

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

1932.

RAJA PRAMATHA NATH MALIA

November,
11.

v.

MR. I. S. MACKEY.*

Res Judicata—application for amendment of decree dismissed for default—subsequent application, hearing of, whether barred—Code of Civil Procedure, 1908 (Act V of 1908), Order IX, rule 4, principle underlying applicable.

Where an application for the amendment of a decree was dismissed for default, the petitioner having failed to file the process forms, and an application for review of that order was also dismissed, and a second application for amendment was subsequently made.

Held, that the previous application having been rejected without adjudication on merits, the dismissal of that application did not operate as a bar, on the principle of *res judicata*, to the hearing of the subsequent application.

Langat Singh v. Janki Kuar(1), followed.

Application by defendant no. 3 for amendment of the decree.

The facts of the case are set out in the judgment of Kulwant Sahay, J.

P. B. Ganguli, for the petitioner.

Government Pleader, for the opposite party.

KULWANT SAHAY, J.—This is an application for amendment of a decree made by this Court. The application is on behalf of defendant no. 3. The decision of this Court, so far as this defendant is concerned, is that the appeal be dismissed as against him with costs. There was another defendant,

* Miscellaneous Judicial Case no. 20 of 1932.

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namely, defendant no. 14, whose Advocate asked for costs also, and it was ordered that the appeal be dismissed as against the said defendant no. 14 and that he be entitled to his costs in this Court—hearing fee ten gold mohurs.

The decree was prepared in this Court awarding costs jointly to the defendants nos. 3 and 14 and it awarded ten gold mohurs as hearing fee to both of them. The petitioner contends that under the terms of the judgment he was entitled to separate costs and to the full hearing fee according to the ordinary scale and that the ten gold mohurs as hearing fee was the fee allowed to defendant no. 14 separately. In my opinion the contention is sound and the decree must, therefore, be amended by awarding separate costs to the defendant no. 3 and defendant no. 14. The defendant no. 3 is entitled to his costs and to the full hearing fee according to the ordinary scale and the defendant no. 14 is entitled to his costs and ten gold mohurs as his hearing fee, according to the terms of the judgment. A point has been taken on behalf of the learned Government Pleader to the effect that the present application is not maintainable because a previous application to the same effect had been rejected by this Court. It appears that upon the previous application a notice was ordered to issue, but the petitioner failed to file the process forms although he had deposited the talbana and copies, and, therefore, the previous application was dismissed for default. He made an application for review of that order and that application was also dismissed. It is contended that the rejection of the previous application operates as a bar, on the principle of *res judicata*, to the hearing of the present application. In my opinion, the objection cannot be entertained. The previous application was not heard and decided on merits. Notice was ordered to issue; but notices were not issued on account of default on the part of the petitioner. The case of the petitioner may not be worse than the case of a plaintiff whose suit has been

dismissed for non-service of summonses upon the defendants. Under Order IX, rule 4, such a plaintiff has the right to institute a fresh suit subject, of course, to the law of limitation. Similarly the dismissal of the previous application in the present case cannot operate as an estoppel and does not debar him from making the present application inasmuch as the previous application had been rejected without adjudication on merits. The point was considered by the Calcutta High Court in *Langat Singh v. Janki Kuar*⁽¹⁾ and the cases cited there support the view which I am inclined to take on the point.

This application is, therefore, allowed as indicated above. There will be no order for costs in this application.

MACPHERSON, J.—I agree.

Application allowed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Khaja Mohamad Noor, J.

CHHATERBIJAI SINGH

v.

DAMODAR DAS.*

1932.

November,
16.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90—sale held in lots—irregularity extending to all the lots—inadequacy of price in respect of some only of the lots—sale, whether should be set aside in respect of all the lots.

In a proceeding under Order XXI, rule 90, Code of Civil Procedure, 1908, where both the irregularity and the injury to the objector can be satisfactorily allotted to one part only of the sale, the court may be justified in setting aside the sale of that part only, but in cases where the irregularity extends

* Miscellaneous Appeals nos. 81 and 85 of 1931, from an order of Babu Debi Prasad, Subordinate Judge of Shahabad, dated the 21st March, 1931.

(1) (1911) I. L. R. 39 Cal. 265.