

(1925) 08 CAL CK 0037**Calcutta High Court****Case No:** None

Khorschedennessa Khatoon and

Mahammad Bazlar Rahaman

Chowdhury

APPELLANT

Vs

Hakikannessa Banoo

RESPONDENT

Date of Decision: Aug. 19, 1925**Citation:** AIR 1926 Cal 845 : 94 Ind. Cas. 228**Hon'ble Judges:** Ewart Greaves, J; Duval, J**Bench:** Division Bench**Judgement**

Ewart Greaves, J.

These two appeals are by-defendants Nos. 3 and 1 respectively in a partition suit for setting aside an ex parte decree that had been passed for partition of certain properties. Defendant No. 3 is a pardanashin lady and her case is that she was never served. Defendant "No. 1 who is appellant in Appeal No. 64 of 1924 says that he was unable to present his case to the Court owing to the negligence or collusion of one Bhola Nath an employer of his who had been entrusted by him with the conduct of the case. So far as the lady is concerned, defendant No. 1, the appellant in Appeal No. 63, it appears that the service was effected by serving summons on her third son who lives in the same house as the lady. Under the circumstances it seems to me that it must be taken to be a proper service on this lady and we have not the slightest doubt that she knew all about the suit and that she had ample opportunity of giving due and proper instructions with regard to the conduct of the case.

2. The result is that Appeal No. 63 of 1924 is dismissed with costs--hearing-fee, one gold mohur.

3. Defendant No. 1 filed a written statement in the suit but he was not present when the ex parte decree was passed on the 13th December 1923. So far as I can make out from the evidence which is very incomplete Bhola Nath on or about the 28th November when the suit was adjourned until the 13th December was present at the

place of hearing and according to his story he left a rupee with some person to be handed over to the Pleader Girindra. Mohan Datta in order that he might apply on the 13th December for further adjournment of the suit. Apparently, the fee never reached the Pleader Girindra and no application for adjournment was made and the suit was decreed ex parte. Now, no doubt, if there had been no negligence on the part of defendant No. 1 he should be allowed, under the circumstances, an opportunity of having the case re-heard. But I am not at all satisfied that he can be acquitted of negligence in the matter. Bhola Nath returned from Mymensingh some time after the 28th November and surely, it was the duty of defendant No. 1 to enquire in a suit of this nature as to what had happened at Mymensingh on the 28th November. If he failed to enquire he was, in my opinion, guilty of negligence and the Court should not assist him and if he did enquire then he knew that the suit had been adjourned until the 13th December and yet in spite of this Bhola Nath and he were both content to rely the fact that he had left the fee behind with instruction that the Pleader was to apply for adjournment on the 13th December. We think that they had no right to assume that the Court would grant an adjournment on the 13th December and that it was their duty to have made proper and adequate provision for the carrying on of the case if, as turned out, the adjournment was refused on the 13th December.

4. In the circumstances, holding as we do that the appellant was negligent in the case we do not think that we should be justified in setting aside the ex parte decree which has been passed. Parties should learn that they cannot have as of right an adjournment or if an adjournment is refused and the case proceeds that they cannot have the case restored as of right and it will be better for the conduct of litigation as well as for the community as a whole when this is realized.

5. The result is that this appeal is also dismissed with costs--hearing-fee, one gold mohur.

Duval, J.

6. I agree.