Before Mr. Justice Bayley and Mr. Justice Paul.

1871 *May* 10.

AMRITNATH JHA (DEFENDANT) *v.* BABOO ROY DHUNPAT SING BAHADUR (PLAINTIFF.)*

Civil Procedure Code (Act VIII of 1859), s. 119—Appeal from Ex-parte Decree.

A suit was postponed on the application of the defendant's pleader; but on his applying for further adjournment at the time fixed for hearing, the application was refused; the Court tried the case, the defendant not appearing and not being represented, and gave a decree for the plaintiff. An appeal was allowed, and the case was sent back for re-trial.

THE plaintiff in this case sued to recover the sum of Rs. 1,08,445, being principal and interest, at the rate of Rs. 1-4 per cent. per mensem, from the defendant under a registered mortgage-bond, dated 27th Jaishta 1276 Mulki (8th June 1868).

The suit was registered in the Court on the same day that it was filed, and an order passed for a summons to issue on the defendant, directing him to appear personally on the 9th September 1870 to answer to the claim of the plaintiff, and to bring all his evidence and witnesses along with him on that day, and to apply in time to the Court for summons against his witnesses, if necessary, so that the process might be served early enough to enable them to appear on the day fixed. On the 29th August 1870, the peon made a return of having affixed the summons on the door-way of the defendant's house.

On the 9th September, the defendant by his pleader, Mr. D'Souza, presented a petition to the Subordinate Judge, praying for two weeks' further time to be granted to him to file his answer, as he was sick, and all his papers and documents relating to the claim were at Dinagepore, his usual place of residence. On this petition, the Court passed an order that the case be postponed to the 21st September for final decision, with a warning to the defendant's pleader that, unless he applied that very

*Regular Appeal, No. 14 of 1871, from a decree of the Subordinate Judge of Purneah, dated the 21st September 1870.

day to the Court for summonses to compel the attendance of witnesses, his client must come prepared with all his evidence on the day fixed.

On the 13th September, Mr. D'Souza filed a list of names of witnesses against whom he prayed for summonses to issue.

The Court passed an order issuing summonses against the witnesses residing in Patna, but declined to accede to the defendant's prayer regarding the other witnesses, on the ground that, as they resided at great distances from the Court, there would be no time for the processes to be served so as to enable them to appear on the day fixed. The same order directed the defendant however to produce them himself.

On the 21st September, the defendant presented another petition, stating that the witnesses in Patna, against whom summonses had issued, had neglected to appear, and that he had failed to cause the other witnesses to attend voluntarily, and praying for warrants to issue against the Patna witnesses, and for summonses against the others.

The Court was of opinion that the witnesses summoned, as well as those not summoned, had not appeared, simply to enable the defendant to obtain a postponement. The Court was willing however to delay the case on the defendant's paying the costs of the attendance of the plaintiff's witnesses; but before it would grant this indulgence, it required the defendant to file his answer to enable the Court to ascertain on what points the evidence of witnesses was necessary. The Court then asked the pleader of the defendant to file his answer. The pleader expressed his inability to do so, as he had not yet been properly instructed. Upon this refusal, the Court rejected the petition of the defendant, and proceeded to decide the case *ex parte*.

Two witnesses, on the same day, were examined on behalf of the plaintiff to prove the genuineness of the bond and the payment of the money. The defendant's pleader declined to cross-examine these witnesses, as he had not been instructed in the facts of the case. No issues were fixed in the case. On the

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same day also, the Court delivered its judgment. With regard to the claim it observed :—

"The genuineness of the bond, as pleaded, is proved by the evidence "on record the conclusion drawn from which of the Justness of the "demand is further justified by the presumption arising from the "default of the defendant (though present by pleader) to enter a "defence." * * * * * * * * * * * * * "He (defendant) has again "petitioned this day for second postponement on the ground that his "witnesses have not come in. But I regard this application as a mere "device to retard the decision of the case; for without entering a "defence, either in writing or *viva voce*, the pleading that the case "should be postponed for adduction of witnesses is simply futile, as "there is no statement to show what the witnesses are to prove; nothing "has been stated to explain satisfactorily why the defendant has failed "to put in an answer to-day for which an adjournment had been "specially granted to him on his first application; and, from all that "I can gather from the indirect statements of his pleader, it appears "to me that a delay is sought only to obtain time to make, if possible, "a mutual settlement on terms which may be more favorable to the "defendant by his entreaties with the plaintiff, than are likely to be "obtained by the Court's verdict passed by the rule of law."

