

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C. I.E., Chief Justice and Mr. Justice Banerjee.

GANODA PRASAD ROY

v.

SHIB NARAIN MUKERJEE.

1901
May 31.

Civil Procedure Code (Act XIV of 1882) s. 108—Decree ex-parte—Judgment debtor, death of—Application by judgment-debtor to have the ex-parte decree set aside.

Held, that where a defendant, against whom a decree has been passed *ex-parte*, dies, his legal representative is competent to apply under s. 108 of the Code of Civil Procedure for an order to set aside the *ex-parte* decree.

Janki Prasad v. Sukhrani (1) dissented from.

THIS rule was obtained by the Petitioner Ganoda Prasad Roy and arose out of an application made by the legal representatives of a judgment-debtor, who died since the decree, to have an *ex-parte* decree set aside. The decree was passed against one Bisseswar Roy on the 31st May 1897, and he died in December 1899. Afterwards two of the sons of the deceased judgment-debtor applied for an order to set aside the *ex-parte* decree. The lower Court rejected the application. The material portion of its order is as follows :—

I do not think that petition is maintainable, for under s. 108 of the Civil Procedure Code the person, against whom the decree is passed, can only apply to set it aside. See also *Janki Prasad v. Sukhrani* (1)."

Against this order the petitioner moved the High Court and obtained a Rule.

Babu Prosanna Gopal Roy for the petitioner.

Babu Umakali Mookerjee for the opposite party.

• Civil Rule No. 405 of 1901.

(1) (1899) I. L. R. 21 All. 274.

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MACLEAN C. J. The first question raised by the opposite party in showing cause against this Rule is that the case does not come within s. 622 of the Code of Civil Procedure, inasmuch as the Court below has only committed an error of law in the construction it has put upon s. 108 of that Code. That question seems to me to be concluded by the judgment of the Full Court in the case of *Jogodanund Singh v. Amrita Lal Sircar* (1), and, therefore, I do not propose, as that authority binds us, to say anything more upon that point. The decision of this Court in the case of *Mathura Nath Sarkar v. Umes Chandra Sarkar* (2) is distinguishable from the case before the Full Court, to which I have already referred.

The question then arises whether the representatives of the original defendant are entitled to apply to have the *ex-parte* decree against their predecessor in title set aside under s. 108 of the Code of Civil Procedure. I am unable, speaking with every respect, to accept the view taken by the Allahabad High Court in the case of *Janki Prasad v. Sukhrani* (3). That decision appears to me to be based upon too narrow a construction of the section and one which might lead to various anomalies and much injustice, and, unless we are actually compelled by the language used to place such a construction upon it, I think we may fairly decline to do so. No doubt the section only refers to the defendant, but we may look at the whole Code to see who is meant by that term and who fills that position. There is ample provision in the Code for bringing the representatives of a deceased defendant before the Court and substituting the former for the latter, and when that substitution has been duly effected such representatives become the defendants and subject to all the obligations, *qua* procedure, of the original defendant. And, if they become subject to the obligations, why are they not entitled to the rights and benefits, *qua* procedure, of the original defendant? In the present case the plaintiff himself has brought the representatives of the original defendant upon the record and has made them defendants. The decree is binding upon them as such representatives and, if they are bound by the decree, as

(1) (1895) I. L. R. 22 Calc. 767.

(2) (1897) 1 C. W. N. 626.

(3) (1899) I. L. R. 21 All. 274.

they are, it would be inequitable that they should not enjoy the same right under s. 108 as the original defendant enjoyed, If they are to bear the burden, they may fairly claim the same benefits as their predecessor in title enjoyed. Looking at the Code as a whole, I think s. 108 is fairly open to the construction I have put upon it, and, in my opinion, if the representatives of a deceased defendant are substituted in his place on the record, they enjoy the same rights under s. 108 as the original defendant did. The Rule must be made absolute with costs.

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BANERJEE J. I am of the same opinion. It is contended by the learned vakil for the opposite party that this case does not come within the scope of any of the three clauses of s. 622 of the Code of Civil Procedure. Upon the question of the construction of that section, this is what I said in the case of *Mathura Nath Sarkar v. Umes Chandra Sarkar* (1) which is one of the cases relied upon by the learned vakil of the opposite party. "The construction of these three clauses of s. 622 has given rise to much conflict of opinion. It may, however, be now taken as authoritatively settled by the decision of the Privy Council, in the case of *Birj Mohun Thakur v. Rai Uma Nath Chowdhry* (2) that a case comes within the scope of the first two clauses, not only where a Court has tried a case which it has no power to try or has failed to try one, which it has power to try; but also where it has applied a course of procedure, which is not applicable to it, or has failed to apply to it a course of procedure, which is applicable. To that view I still adhere; and I may add that the case of *Jogodanund Singh v. Anvita Lal Sarkar* (3) also supports that view. Now the Court below, in holding, erroneously, as we think, that the procedure prescribed by s. 108 of the Code of Civil Procedure for enabling a party defendant to apply to the Court to have an *ex-parte* decree set aside, was inapplicable to this case by reason of the applicant being, not the defendant, against whom the *ex-parte* decree was made, but his legal representative, has, practically, failed to exercise a jurisdiction vested in it by law, the

(1) (1897) 1 C. W. N. 626. (2) (1892) I. L. R. 20 Calc. 8.

(3) (1895) I. L. R. 22 Calc. 767.

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jurisdiction, namely, to try the summary case initiated by the application of the petitioner.

Then with reference to the ground upon which the Lower Court has held that s. 108 of the Code is inapplicable to this case, it is, I think, enough to say that when by s. 234 of the Code, the *ex-parte* decree is binding on the legal representatives of the deceased defendant, and when the opposite party has taken out execution proceedings against the petitioner as the legal representative of the deceased defendant, there can be no valid reason why the petitioner should be deprived of the remedy prescribed by s. 108, which may be the only remedy available to him against the *ex-parte* decree. It is true s. 108 speaks of the defendant applying to have the *ex-parte* decree set aside ; but it is no unreasonable straining of language to say that the defendant there includes the legal representative of a deceased defendant. I must, therefore, respectfully dissent from the view taken by the learned Judges of the Allahabad High Court, who decided the case of *Janki Prasad v. Sukhrani* (1).

S. C. G.

Rule made absolute.

Before: Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Rampini and Mr. Justice Gupta.

1901
Sept. 4.

RAM NARAIN ROY PLAINTIFF,
v
BAIJ NATH MALLA DEFENDANT.*

Award—Application to set aside award—Limitation Act (XV of 1877) Art. 158—Arbitrators, misconduct of—Civil Procedure Code (Act XIV of 1882) s. 521.

An application to set aside an award on the ground that three out of five arbitrators were not present at the time the award was made and did not sign the award, although it purported to have been signed by all of

* Appeal from Order No. 114 of 1900, against the order of Babu Bepin Behari Mukerjee, Subordinate Judge of Mozufferpur, dated the 14th March, 1900, reversing the order of Moulvie Abdul Jabbar, Munsif of Madhubani, dated the 7th August 1899.