

Court. If the suit is simply for a personal claim against the widow then merely the widow's qualified interest is sold and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes. In many of the cases, although the right, title and interest of the widow had been sold, the whole interest in the estate was held to have passed and the reversionary heir to be bound by it." 1895

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The suit for contribution brought by Jiban Gopal was a suit to recover a debt due by the estate. The amount of the debt in the shape of mesne profits had been decreed against Manikmoni and others as representing the estate of Nobin Krishna and Krishna Dass, and it was not, therefore, in our opinion, a personal debt of Manikmoni, that is to say, a debt contracted by her for which she was personally liable. We do not think that the character of the debt was changed merely because Jiban Gopal paid the whole of the mesne profits and then brought a suit to recover the amount from the other judgment-debtors. He paid the whole of the mesne profits and he then sued to recover these mesne profits from Manikmoni and others. In this view we are of opinion that the cases cited by the learned pleader for the appellant are not strictly applicable to the present case, and that the decision of the Privy Council in the case of *Jugul Kishore v. Jotendro Mohun Tagore* (1) does apply.

The appeal fails and is dismissed with costs.

S. O. G.

Appeal dismissed.

Before Mr. Justice Pigot and Mr. Justice Stevens.

CHINTAMONY DASSI (DEFENDANT) v. BAGHOONATH SAHOO
(PLAINTIFF.) *

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June 3.

Appeal—Civil Procedure Code (Act XIV of 1882), sections 108, 591—Ex parte decree—Order setting aside ex parte decree.

The words "affecting the decision of the case" in section 591 of the Civil

* Appeal from Appellate Decree No. 1340 of 1894, against the decree of Babu Hurro Gobind Mookerji, Subordinate Judge of Bhagalpur, dated the 21st of May 1894, reversing the decree of Babu Debendra Nath Roy, Munsif of Bhagalpur, dated the 7th of October 1893.

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Procedure Code mean "affecting the decision of the case with reference to the merits of it."

Where an *ex parte* decree was set aside by an order under section 108 of the Civil Procedure Code, and the suit heard upon the merits and dismissed: *Held*, that such order was not an order affecting the decision of the case under section 591 and was not appealable under that section.

THIS was a suit, brought in the Court of the Munsif of Bhagalpur, for money due on a mortgage bond. It was decreed *ex parte* on the 27th of February 1890. In execution of that decree notice was served on the debtor on the 19th September 1892, and proclamation of sale was made on the 7th November following. On the application of the defendant the Munsif set aside the *ex parte* decree on the 31st December 1892. The suit was then heard on the merits and dismissed. The plaintiff, who appealed to the Subordinate Judge of Bhagalpur, contended on appeal that the application to set aside the *ex parte* decree was barred by limitation under section 164 of the Limitation Act, and that the said decree could not, therefore, be set aside. On behalf of the defendant it was contended, on the authority of *Sankali v. Murliidhar* (1), that the question of limitation was one of fact, and that the decision of the Munsif on that point could not be interfered with on general appeal.

The Subordinate Judge of Bhagalpur reversed the Munsif's decree, and restored the *ex parte* decree, on the ground that the order made under section 108 of the Civil Procedure Code, setting aside the *ex parte* decree, was wrong. From this decision the defendant brought this appeal to the High Court.

Babu *Dwarkanath Chuckerbutty* and Babu *Lakshmi Narain Sing* for the appellants.

Babu *Lal Mohun Das* and Babu *Joy Gopal Ghosa* for the respondent.

The judgment of the Court (PIGOT and STEVENS, JJ.) was delivered by

PIGOT, J.—This is an appeal from a decision of the Subordinate Judge of Bhagalpur, reversing a decree made by the Munsif, on the ground that an order made by the Munsif under section 108 of the Civil Procedure Code, setting aside an *ex parte*

(1) I. L. R., 12 All., 200.

decree previously had before him in favour of the plaintiff, was wrong. 1895

The Munsif, after setting aside the *ex parte* decree, heard the case upon the merits, decided in favour of the defendant, and dismissed the suit. The decision, therefore, of the Subordinate Judge setting aside (on the ground of limitation) the order of the Munsif under section 108, and setting aside the decree arrived at by him at the subsequent hearing, substitutes for the decision on the merits an *ex parte* decision previously come to, without the defendant's case being heard at all.

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The Subordinate Judge, in setting aside the decree of the Munsif, and restoring the *ex parte* decree, did not, of course, go into the merits of the case. He dealt with the order made by the Munsif under section 108 as being appealable under section 591, upon the case coming before him on general appeal, and amongst the different points that have been raised before us is the question whether or not under section 591 it was competent for the Subordinate Judge to set aside the order under section 108 which had been made by the Munsif.

We are of opinion that it was not competent for the Subordinate Judge to set aside that order under section 591. By that section, "if any decree be appealed against, any error, defect or irregularity in any such order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." Now the error or defect or irregularity which the Subordinate Judge found in the Munsif's order was that it was made after time, that is to say, after the thirty days provided by article 164 of the Limitation Act had elapsed. But then the question is whether the Munsif, in making the order that the case should be heard upon the merits, made an order "affecting the decision of the case" within the meaning of section 591. We do not think that that section applies to an order setting aside an *ex parte* decree under section 108. The object of section 108 is to ensure that the defendant shall get a hearing, notwithstanding that he did not appear when the case was called on, if he had not been served with summons, or was prevented by sufficient cause from appearing. The first object and purpose for which Courts

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sit is, of course, that the parties shall be heard; the object of decision 108 is to ensure within reasonable limits as to public convenience that every defendant shall have a hearing. An order under section 108 is not appealable under section 588. Unless an order under that section is appealable by reason of its being an order "affecting the decision of the case," it is not appealable under section 591. Now in one sense it affects the decision of the case, because it ensures a decision upon the merits, and sets aside a decision which has not been obtained upon the merits, but we cannot think that that can be an "affecting" within the meaning of the words "affecting the decision of the case." We think that the words "affecting the decision of the case" must be taken to mean "affecting the decision of the case with reference to the merits of it," and that an order under section 108, which merely ensures a hearing upon the merits, cannot be considered to be an order "affecting the decision of the case" under section 591.

We, therefore, set aside the decision of the Subordinate Judge, and we remand the case to him, in order that he may proceed with the hearing of the appeal according to law, upon the merits.

F. K. D.

Case remanded.

Before Mr. Justice Pigot and Mr. Justice Stevens.

BARODA CHEURN GHOSE (DEFENDANT) v. GOBIND PROSHAD
 TEWARY AND OTHERS (PLAINTIFFS.) *

*Appeal—Order granting review of judgment—Civil Procedure Code
 (Act XIV of 1882), section 629.*

In general final appeal an order for review can only be challenged upon the grounds stated in section 629 of the Civil Procedure Code. *Har Nandan Sahai v. Behari Sing* (1) followed.

THIS was a suit brought in the Court of the Munsif of Ghatal

* Appeal from Appellate Decree No. 1084 of 1894 against the decree of Babu Karoonamoy Banerjee, Subordinate Judge of Midnapore, dated the 30th of March 1894, affirming the decree of Babu Benode Behary Mitter, Munsif of Ghatal, dated the 14th of December 1892.

(1) *Ante* p. 3.

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