1897

SRINATH ROY v. GODADHUR DAS.

were correct then the remedy would be foreclosure. It seems, however, that the practice in this Court has for a long series of years been to decree a sale, and I accordingly will make a decree in that form. I think it would be right to preface the decree with a statement to the following effect: "It appearing that the documents of title relating to the immoveable properties in question and mentioned in the plaint have been delivered to the plaintiff or his agent with intent to create security thereon. Declare, &c."

By this means it will appear on the face of the decree that the case comes within the last paragraph of section 59 of the Transfer of Property Act.

Attorney for the plaintiff: Babu *Ashutosh Dhur*.

S. C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice O'Kinealy, Mr. Justice Macpherson, Mr. Justice Trevelyan and Mr. Justice Banerjee.

1896 *September 4.*

FATIMUNNISSA *alias* KANEZ FATIMA AND OTHERS (PETITIONERS) *v.* DEOKI PERSHAD AND OTHERS (OPPOSITE PARTY).*

Review—Appeal—Appeal from original decree—High Court Rules, Part II, Chapter VIII, Rule 17—Deposit of cost for paper book—Order of Dismissal for default—Procedure to set aside such order—Civil Procedure Code (1882), sections 623, 626.

A decree of a Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparation of the paper book under Rule 17 of the High Court Rules, Part II, Chapter VIII, can only be set aside by an order under section 626 of the Civil Procedure Code (Act XIV of 1882).

Ramhari Sahu v. *Madan Mohan Mitter* (1), so far as it decides the contrary, is wrongly decided.

THE question referred to the Full Bench in this case arose in a rule upon the application of the petitioners for restoration of an appeal from an original decree, which was dismissed for default

*Full Bench Reference on Rule Nisi No. 333 of 1896 issued in Appeal from Original Decree No. 215 of 1894, being an appeal against the decree of the Court of the Second Subordinate Judge of Saran passed in suit No. 15 of 1892, and dated the 28th March 1894.

(1) I. L. R., 23 Calc., 339.

in the payment of costs for the preparation of the paper book in the appeal. The appeal was dismissed on the 29th July 1895, under High Court Rules, Part II, Chap. VIII, Rule 17, by a Division Bench consisting of PRINSEP and NORRIS, JJ., who were at that time hearing cases from the "Patna Group" of districts; and the present application was made to TREVELYAN and BEVERLEY, JJ., who subsequently took charge of those districts, and the rule was granted by them. At the hearing of the rule the opposite party objected that the prayer of the appellants was really one to set aside the decree, and that this could be asked for only by way of review under section 626 of the Civil Procedure Code, before Mr. Justice PRINSEP, Mr. Justice NORRIS having then retired from the Bench of the High Court. The Bench hearing the rule were of opinion that this objection was well founded, but as there was a ruling of another Division Bench to the contrary in the case of *Ramhari Sahu* v. *Madan Mohan Mitter* (1) the present case was referred to a Full Bench.

The facts of the case are fully stated in the order of reference by TREVELYAN and BEVERLEY, JJ., which was as follows :—

"On the 28th March 1894 a decree was made by the second Subordinate Judge of Chupra in a suit in which one Fatimunnissa was, amongst others, a defendant. She died on the 30th of April 1894, leaving her surviving Mahomed Asgar, her husband, an adult son, Athur Hosain, and three minor sons. The heirs of Fatimunnissa were, by an order of this Court, dated the 25th July 1894, permitted to prosecute an appeal in this Court, from the abovementioned decree, Mahomed Asgar acting as next friend for his minor sons. Mahomed Asgar died on the 15th September 1894, and by an order of this Court, dated the 7th of February 1895, his sons were substituted in his place, and his adult son was appointed 'guardian *ad litem*' of the minors.

"On the 9th of April 1895, an estimate for the costs of preparing the paper-book, amounting to Rs. 782 was served. On the 23rd of May the case first came on the *loazima* list, and was then postponed for a fortnight to allow the appellant to put in an affidavit.

"On the 1st June 1895, Athur Hosain affirmed an affidavit,

(1) I. L. R., 23 Calc., 344.

1896

FATIMUN-NISSA v. DEOKI PERSHAD.

saying 'I am dangerously ill, and cannot do any work and cannot walk, hence I am unable to try to search for money for the expenses of the suit in appeal in High Court at Calcutta.'

"On the 7th June 1895, this Court, doubting the truth of the affidavit, allowed fifteen days' time for the deposit of the money, and in their order the learned Judges stated that, 'If within that time the deposit is not made, it will become necessary for us to consider whether the interests of the minors should not be entrusted to other hands for the purposes of this suit.' The money not having been paid, the same learned Judges on the 15th of July directed the case to be placed on the board for orders, on the 29th July. On the latter date the appeal was dismissed for want of prosecution by a Division Bench consisting of Prinsep and Norris, JJ., and a decree was accordingly drawn up and signed.

"On the 29th August Athar Hosain died, having, it is now said, been ill since March.

