

(1925) 04 CAL CK 0042

Calcutta High Court

Case No: None

Sarba Sundari (Baxi) Dassi

APPELLANT

Vs

Panchanon Ray

RESPONDENT

Date of Decision: April 30, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 90

Citation: AIR 1926 Cal 112

Hon'ble Judges: Cuming, J

Bench: Division Bench

Judgement

Cuming, J.

The facts of the case out of which this rule arises are as follows:

2. The petitioner obtained a money-decree against the opposite party, and in execution of this decree certain properties belonging to the judgment-debtor opposite party were put up to sale and purchased by the petitioner decree-holder on the 26th March 1924. On the 25th April 1924, the opposite party put in an application under, Order 21, Rule 90, Civil P.C., for setting aside the sale and various dates were (sic) the hearing of the case; the last date fixed was the 21st June (sic). Orhat date the applicant judgment-debtor, the opposite party, was not present and the application was dismissed for default. On the 18th July 1924 the judgment-debtor, opposite party, put in an application under Order 9, Rule 4, Civil P.C., for setting aside the order of dismissal, the ground apparently being that he was unable to be present on account of the illness of his mother and of himself. The learned Subordinate Judge entirely disbelieved the story of his mother's illness as explaining the reason why he could not be present and held that he had failed to establish sufficient excuse for his absence and his application under Order 9, Rule 4, Civil P.C., was rejected. The Court then proceeded to deal with the matter on a ground which had not been raised by the judgment-debtor himself but apparently was raised by the Court, namely, that as the summons on the decree-holder

auction-purchaser had been returned unserved the Court could not, under such circumstances, dismiss the application, but that it should have dealt with the matter under Order 9, Rule 5, Civil P.C., and should have waited for one year from the date of the return made to the Court by the officer, and if the petitioner did not within that time apply for fresh summons the Court could then dismiss the application. It is rather difficult to understand under which rule and order the Subordinate Judge had proceeded. Order 9, Rule 5, has no application to a case where the plaintiff has failed to appear and the fact that the summons was returnee unserved on the auction-purchase opposite party was no ground for setting aside the order of dismissal for default of the judgment-debtor. Under what section the learned Judge proceeded it is difficult to understand. He states that "by virtue of an inherent power, of that Court to rectify its mistakes."

3. But as a matter of fact there was no mistake to rectify. It appears to me that the Court acted entirely without jurisdiction in setting aside the order, having found that the judgment-debtor did not come within the scope of Order 9, Rule 4, the section which provides for restoration of a case dismissed for default. As far as Pean see the Subordinate Judge had no jurisdiction. The order of the Subordinate Judge complained of is set aside and this rule is made absolute with costs, the hearing fee being assessed at one gold mohur.