(1868) 07 CAL CK 0026

Calcutta High Court

Case No: Special Appeal No. 81 of 1868

Lala Jagat Narayan		APPELLANT
	Vs	
Tulsiram		RESPONDENT

Date of Decision: July 2, 1868

Judgement

Phear, J.

As the plaintiff''s purchase was effected on the 13th of March after the attachment was issued, and before his Vendor''s application for a new trial on the 4th of July, it was evidently made while the attachment was pending. But we think that the effect of granting an application made u/s 119 of Act VIII of 1859, is to declare that there has not been yet a valid decree in the suit. There are two sets of grounds upon which the Court may set aside its own decree within Section 119. The first is, that the summons was not duly served upon the defendant who applies for a new trial; and the second, that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. If the Court is satisfied that either of these two grounds is made out, it sets aside its original judgment, and proceeds with the hearing of the suit. But the attachment of the 2nd February 1865 was issued in process of execution of the first decree. It owed its validity as an attachment entirely to the foundation afforded by the decree, and when that decree was set aside and declared invalid, the attachment, in our opinion, fell with it. Without a decree, the attachment could not be made. The mere fact of seizure and affixing a notice would alone have no legal effect; and, therefore, as soon as it appeared that a valid decree had not been passed, necessarily the form of attachment which had been gone through by the officer of the Civil Court, came to nothing. We, therefore, think that the Principal Sudder Ameen was wrong in holding, that the plaintiff''s purchase was, necessarily, void, merely because it was made between the 2nd of February and 4th of July 1865. It may yet be that the plaintiff''s purchase, on the facts of the case, may turn out to have been a pretence, and not to have been a real transfer on the part of his alleged vendor, but that is a question which has not yet been tried by the Lower Appellate Court. We, therefore, reverse the decision of the Principal Sudder Ameen,

and remand the ease for re-trial on its merits.

2. The costs will abide the event.

---

[1](1) No appeal from judgment passed ex parte or by default.

(2) When and how judgment ex parte against a defendant may be set aside.

(3) When and how judgment by default against a plaintiff may be set aside.

(4) No judgment to be set aside, without notice to opposite party.

(5) Order for setting aside judgment shall be final.

(6) In appealable cases an appeal from order or rejection.

Proviso.

[Sec. 119:--(1) 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, (2) But in all cases in which judgment may be passed ex parte against a defendant be 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. (3) In all cases of judgment against a plaintiff by default, be 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. (4)- But no judgment shall be set aside on any such application as aforesaid, unless notice thereof has been served on the opposite party. (5) In all oases 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 (6) the application, an appeal shall lie from the order or 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 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.

Any private alienation of property after attachment to be null and void.

Sec. 240:--After an attachment shall have been made by actual seizure, or by written order as aforesaid, and in the case of an attachment by written order after it shall

have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale gift, or otherwise, and any payment of the debtor or debts or dividends or shares to the defendant during the continuance of the attachment, shall be null and void.]