
(1871) 06 CAL CK 0008

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 09 of 1871

Musst. Drabamayi
Guptia

APPELLANT

Vs

Taracharan Sen

RESPONDENT

Date of Decision: June 5, 1871

Final Decision: Allowed

Judgement

Jackson, J.

We differ from the Judge in the view he has taken of the provisions of Act VIII of 1869 (B.C.). Section 103 of that Act applies to applications for a review of any judgment or order passed in any suit brought under the provisions of this Act." It does not apply to applications for a re-hearing of a suit which has been decided ex parte against the defendant. Sections referring to re-hearing of ex parte decisions and to review of judgment, both in Act VIII of 1859 and also in Act X of 1859, were distinct and separate. Section 103, Act VIII of 1869 (B.C.), applies only to reviews; and section 119 of Act VIII of 1859 will, under the provisions of section 34 of Act VIII of 1869 (B.C.), apply to applications for a re-hearing in cases in which decisions have been passed ex parte. We remand this case to the Judge to be returned to the first Court for a fresh trial.

2. Costs will abide the result.

Mookerjee, J.

3. In this case the Courts below are evidently wrong in the view they have taken of the law, Act VIII of 1869 (B.C.). The plaintiff instituted this suit, on the 23rd of May 1870, for arrears of rent in the Court of the Moonsiff under the provisions of Act VIII of 1869 (B.C.) and an ex parte decree was passed in his favor on the 6th June following. The plaintiff then sued out execution of this decree, and attached certain properties belonging to the judgment-debtor on the 10th Sraban 1277 (29th July 1870). On the 25th Sraban, which corresponds to the 13th August 1870, the defendant filed a petition in the Court u/s 119 of the Civil Procedure Code, praying to set aside the ex parte decision passed against him,

on the ground that he had no notice either of the suit or the decree. This application, it is admitted, was made within thirty days after a process of attachment was executed by the decree-holder to enforce the ex parte judgment. The Moonsiff was therefore bound to proceed under the provisions of this section, and determine whether the summons was or was not duly served on the applicant. Instead of doing so, the Moonsiff states that inasmuch as there is no distinct provision in Act VIII of 1869 (B.C.) like the provisions of section 58 of Act X of 1859, or of section 119 of Act VIII of 1859, he cannot allow this application. He holds that the only section in this law of the Bengal Council, which provides for an application for a re-hearing or re-consideration of a judgment passed under it, is section 103 of that Act, which requires that no petitions for a review of a judgment or order passed in any suit under the provisions of this Act shall be received after the expiration of thirty days from the date of such order or judgment."

4. The Moonsiff therefore was of opinion that the application of the judgment-debtor was beyond time, having been preferred thirty days after the date of the judgment, which was passed in this case on the 6th of June 1870, The Judge also appears to have fallen into the same mistake. Both the Courts seem to me to have lost sight of section 34 of Act VIII of 1869, or to have misapprehended its provisions. Section 34 lays down that, ■save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the CPC passed by the Governor-General in Council, being Act No. VIII of 1859," &c.

5. In the Act of the Bengal Council, there is no provision separately made for applications to set aside ex parte decisions passed by the Court, but yet it is clear that such decisions must be set aside when it is proved that the summons had not been duly served on the defendant as required by law, for a Civil Court will not receive an appeal from a judgment passed ex parte against a defendant who has not appeared, or from a judgment passed against a plaintiff by default for non-appearance, unless there was an application, though unsuccessful, under the provisions of section 119 of the Civil Procedure Code. It is therefore obvious that the Legislature clearly intended that the procedure on applications to set aside ex parte judgments should be the same as is provided for by section 119 of Act VIII of 1859. By section 34 of the aforesaid Act of the Bengal Council, a clear provision is made to the effect that, where the Act does not otherwise provide, all suits brought under Act VIII of 1869 shall be regulated by the Civil Procedure Code, and "that all the provisions of that Act" shall apply.

6. There is little doubt, however, that section 103 of Act VIII of 1869 (B.C.) applies merely to applications for review of judgment, and not to applications to set aside ex parte decisions. The Legislature, being of opinion that the procedure laid down in Act VIII of 1859 should not be made applicable to applications for review preferred in cases decided under the provisions of Act VIII of 1869 (B.C.), made a separate provision by enacting section 103, which limits the period within which such applications should be made to thirty days instead of ninety days as provided for in section 377 of the Civil Procedure Code. In cases where a review is applied for of a judgment passed under the Act of 1869,

the Civil Court must follow section 103 of that Act, and not section 376 or 377 of Act VIII of 1859, because a different procedure is made by the Bengal Act, and u/s 34 that procedure must be followed. I would therefore remand this case to the Court of the Moonsiff for an enquiry and adjudication of the application made by the defendant under the provisions of section 119 of the Civil Procedure Code. The costs of this appeal will abide the final result of this litigation.

¹ (1) Act VIII of 1869 (B.C.), s. 34.--"Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the CPC passed by the Governor-General in Council, being Act VIII of 1859, and by such further and other enactments of the Governor-General in Council in relation to Civil Procedure as now are, or from time to time may be,

in force: and all provisions of the said Act and of such other enactments shall apply to such suits.

(2) Section 103.--"No application for a review of any judgment or order passed in any suit brought under the provisions of this Act shall be received by any Court after the expiration of thirty days from the date of such order or judgment, but nothing in this section contained shall be deemed to apply to the High Court of Judicature at Fort William in Bengal.