"On the 6th February 1896, the minors represented by a new next friend asked us to restore the case and to permit them to deposit the necessary money. We issued a rule which we have now heard. There are three questions to be determined—

"*First.*—Have we power to make an order of this kind?

"*Second.*—Is the application barred by limitation?

"*Third.*—Do the merits of the case justify an order?

"We have no difficulty in dealing with the last two questions. Section 7 of Act XV of 1877, in our opinion, saves the limitation, and on the merits we should be inclined to make the order.

"It is contended that an order of the kind asked for can only be made by way of review, *i. e.*, under section 626 of the Civil Procedure Code. If that contention be right we have no jurisdiction, and the application can, under section 627, be dealt with by Mr. Justice Prinsep only.

"Our attention has been called to a judgment of a Division Bench of this Court in Letters Patent Appeal No. 6 of 1895 (1) on the 13th March 1895, in which it was held that an application of this kind did not amount to an application for a review, but could be properly made under section 558 of the Civil Procedure Code. In a subsequent judgment (2) in the case by two out of the

(1) I. L. R., 23 Calc., 339 (2) I. L. R., 23 Calc., 344.

three learned Judges who decided the Letters Patent Appeal, it was held that the application should be regarded as one under Rule 17 of Chapter VIII of the Rules of this Court (Appellate Side).

"In our opinion the decree of the 29th of July can only be set aside by an order under section 626 of the Civil Procedure Code. A decree can only be set aside as far as we are aware in a way expressly provided by law. Except under section 626 there is, as far as we can see, no such provision applicable to the present case.

"It is, in our opinion, desirable that the question whether we have any power to make an order should be determined by a Full Bench. We, therefore, refer this case for the decision of a Full Bench."

Babu *Harendra Narayan Mitra* (for Moulvie *Serajul Islam*) and Syed *Mahomed Tahir* for the petitioners.

Babu *Kali Kishen Sen* for the opposite party.

Babu *Harendra Narayan Mitra* contended that the application could be granted under section 558 read in connection with Rule 17, or at all events under Rule 30. [PETHERAM, C.J.—Did the appellants appear on the 29th July, when the appeal was dismissed? Babu *Kali Kishen Sen*, Vakil for the opposite party, pointed out that the appellant's Vakil did appear and ask for time.]

The order of the Court (Prinsep and Norris, JJ.) is not a "decree" under section 2 of the Code of Civil Procedure. *Jagarnath Singh* v. *Budhan* (1). [O'KINEALY, J.—See section 558. The Court had not the materials to decide the case and dismissed it.] The dismissal by default is by an order and not by a decree. *Munsab Ali* v. *Nihal Chand* (2). No doubt the dismissal in that case was for a default under section 556, but the provision of section 558 was applicable here, as was decided in *Ramhari Sahu* v. *Madan Mohan Mitter* (3). [PETHERAM, C.J.—There is no provision there for setting aside the order in this case.] I submit that section 558 and Rule 17 must be read together, but if that could not be done, Rule 30 is sufficiently wide to authorize an order for

(1) I. L. R., 23 Calc., 115. (2) I. L. R., 15 All., 359.
(3) I. L. R., 23 Calc., 339.

1896

FATIMUNNISSA v. DEOKI PERSHAD.

receiving the money now. [MACPHERSON, J.—After the decree?] An order may be made so long as the matter is pending. The Rule does not lay down any limitation. A liberal construction of section 558 would make Rule 17 more consistent. Section 623 does not apply.

The opposite party was not called upon.

The judgment of the Full Bench (PETHERAM, C.J., and O'KINEALY, MACPHERSON, TREVELYAN and BANERJEE, JJ.) was as follows :—

In March 1894, a decree was given against one Fatimunnissa and others. She died and her heirs prosecuted an appeal in the Court. In April 1895 they were called upon to deposit Rs. 782 as costs for the preparation of the Paper-Book. The money was not paid, and after some delay the appeal was on the 29th July 1895 dismissed for want of prosecution under Rule 17 of the Rules for the preparation of Paper-Books in appeals from Original Decrees. An application was then made to a Divisional Bench of this Court on the 6th February 1896, and the Judges of that Bench, being of opinion that the decision and decree of the 29th July could only be set aside by review, referred the case to a Full Bench, as they disagreed with the judgment of another Divisional Bench of this Court in *Ramhari Sahu* v. *Madan Mohan Mitter* (1).

Now, under the Code there are only two ways known to the law by which a judgment and decree of a Divisional Bench of this Court can be set aside in India. These two methods are described in sections 558 and 623 of the Code. The present case is clearly not one in which default was made in appearing at the hearing of the case, for the record shows that the pleaders on both sides were in attendance and heard. It seems to us, therefore, that the view expressed in the reference is correct, and that the case of *Ramhari Sahu* v. *Madan Mohan Mitter* (1) so far as it decides the contrary is wrongly decided.

[The rule was discharged by the Division Bench on the 15th February 1897.]

S. C. C.

(1) I. L. R., 23 Calc., 339.