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petition, and to restore the revision petition to file if there were really any merits in the revision petition, or he would be subjected to any serious hardship if the application were refused. But it is far from apparent that upon the merits the decree passed against him is unjust or contrary to law. Moreover it is merely a decree for a sum of about Rs. 48; nor is it clear upon the face of the plaint that the suit is one which is excepted from the jurisdiction of a Court of Small Causes.

For the above reasons I dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. February 2, 3.

GOPALA CHETTI (PLAINTIFF), APPELLANT,

v.

SUBBIER (DEFENDANT No. 2), RESPONDENT. *

Civil Procedure Code—Act XIV of 1882, *s.* 148—Ex parte *decree against two defendants—Application by one defendant only to set aside the decree—Defence peculiar to that defendant—Order of Court setting aside entire decree as against both—Validity.*

First defendant had executed a promissory note in plaintiff's favour. Plaintiff now sued first defendant on the note, as the maker, and he joined the first defendant's nephew as second defendant on the ground that the note was for a debt binding on the family, including second defendant. Neither defendant appeared and the District Munsif passed a decree *ex parte* against both. Later, the second defendant alone applied under section 108 of the Code of Civil Procedure that the *ex parte* decree might be set aside. The Munsif accordingly set it aside *in toto* as against both defendants. When appealing against the final decree, plaintiff took the objection that the order was contrary to law, and claimed that the decree should not have been set aside as against first defendant and asked to have it restored:

Held, that the decree should be restored as against first defendant; whatever doubt might exist in a case in which the decree sought to be set aside under section 108 proceeds on a ground common to the applicant and another defendant who has not applied under that section, the decree should not have been set aside *in toto* in a case like this where the defence of the second defendant was peculiar to him. *Mahomed Hamidula* v. *Tahurennissa Bibi*, (I.L.R., 25 Calc., 155), commented on.

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* Second Appeal No. 1088 of 1901 presented against the decree of A. C. Tate, District Judge of Chingleput, in Appeal Suit No. 83 of 1900, presented against the decree of J. S. Gnaniyar Nadar, District Munsif of Trivellore, in Original Suit No. 641 of 1899.

THE facts appear from the head-note and from the judgment.

P. S. Sivaswami Ayyar for appellant.

K. R. Krishnaswami Ayyangar for respondent.

JUDGMENT.—The appellant sued on a promissory note made by the first defendant alone and joined the undivided nephew of the first defendant as a party (second defendant) to the suit, on the ground that the promissory note was for a debt binding on the family including the second defendant.

Neither defendant appeared and the District Munsif, on the 25th August 1899, passed a decree *ex parte* against both the defendants, which, as properly construed, means that the first defendant, the maker of the note, is personally liable for the sum sued for, and that the plaintiff is entitled to recover the amount decreed also from the interest of the second defendant in the joint family property. This decree proceeds on the footing that the debt was incurred for a family purpose. The second defendant alone applied under section 108, Civil Procedure Code, alleging that he was not duly served with a summons, and praying that the decree passed against him *ex parte* might be set aside. The District Munsif set aside the decree *in toto*, that is, as against both the defendants. There being no appeal against such an order it is open to the appellant in appealing against the final decree in the case to object to such order as contrary to law and he accordingly contends that the decree passed *ex parte* should be restored as against the first defendant. In our opinion the contention is well founded under the circumstances of the case. There is no contention as to the making of the note and the consideration therefor. That being so, the contention of the second defendant that the debt was one not binding upon him, is a defence peculiar to him, and not one common to him and the first defendant. We are, therefore, clearly of opinion that the District Munsif was not warranted by law in setting aside the decree as against the first defendant, as the correctness of the decree does not depend on the character of the debt. If the decision in *Mahomed Hamidula* v. *Tahurennissa Bibi*(1) relied upon by the District Judge, really means that, if an application made by any one defendant under section 108 of the Civil Procedure Code be granted, the whole decree must be set aside in favour of all other defendants, whether *ex parte* or not and whether they applied

(1) I.L.R., 25 Calc., 155.

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under section 108 or not, we are with great respect unable to concur. But having regard to the decision of the same Bench in a subsequent case (*Monomohini Chowdhurani* v. *Nara Narayan Roy Choudhri*(1)), we are inclined to think that such is not the effect of that decision.

Whatever doubt may exist in a case in which the decree sought to be set aside under section 108 proceeds on a ground common to the applicant and another defendant, who has not applied under that section, we entertain no doubt in a case like the present in which the decree does not proceed on a ground common to both the defendants (*Bhura Mal* v. *Har Kishan Das*(2)). The District Munsif, in his revised decree, held that the debt was not binding on the second defendant and passed a decree against him merely as the legal representative of the first defendant, the first defendant having died subsequent to the order setting aside the decree *ex parte*. As, in our opinion, the decree passed *ex parte* against the first defendant ought not to have been so aside, we reverse the decree of the lower Appellate Court and the revised decree of the District Munsif, dated 2nd February 1900, and restore his original decree, so far as it directs the first defendant to pay the amount decreed with interest and costs.

The effect of this will be that the decree against the first defendant is one which was passed during his life-time and it will have to be executed against his legal representative under section 234, Civil Procedure Code. In this view, the decision of this Court in *Ramanayya* v. *Rangappayya*(3) as to the effect of attachment before judgment in a case in which the defendant, being an undivided member of a Hindu family dies before judgment, has no application to the present case.

In executing the decree under section 234, the question as to whether by reason of the attachment pending suit the share of the deceased judgment-debtor should also be regarded as assets of the deceased in the hands of second defendant will have to be decided.

As the appellant has failed as against the second defendant, he must pay his costs throughout, but he will be entitled to recover his costs throughout from the estate of the first defendant.

(1) 4 Calc. W.N., 456. (2) I.L.R., 24 All., 383.
(3) I.L.R., 17 Mad., 144.