The Subordinate Judge decreed the claim. Against this decree the defendant preferred a Regular Appeal to the High Court.

Baboo *Srinath Das* (with him Baboo *Rashbehari Ghose*), for the respondent, objected to the hearing of the appeal, on the ground that the decision appealed against was *ex parte*, and therefore fell within the provisions of section 119 of Act VIII of 1859. He however admitted to the Court that he could not, upon the facts found, maintain the judgment of the Court below.

Boboos *Annada Prasad Banerjee* and *Taraknath Sein*, for the appellant, were not called upon by the Court to support the appeal.

BAYLEY, J.—On this appeal coming on for hearing, Baboo Srinath Das for the respondent took a preliminary objection that no appeal lies against the decision of the lower Court, as

it was an *ex parte* decision under the provisions of section 119, Act VIII of 1859. Baboo Srinath Das quotes the case of *Bhimacharya* v, *Fakirappa* (1) in support of his contention.

I take up the preliminary objection, first, as it stands. The Bombay case is not at all a case similar to the one before us. It was there ruled "that the hearing of a suit in which a pleader "was duly appointed on behalf of the defendant, but not instruct- "ed to answer, or instructed not to answer at all, was an *ex parte* "hearing, and that no appeal lay from a judgmnet passed in such "suit." No other authority has been advanced. Now we would have paid the highest respect to the authority cited, were it at all in point, but as it stands, it is entirely different from the case now before us.

The facts of this case appear to be these:—There was a petition given by Mr. D'Souza, the pleader for the defendant, on the 9th September 1870. The order on that petition was "Let "the defendant's pleader take notice that, if he intends to have "any witnesses called up, he must pray for the same by filing a "petition in Court to-day, otherwise he must appear on the date "fixed along with his witnesses." On the 13th September, Mr. D'Souza put in an *issamnavisi* (list of witnesses on behalf of the defendant. The lower Court held that, as the order of the 9th September was that the defendant should file his *issamnavisi* on that very day, he should have done so; but that as then there was no time to serve the summonses, the defendant should himself try to bring the witnesses into Court on the day fixed for the hearing of the case, *viz.* the 21st. On the 21st September, Mr. D'Souza again presented a petition to the effect that as the witnesses from the other district (Dinagepore) whom the defendant was directed to produce in Court on that day had not yet appeared, summonses might be issued in their names; and that as the witnesses in Purneah had also failed to appear, although summonses had been issued in their names, a *dustuk* might issue against them.

Upon this petition the Court says that it was clear that the defendant's intention was to gain time; and as the Court could

(1) 4 Bom. H. C. Rep., A. C. J., 206.

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not postpone the case again, having once before granted a postponement without reason, the petition must be rejected. The petition was accordingly rejected, and the case was heard and disposed of on that very day, *viz.*, the 21st September. So that it is clear that this suit, involving a claim of no less than Rs. 1,08,445, was instituted on the 9th August, and disposed of on the 21st September, notwithstanding all those petitions on the part of the pleader of the defendant to allow him a further and reasonable period to produce his witnesses. This fact in itself indicates an improper haste with which the case has been disposed of, without a due regard to the interests of justice.

Reverting to the preliminary objection raised by the pleader for the respondent, I have to remark that this case is altogether different from the Bombay case cited. Here the pleader was not one who was "not instructed to answer, or was instructed not to answer," or who stood by and let the judgment go against him, but who, according to the Subordinate Judge himself and to record, was present in Court, and trying from time to time by reasonable requests, and under the above circumstances without any injury to justice to the parties, to obtain further time for his client in order to produce witnesses, who, on account of the distance of their place of abode in different districts, Purneah and Dinagepore, and the difficulty of enforcing their attendance in Court, could not be produced within the very limited time given. Irrespective, however, of this consideration, every Judge in dealing with an *ex parte* case should take good care to see that the plaintiff's case is at least *primâ facie* proved. Now what have we in this case before us? The allegation of the plaintiff in the plaint was that, under the conditions of the bond, if the mortgaged property were likely to be sold, or if four successive instalments remained unpaid, the plaintiff would be entitled to sue without waiting for the expiration of the remaining dates fixed for the instalments; and that accordingly, as there had been default in the payment of four successive instalments the property was likely to be brought to sale, the defendant having allowed the rent for two years to remain unpaid. Besides that there was a stipulation for the payment of interest, on certain dates specified in the schedule, which had not been paid.

