which judgment may be passed ex parte against a defendant he may apply within a reasonable time not exceeding thirty days after any process for enforcing the judgment has been executed, to the Court by which the judgment was passed, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment, and shall appoint a day for proceeding with the suit. In all cases of judgment against a plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside; and if it shall be proved to the satisfaction of the Court that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment by default, and shall appoint a day for proceeding with the suit. But no judgment shall be set aside on any such application as aforesaid, unless notice thereof has been served on the opposite party. In all cases in which the Court shall pass an order under this section for setting aside a judgment, the order shall be final; but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable, provided that the appeal be preferred within the time allowed for an appeal from such final decision, and be written upon stamp paper of the value prescribed for petitions to the Court where a stamp is required on petitions.</p>
When and how judgment ex parte against a defendant may be set aside.	
When and how judgment by default against a plaintiff may be set aside.	
No judgment to be set aside without notice to opposite party.	
Order for setting aside judgment shall be final.	
In appealable cases an appeal from order of rejection.	
Proviso.	

<p>How questions regarding amount of mesne profits and interest and sums paid in satisfaction of decrees, &amp;c., are to be determined.</p>	<p>Sec. 11:--All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by the order of the Court executing the decree, and not by separate rate suit, and the order passed by the Court shall be open to appeal. Provided that if upon a perusal of the petition of appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal, and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed.</p>
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Procedure prescribed by Act VIII of 1859 to be followed in all future miscellaneous cases and proceedings.	Sec. 38:--The procedure prescribed by Act VIII of 1869 shall be followed as far as it can be in all miscellaneous cases and proceedings which after the passing of the Act shall be instituted in any Court.
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