
(1872) 08 CAL CK 0012

Calcutta High Court

Case No: None

Bhairabdan Ramchand

APPELLANT

Vs

Bassantlal Bhagat

RESPONDENT

Date of Decision: Aug. 31, 1872

Judgement

Sir Richard Couch, Kt. C.J.

1. In this case the Judge of the Small Cause Court has set aside the proceeding subject to the opinion of this Court on the question whether he was correct in holding that a summons, returnable in less than two days, is irregular under Act IX of 1850, s. 26. With reference to the objection that it does not appear that there is a good defence on the merits of the case, and therefore a new trial ought not to be granted, we must consider that the Judge is satisfied that it is a proper case for getting aside the judgment if the summons was irregular, and s. 53 gives power to the Judges in every case whatever, if they shall think fit, to order a new trial. We think the meaning of s. 26 is that the time between the service of the summons and the day on which the Court is hold on which the cause is to be tried, shall in all cases be fixed by the Rules for regulating the practice of the Court. The only time fixed by Rule 3 is two clear days. The words "unless the Court shall otherwise order" do not fix any other time, but give the power in any case to disregard the rule and the Act, and to have the summons served at any time before the trial S. 41 does not in our opinion authorize this. The Rules for regulating the practice and proceeding of the Court, cannot override the provisions of the Act, and dispense with fixing a time for the service when the Act has expressly required that it should be done. In our opinion the summons in this case was not properly served, and the judgment was irregular.

¹ The following sections of Act IX of 1850, and Rules of Practice of the Calcutta Small Cause Court are material for the purpose of this report:--

Act IX of 1850, s. 26.--On the application of any person desirous to bring a suit under this Act, the Clerk of the Court shall issue, under the seal of the Court, a summons which shall be numbered, and shall set forth the names of the plaintiff and defendant, the cause of action, with such particulars as shall be, from time to time, directed by the rules of the Court, and the amount sued for and shall be served on the defendant so many days before the day on which the Court shall be hold at which the cause is to be tried as shall he directed by the rules for regulating the practice of the Court; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules of practice shall be deemed good service.....

Act IX of 1860 s. 41--The Judges of each Court, holder under this Act, subject to the approval of the Judges of the Supreme Court, shall have power¹to make and is one all the general rules for regulating the practice and proceeding of the Court,..... and from time to time to alter any such rule.....; and the rules so made.....shall be observed.....in the Court of that Presidency, and shall be sent to the Supreme Court for approval, but shall be of force until disapproved.....

Rule 2.--The summons to appear to suite or action shall be issued according to the forms in the schedule, and shall be dated as of the day when issued Summonses shall be made return-able on the seventh day, but may be made returnable in a shorter or longer period, at the discretion of the Judge.

Rule 3.--Every such summons to appear to a unit or action shall be served by one of the bailiffs of the Court two clear days before the holding of the Court at which it shall be made returnable, unless the Court shall otherwise order.

Rule 6.--When any defendant shall, by keeping his house, place of abode, or place of business closed, or by absconding or by violence or threats, prevent any bailiffs from serving any summons to appear to a suit or action as herein before directed, and such summons shall have been conspicuously fixed on, or near to, such place of (sic) or place of business, or otherwise served as nearly as may be according to the mode herein before directed, such service may be deemed good service.¹Rules 63.--It is ordered that summons shall in future be returnable no the fourteenth day, unless when the plaintiff shall apply for a summons at a shorter date in terms of the 2nd Rule of the Court.

² The affidavit was to the effect that the defendant was removing his person and property from the jurisdiction of the Court with fraudulent intent.

³ The reason given for the proposed Addition was "to obviate the necessity¹in some cases of issuing a Bench warrant."