Instead, however, of enquiring into any of the above points, the whole judgment of the lower Court seems to be directed to the determination of one point only, *viz.*, the *factum* of the execution of the bond. No determination as to the non-papment of the patni rents, or to the breach in the payment of instalments, has been come to or attempted. Indeed, the whole judgment on the merits of the case is contained in these few words :—"The genu- "ineness of the bond impleaded, is proved by the evidence on "the record, the conclusion drawn from which of the justness "of the demand is further justified by the presumption arising "from the default of the defendant (though present by pleader) "to enter a defence." So that out of the very judgment from which Baboo Srinath Das takes his preliminary objection owing to the case being decided *ex parte*, that is, in the defendant's absence, we find that the defendant was present through his pleader, who acted for him from time to time by petitions. After this it is needless to observe that the facts found by the lower Court in the passage quoted are quite insufficient to justify a decree in the plaintiff's favor. It might well be that the bond had been really executed, and yet the patni rent, or the several instalments, might not have remained unpaid, so as to give the plaintiff a cause of action. Besides, the presumption drawn by the Subordinate Judge as to the justness of the plaintiff's claim, from the default of the defendant in entering a defence, is as illogical as it is wrong in law. Some illness, accident, want of a friend to look into his affairs, and a variety of other circumstances, might have combined to prevent the defendant from being present in Court, so that it cannot be laid down as a safe or a sound rule that the mere absence of the defendant of itself justifies the presumption that the plaintiff's case is true. The real fact in the case seems to be that, simply with a view to get the case disposed of before the holidays, 21st September being the last day before the vacation, this unseemly haste has been made in the decision of the case, and the unavoidable result has been a total denial of justice.

Under all the above circumstances, we think that the case must go back to the lower Court to be re-tried with reference to the above remarks; each party being willing that it should be taken up and disposed of out of its turn.

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The Deputy Registrar will certify before Friday evening that the records of this case have been despatched to the post office, and the 1st July next is hereby fixed the date for the decision of this case by the lower Court, after which period no further time should be allowed to either party.

PAUL, J.—I am entirely of the same opinion. I consider the request made by the defendant for a postponement of the hearing of the case was perfectly reasonable and well-grounded and the Subordinate Judge has acted most indiscreetly and unreasonably in refusing it. I quite concur with Mr. Justice Bayley in thinking that the whole proceeding in this case is marked by a degree of precipitation which the circumstances hardly justify or at all render necessary, and that therefore on that ground the case must be sent back for re-trial.

If I were to yield to the objection taken by Baboo Srinath Das that this is an *ex parte* proceeding, and no appeal lies, then I must say that, inasmuch as this decision of the Subordinate Judge has been some way or other brought to our notice, and we have read it, and we think that it is a most hasty, incomplete, and erroneous judgment, we ought, by virtue of the large powers which we have, to interfere for the ends of justice. In fact, when a challenge was thrown out by the Court to Baboo Srinath Das, if he could maintain the judgment of the lower Court upon the facts found, he most candidly and honorably admitted that he could not. Such being the case, I think that the case must be sent back for a fresh trial. The costs will follow the result.

Case remanded.

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May 18.

Before Mr. Justice Macpherson and Mr. Justice Mookerjee.

MAGJU PANDAEN (PLAINTIFF) *v.* RAMDYAL TEWARI AND OTHERS (DEFENDANTS).*

Jurisdiction—Civil Court—Small Cause Court—Contract—Suit for a Share of the Fees received by a Hindu Priest.

The plaintiffs sued the defendants in the Civil Court for a declaration of their right by contract to share in the ministrations at a certain ghat, and to recover a sum of Rs. 75-9 as their share, under the contract, of monies received by the defendants at that ghat. *Held*, the suit would lie.

* Regular Appeal, No. 155 of 1870, from a decree of the Subordinate Judge of Patna, dated the 10th May 1870.