
(1871) 05 CAL CK 0010

Calcutta High Court

Case No: Regular Appeal No. 14 of 1871

Baboo Roy Dhunpat
Sing Bahadur

APPELLANT

Vs

Amritnath Jha

RESPONDENT

Date of Decision: May 10, 1871

Judgement

Bayley, J.

On this appeal coming on for hearing, Baboo Srinath Das for the respondent took a preliminary objection that no appeal lies against the decision of the lower Court, as it was an ex parte decision under the provisions of section 119, Act VIII of 1859. Baboo Srinath Das quotes the case of Bhimacharya v. Fakirappa 4 Bom. H.C. Rep., A.C.J., 206 in support of his contention. I take up the preliminary objection, first, as it stands. The Bombay case is not at all a case similar to the one before us. It was there ruled "that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant, but not instructed to answer, or instructed not to answer at all, was an ex parte bearing, and that no appeal lay from a judgment passed in such suit." No other authority has been advanced. Now we would have paid the highest respect to the authority cited, were it at all in point, but as it stands, it is entirely different from the case now before us.

2. The facts of this case appear to be these:--There was a petition given by Mr. D'Souza, the pleader for the defendant, on the 9th September 1870. The order on that petition was "Let the defendant's pleader take notice that, if he intends to have any witnesses called up, he must pray for the same by filing a petition in Court to-day, otherwise he must appear on the date fixed, along with his witnesses." On the 13th September, Mr. D'Souza put in an issamnavisi (list of witnesses) on behalf of the defendant. The lower Court held that, as the order of the 9th September was that the defendant should file his issamnavisi on that very day, he should have done so; but that as then there was no time to serve the summonses, the defendant should himself try to bring the witnesses into Court on the day fixed for the hearing of the case, viz. the 21st. On the 21st September, Mr. D'Souza again presented a petition to the effect that, as the witnesses from the other district (Dinagapore) whom the defendant was directed to produce in Court on that day had not

yet appeared, summonses might be issued in their names; and that as the witnesses in Purneah had also failed to appear, although summonses had been issued in their names, a dustuk might issue against them.

3. Upon this petition the Court says that it was clear that the defendant's intention was to gain time; and as the Court could not postpone the case again, having once before granted a postponement without reason, the petition must be rejected. The petition was accordingly rejected, and the case was heard and disposed of on that very day, viz., the 21st September. So that it is clear that this suit, involving a claim of no less than Rs. 1,08,445, was instituted on the 9th August, and disposed of on the 21st September, notwithstanding all those petitions on the part of the pleader of the defendant to allow him a further and reasonable period to produce his witnesses. This fact in itself indicates an improper haste with which the case has been disposed of, without a due regard to the interests of justice.

4. Reverting to the preliminary objection raised by the pleader for the respondent, I have to remark that this case is altogether different from the Bombay case cited. Here the pleader was not one who was "not instructed to answer, or was instructed not to answer," or who stood by and let the judgment go against him, but who, according to the Subordinate Judge himself and to record, was present in Court, and trying from time to time by reasonable requests, and under the above circumstances without any injury to justice to the parties, to obtain further time for his client in order to produce witnesses, who, on account of the distance of their place of abode in different districts, Purneah and Dinagepore, and the difficulty of enforcing their attendance in Court, could not be produced within the very limited time given. Irrespective, however, of this consideration, every Judge in dealing with an ex parte case should take good care to see that the plaintiff's case is at least prima facie proved. Now what have we in this case before us? The allegation of the plaintiff in the plaint was that, under the conditions of the bond, if the mortgaged property were likely to be sold, or if four successive instalments remained unpaid, the plaintiff would be entitled to sue without waiting for the expiration of the remaining dates fixed for the instalments; and that accordingly, as there had been default in the payment of four successive instalments, the property was likely to be brought to sale, the defendant having allowed the rent for two years to remain unpaid. Besides that there was a stipulation for the payment of interest, on certain dates specified in the schedule, which had not been paid.

5. Instead, however, of enquiring into any of the above points, the whole judgment of the lower Court seems to be directed to the determination of one point only, viz., the factum of the execution of the bond. No determination as to the non-payment of the patni rents, or to the breach in the payment of instalments, has been come to or attempted. Indeed, the whole judgment on the merits of the case is contained in these few words:-- "The genuineness of the bond impleaded, is proved by the evidence on the record, the conclusion drawn from which of the justness of the demand is further justified by the presumption arising from the default of the defendant (though present by pleader) to enter

a defence." So that out of the very judgment from which Baboo Srinath Das takes his preliminary objection owing to the case being decided ex parte, that is, in the defendant's absence, we find that the defendant was present through his pleader, who acted for him from time to time by petitions. After this it is needless to observe that the facts found by the lower Court in the passage quoted are quite insufficient to justify a decree in the plaintiff's favor. It might well be that the bond had been really executed, and yet the patni rent, or the several instalments, might not have remained unpaid, so as to give the plaintiff a cause of action. Besides, the presumption drawn by the Subordinate Judge as to the justness of the plaintiff's claim, from the default of the defendant in entering a defence, is as illogical as it is wrong in law. Borne illness, accident, want of a friend to look into his affairs, and a variety of other circumstances, might have combined to prevent the defendant from being present in Court, so that it cannot be laid down as a safe or a sound rule that the mere absence of the defendant of itself justifies the presumption that the plaintiff's case is true. The real fact in the case seems to be that, simply with a view to get the case disposed of before the holidays, 21st September being the last day before the vacation, this unseemly haste has been made in the decision of the case, and the unavoidable result has been a total denial of justice.

6. Under all the above circumstances, we think that the case must go back to the lower Court to be re-tried with reference to the above remarks; each party being willing that it should be taken up and disposed of out of its turn.

7. The Deputy Registrar will certify before Friday evening that the records of this case have been despatched to the post office, and the 1st July next is hereby fixed the date for the decision of this case by the lower Court, after which period no further time should be allowed to either party.

Paul, J.

8. I am entirely of the same opinion. I consider the request made by the defendant for a postponement of the hearing of the case was perfectly reasonable and well-grounded, and the Subordinate Judge has acted most indiscreetly and unreasonably in refusing it. I quite concur with Mr. Justice Bayley in thinking that the whole proceeding in this case is marked by a degree of precipitation which the circumstances hardly justify or at all render necessary, and that therefore on that ground the case must be sent back for re-trial. If I were to yield to the objection taken by Baboo Srinath Das that this is an ex parte proceeding, and no appeal lies, then I must say that, inasmuch as this decision of the Subordinate Judge has been some way or other brought to our notice, and we have read it, and we think that it is a most hasty, incomplete, and erroneous judgment, we ought, by virtue of the large powers which we have, to interfere for the ends of justice. In fact, when a challenge was thrown out by the Court to Baboo Srinath Das, if he could maintain the judgment of the lower Court upon the facts found, he most candidly and honorably admitted that he could not. Such being the case, I think that the case must be sent back for a fresh trial. The costs will follow the result.