

1907
May 17.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

BETI JEO (PETITIONER) v. SHAM BIHARI LAL (OPPOSITE PARTY).*

Civil Procedure Code, section 108—Decree ex parte—Application to set aside decree—Right of representative to continue proceedings initiated by defendant.

Where proceedings under section 108 of the Code of Civil Procedure have been initiated by the defendant the legal representative of the defendant is entitled to continue such proceedings. *Janki Prasad v. Sukhrani* (1) distinguished. *Ganada Prasad Roy v. Shib Narain Mukerjee* (2) referred to.

MUSAMMAT Duni Kunwar, against whom an *ex parte* decree had been passed on the 19th of March 1906, applied on the 18th of April 1906 under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside and the case restored. The plaintiff filed objections, alleging that the applicant had died on the day when her application was filed and that for this and other reasons the application should fail. On the 19th May 1906 the original applicant's daughter Musammat Beti Jeo was brought on to the record in place of her mother. On the 9th of June 1906 the Subordinate Judge dismissed the application, holding that it could not be proceeded with after the death of Musammat Duni Kunwar. Musammat Beti Jeo appealed to the High Court.

Messrs. *W. Wallach*, and *M. L. Agarwala* and *Munshi Gutzari Lal*, for the appellant.

The Hon'ble Pundit *Sundar Lal* and *Munshi Gokul Prasad*, for the respondent.

KNOX, ACTING C. J., and RICHARDS, J.—The only question which arises in this appeal is whether the legal representative of a deceased judgment-debtor is entitled to continue an application made by her predecessor in title under section 108 of the Code of Civil Procedure to set aside an *ex parte* decree. It is urged on behalf of the respondent that under the ruling of *Janki Prasad v. Sukhrani* (1), the legal representative has no such right. In that case it was held that where a defendant had died after an *ex parte* decree had been made, his personal representative could

* First Appeal No. 107 of 1906, from an order of Babu Ishri Prasad, Subordinate Judge of Mainpuri, dated the 9th of June 1906.

not apply under section 108 because the right given under section 108 is a right personal to the defendant and does not pass to his representative. This decision was considered by the Calcutta High Court in the case of *Ganoda Prasad Ray v. Shib Narain Mukerjee* (1). The Court would naturally lean toward giving as wide a construction as possible to section 108 so as to give the benefit conferred by that section on the defendant to his representative to contest the decree passed *ex parte* against the deceased. The case differs from the case of *Janki Prasad v. Sukhrani*, because in the present case the application was made during the life-time of the deceased defendant to set aside the decree. She died before any order could be made and the decree-holders gave notice to the present appellant and, in that sense, themselves brought her on to the record. Under these circumstances it is unnecessary to say anything more upon the authority cited in support of the respondent's proposition than that it does not apply to the present case. We allow the appeal, set aside the order of the Court below, and send the case back to the Court below for proceeding according to law. Costs will abide the event.

1907

BETI JEO
n.
SHAM
BIHARI LAL.

REVISIONAL CRIMINAL.

1907

May 27.

Before Mr. Justice Atkman and Mr. Justice Griffin.

EMPEROR *v.* PARSIDDHAN SINGH AND OTHERS.*

Act No. XLV of 1860 (Indian Penal Code), section 225—Criminal Procedure Code, sections 59 and 60—Rescue from lawful custody—Definition.

A private person lawfully arrested a thief in the act of committing theft and made him over to a village chaukidar to be taken to the nearest police station. On the way to the police station three persons seized the chaukidar, and the thief made his escape. *Hold* that the rescuers were rightly convicted under section 225 of the Indian Penal Code. The arrest of the thief having been in the first instance lawful, the requirements of section 39 of the Code of Criminal Procedure were sufficiently complied with by the person arresting sending him to the police station in the custody of the chaukidar. *Queen-Empress v. Potadu* (2) followed. *King-Emperor v. Johri* (3) referred to.

THE facts out of which this case arose were as follows: One Mahabir caught a man called Dukhi in the act of stealing his jack fruit. Mahabir arrested Dukhi and made him over to the village

* Criminal Revision No. 188 of 1907.

(1) (1901) L. L. R., 29 Cal., 33. (2) (1888), L. L. R., 11 Mad., 48.
(3) (1901) L. L. R., 23 All., 260.