
(1872) 09 CAL CK 0007

Calcutta High Court

Case No: Rule Nisi No. 767 of 1872

In Re: S.J. Leslie

Vs

APPELLANT

RESPONDENT

Date of Decision: Sept. 16, 1872

Judgement

Ainslie, J.

We held at the former hearing that the Judge had jurisdiction to ascertain the debt due by the petitioner to the Land Mortgage Bank, and to make an order for the sale of the mortgaged property which is situated within the local limits of the jurisdiction of his Court, and to award the costs of the action to the plaintiff. We declined to entertain the question whether the decree should be set aside in part, on the ground that there was nothing before us to enable us to make any declaration as to the extent to which each an order should operate. It is now said that the materials necessary for distinguishing the portion of the decree that ought to be set aside were and are before us, though at that time this fact was overlooked. But it does not follow that we must modify the decree, because it is shown to us that it contains provisions which should not have been embodied in it. This is an application under s. 15 of the High Courts' Act, asking us to proceed under the general powers of superintendence thereby Tested in the Court, with a view to supply to the petitioner a remedy in lieu of that which he has lost by his own deliberate act. Under ordinary circumstances the petitioner would have been entitled to an appeal against any decree made by the Judge in the suit, and on such appeal this Court would have had power to confirm, reverse, or modify the decree of the lower Court, and so to make a proper decree in the suit: but s. 119 expressly enacts that "no appeal shall lie from a judgment passed ex parte against a defendant who has not appeared," and then proceeds to provide a remedy for a defendant who can establish to the satisfaction of the Court either that the summons to him was not duly served or that he was prevented by sufficient cause from appearing when the suit was called on for hearing; but it gives no remedy to a defendant who has willfully or carelessly failed to appear after due service of summons. It has been found both by the Court below and by this Court that the petitioner failed to make out any right to a re-opening of the case under s. 119, and that he has

consequently, by his own omission to attend to the summons, lost his right to appeal against the decree. We are now, in effect, asked to restore to him the benefit of an appeal by dealing with the case under our general powers of superintendence. We do not think we are called on to consider in a proceeding in, this form what may be the consequences of the Bank's taking further steps to realise the balance still due under the decree. The question is simply whether we ought to give an extraordinary remedy to a defendant who has deliberately thrown away his ordinary remedy. We think we ought not to do so, and that the rule should be discharged with costs.