The 5th June 1871.

Present:

The Hon'ble E. Jackson and Onoocool Chunder Mookerjee, *Judges.*

Reviews—Section 103 Act VIII (B. C.) 1869—Re-hearing—Section 119, Civil Procedure Code.

Case No. 99 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 19th December 1870, affirming an order of the Moonsiff of Muksoodpore, dated the 31st August 1870.

Durpo Monee Gooptea (Judgment-debtor) *Appellant,*

versus

Tara Churn Sein (Decree-holder) *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

No one for Respondent.

Section 103 Act VIII (B. C.) of 1869 applies only to reviews, and not to applications for a re-hearing where decisions have been passed *ex-parte*. Cases of the latter description are governed, under Section 34, by Section 119 Act VIII of 1859.

Jackson, J.—We differ from the Judge in the view he has taken of the provisions of Act VIII of 1869, B. C. Section 103 of that Act applies to applications "for a "review of any judgment or order passed "in any suit brought under the provisions "of this Act." It does not apply to applications for a re-hearing of a suit which has been decided *ex-parte* against the defendant. Sections referring to re-hearing of *ex-parte* decisions and to review of judgment, both in Act VIII of 1859 and also in Act X of 1859, were distinct and separate. Section 103 Act VIII of 1869, B. C., applies only to reviews; and Section 119 of Act VIII of 1859 will, under the provisions of Section 34 of Act VIII of 1869, B. C., apply to applications for a re-hearing in cases in which decisions have been passed *ex-parte*.

We remand this case to the Judge to be returned to the first Court for a fresh trial.

Costs will abide the result.

Mookerjee, J.—In this case, the Courts below are evidently wrong in the view they have taken of the law, Act VIII of 1869, B. C. The plaintiffs instituted this suit on the 23rd of May 1870 for arrears of rent in the Court of the Moonsiff under the provisions of Act VIII of 1869, B. C. An *ex-parte* decree was passed in their favor on the 6th June following. Plaintiff then sued out execution of this decree and attached certain properties belonging to the judgment-debtor on the 10th Srabun 1277. On the 25th Srabun, which corresponds to the 13th August 1870, the defendant filed a petition in the Court under Section 119 of the Procedure Code, praying to set aside the *ex-parte* decision passed against him on the ground that he had no notice either of the suit or the decree. This application, it is admitted, was made within 30 days after a process of attachment was executed by the decree-holder to enforce the *ex-parte* judgment. The Moonsiff was, therefore, bound to proceed under the provisions of this Section and determine whether the summons was or was not duly served on the applicant. Instead of doing so, the Moonsiff states that inasmuch as there is no distinct provision in Act VIII of 1869, B. C., like the provisions of Section 58 of Act X of 1859, or of Section 119 of Act VIII of 1859, he cannot allow this application. He holds that the only Section in this law of the Bengal Council which provides for an application for a re-hearing or re-consideration of a judgment passed under it, is Section 103 of that Act which requires that no petitions for a review of a judgment or order passed in any suit under the provisions of this Act shall be received after the expiration of thirty days from the date of such order or judgment.

The Moonsiff, therefore, was of opinion that the application of the judgment-debtor was beyond time, having been preferred 30 days after the date of the judgment, which was passed in this case on the 6th of June 1870.

The Judge also appears to have fallen into the same mistake. Both the Courts seem to me to have lost sight of Section 34 of Act VIII of 1869 or to have misapprehended its provisions. Section 34 lays down that "save as in this Act is other-"wise provided, suits of every description "brought for any cause of action arising

" under this Act and all proceedings there-
" in, shall be regulated by the Code of
" Civil Procedure passed by the Governor-
" General in Council being Act No. VIII
" of 1859," &c., &c.

In the Act of the Bengal Council there is no provison separately made for applications to set aside *ex-parte* decisions passed by the Court, but yet it is clear that such decision must be set aside when it is proved that the summons had not been duly served on the defendant as required by law, for a Civil Court will not receive an appeal from a judgment passed *ex-parte* against a defendant who has not appeared or from a judgment passed against a plaintiff by default for non-appearance, unless there was an application, though unsuccessful, under the provisions of Section 119 of the Procedure Code.

It is, therefore, obvious that the Legislature clearly intended that the procedure on applications to set aside *ex-parte* judgments should be the same as is provided for by Section 119 of Act VIII of 1859.

By Section 34 of the aforesaid Act of the Bengal Council a clear provision is made to the effect that, where the Act does not otherwise provide, all suits brought under Act VIII of 1869 shall be regulated by the Code of Civil Procedure and " that all the provisions of that Act" shall apply.

There is little doubt, however, that Section 103 of Act VIII of 1869, B. C., applies merely to applications for review of judgment and not to applications to set aside *ex-parte* decisions. The Legislature, being of opinion that the procedure laid down in Act VIII of 1859 should not be made applicable to applications for review preferred in cases decided under the provisions of Act VIII of 1869, B. C., made a separate provison by enacting Section 103, which limits the period within which such applications should be made to 30 days, instead of 90 days as provided for in Section 377 of the Civil Procedure Code. In cases where a review is applied for of a judgment passed under the Act of 1869, the Civil Court must follow Section 103 of that Act, and not Section 376 or 377 of Act VIII of 1859, because a different procedure is made by the Bengal Act, and under Section 34 that procedure must be followed.

I would, therefore, remand this case to the Court of the Moonsiff for an inquiry and adjudication of the application made by the defendant under the provisions of Section 119 of the Civil Procedure Code. The costs of his appeal, which we assess at 2 gold mohurs, will abide the final result of this litigation.

The 6th June 1871.

Present :

The Hon'ble H. V. Bayley and W. Ainslie, *Judges.*

Reversioner—Cause of action.

Case No. 290 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 14th December 1870, reversing a decision of the Moonsiff of Tegrah, dated the 18th May 1870.

Sooruj Bunsee Koonwar (one of the Defendants) *Appellant,*

versus

Moheeput Singh (Plaintiff) *Respondent.*

Mr. C. Gregory and *Doorga Doss Dutt* for Appellant.

Baboo Nil Madhub Sein for Respondent.

The mere execution and registration of a deed as between strangers, without any ulterior act directed against a Hindoo widow in possession, or against the reversionary heir or his possession, cannot give the latter any cause of action or entitle him to ask for a declaratory decree.

Bayley, J.—In this case, we think that the first and second grounds of special appeal must prevail. The facts are briefly these :—The plaintiff comes in as the reversioner of the widow of one Nund Lall, the son of Sheoburn Lall. He sued for the declaration of his title by setting aside a kobala dated the 25th March 1867 from one Mussamut Champa Koonwar, daughter of Reetburn Sahee, and others, propounded by the defendant. The plaintiff does not sue for confirmation of possession ; on the contrary, his allegation is that his possession is undisturbed. It is also a fact that the widow of Nund Lall, the tenant for life, is in possession. The suit is not brought to set aside any alienation made by her, or