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July 16.

FULL BENCH.

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

GULAB SINGH (PETITIONER) *v.* LACHMAN DAS (OPPOSITE PARTY).*

Application to set aside an ex parte *decree—Appeal—Act X of* 1877 *(Civil Procedure Code), ss.* 2, 103, 108, 244, 540, 588—*Act VIII of* 1859 *(Civil Procedure Code), s.* 119.

No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for an order setting aside a decree made *ex parte* against a defendant.

A DECREE was passed *ex parte* against one Gulab Singh, the defendant in a suit. He applied to the Court of first instance for an order to set this decree aside, on the ground that no summons to appear had been served upon him. The Court, on the 20th December, 1877, rejected the application.

Gulab Singh preferred a petition of appeal to the High Court against the order rejecting the application. The Court (Pearson, J.) referred the case to the Full Bench, observing that, unless orders made under s. 108 of Act X of 1877 fell within the definition of decrees and were appealable as such, there seemed to be no provision in Act X of 1877 for appeals from orders made under that section.

Babu *Dwarka Nath Mukarji*, for the petitioner.

The opposite party was not represented.

The following judgments were delivered by the Full Bench:

PEARSON, J.—S. 119 of Act VIII of 1859 provided that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," but that, "in all cases in which judgment may be passed *ex parte* against a defendant, he may apply within a reasonable time to the Court by which the judgment was passed," for an order to set it aside, and that "in all cases in which the Court shall pass an order for setting aside the judgment, the order shall be final, but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable."

Under the new Code of Procedure an *ex parte* decree is appealable like any other decree. The provision that no appeal shall lie

* Miscellaneous First Appeal, No 35 of 1878, from an order of Maulvi Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 20th December, 1877.

against an *ex parte* decree has not been re-enacted. S. 108 of Act X of 1877 provides that, as before," in any case in which a decree is passed *ex parte* against a defendant under s. 100 he may apply to the Court by which the decree was made for an order to set it aside." S. 119 of Act VIII of 1859 made provisions of a somewhat similar nature in respect of judgments against a plaintiff by default. He was not allowed to appeal against the judgment, but was permitted to apply within thirty days from its date for an order to set it aside; and in all appealable cases in which the application was rejected, the order of rejection was appealable. By the new Code of Procedure it may be a question whether a plaintiff is not precluded from appealing from a judgment against him by default; but he may, under s. 103 of Act X of 1877, apply for an order to set the dismissal of his suit aside; and under cl. (*f*), s. 588, orders rejecting applications under s 103 (in cases open to appeal) for an order to set aside the dismissal of a suit are expressly declared to be appealable. As there is no provision of a like nature made in s. 588 of Act X of 1877 for appeals from orders rejecting applications under s. 108 for setting aside *ex parte* decrees, it is *primâ facie* inferrible that such orders were not intended by the Legislature to be appealable. There remains the question whether such orders can be held to be decrees within the scope of the definition of a decree given in s. 2 of the Act, and as such appealable under s. 540. It is obvious to remark that if such orders could be regarded as decrees, so also might orders on applications under s. 103 refusing to set aside *ex parte* decrees be regarded as decrees. The circumstance that provision has been made in s. 588 for an appeal from orders rejecting applications under s. 103 seems to show that they were not regarded as decrees appealable under s. 540 by the Legislature, and warrants the conclusion that orders rejecting applications under s. 108 cannot properly be so regarded. "Decree" is defined in s. 2 as meaning the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. An order refusing an application to set aside an *ex parte* decree certainly does not embody the result of the decision of the suit. Such an order does, indeed, it must be admitted, embody the result of a judicial proceeding. But so do the orders specified in s. 588 embody the results of judicial proceedings, and yet they cannot be presumed to have been

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regarded by the Legislature as decrees appealable under s. 540; for had they been so regarded, it would have been unnecessary to declare in s. 588 that an appeal shall lie from them. It is presumable then that the judicial proceedings referred to in s. 2 are of a different nature from those which result in the orders specified in s. 588, and that they in some degree resemble and partake of the character of a suit. The category given in s. 588 includes all important orders passed in the course of the trial of a suit and the execution of a decree, except the most important of all, namely, orders finally disposing of applications for the execution of decrees. As it cannot be supposed that an appeal would be allowed from orders of secondary importance, and not from orders of the first importance, it may reasonably be concluded that orders finally disposing of applications for the execution of decrees were intended to be appealable as decrees under s. 540. A recent judgment of the Full Bench of this Court (1) has settled that they are so appealable. Proceedings in execution of decree, following the decision of the suit, may be still a part of the suit, if that be held to terminate not with the decree, but with the execution of the decree. Nevertheless each application for execution may be viewed as a little suit of itself, though it be a suit within a suit; and the proceedings in each are not unlike those in the trial of a suit. That proceedings under s. 244 were so viewed by the Legislature as proceedings of a distinct kind, analogous to proceedings in a suit, is indicated by the special and remarkable provision made in s. 588, cl. (*j*), for appeals from orders passed in the course of proceedings under s. 244 of the same nature as orders appealable in the course of a suit. The proceeding which results in an order rejecting an application to set aside an *ex parte* decree is a proceeding very different from that which results in an order determining matters in issue between parties relating to the execution of a decree, and is not at all of the same character as a suit. The present appeal should, therefore, in my opinion, be rejected.

TURNER, O. C. J.—I am of the same opinion.

OLDFIELD, J.—I concur in the view expressed by Mr. Justice Pearson.

Appeal rejected.

(1) *Thakur Prasad* v. *Ahsan Ali*, *ante*, p. 668.