

CIVIL RULE.

Before Mr. Justice Coxe and Mr. Justice Doss.

NAGENDRA KUMAR BASU

v.

NABIN MANDAL.*

1908

July 27.

Civil Procedure Code (Act XIV of 1882), ss. 100, 108, 157, 158, 622—Adjourned hearing—Ex parte decree—Revival of case.

Where a suit was decreed *ex parte* on the adjourned day of hearing after taking evidence in the case.

Held, that the order was passed under section 100 read with section 157 of the Civil Procedure Code.

Held, further that the order could be set aside on an application under section 108, of the Civil Procedure Code.

Mariannissa v. Ramkalpa Gorain (1) and *Cooke v. The Equitable Coal Company* (2), followed in principle.

Sitara Begam v. Tulsi Singh (3) distinguished.

CIVIL RULE granted to the plaintiffs Nagendra Kumar Basu and others.

The petitioners brought a suit against the opposite party in the Court of the 2nd Munsif at Basirhat for arrears of *jalkar* rent. On the 22nd January 1907, the date fixed for the hearing of the suit, the case was adjourned to the 5th March 1907 on the application of the opposite party, through their pleaders, to enable them to obtain copies of certain documents from the Judge's Court and the Registration Office of the 24-Parganas and to file written statements. On the 5th March, the defendants neither appeared nor filed written statements, and the suit was decreed. The petitioners executed the said decree in November 1907 and the moveable property of the judgment-debtor was attached on the 17th December 1907.

On the 8th January 1908 the opposite party applied under section 108 of the Civil Procedure Code, to set aside the decree

* Civil Rule No. 1997 of 1908, against the order of the 2nd Munsif of Basirhat, dated 11th April 1908.

(1) (1907) I. L. R. 34 Calc. 235. (2) (1904) 8 C. W. N. 621.

(3) (1901) I. L. R. 23 All. 462.

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passed by the Munsif on the 5th March 1907 on the ground that no summons were served on them, and that they knew nothing about the suit till their moveable property was attached on the 17th December 1907. This application was registered and the 20th February 1908 was fixed for the hearing of the case under section 108 of the Civil Procedure Code. On that date the case was adjourned to the 21st March for hearing on the application of the opposite party. On the 21st March, the petitioners applied for summonses against their witnesses and the Court ordered the summonses for hearing of the case. On the 11th April 1908, the witnesses not appearing, the petitioners applied for fresh summonses on some of the witnesses. This application was rejected and the Munsif immediately went on with the application under section 108 of the Civil Procedure Code and examined one of the defendants before him in the absence of the pleader for the plaintiffs and ordered that the application be granted and the decree set aside and the case restored for trial.

The plaintiffs thereupon applied to this Court under section 622 of the Civil Procedure Code.

Babu Dwarka Nath Mitter for the petitioners. The order of the Munsif on the 5th March was one under section 158 of the Civil Procedure Code. The Legislature has impressed the character of finality on orders under section 158 and the order of the 5th March could not consequently be reopened. The order of revival was therefore without jurisdiction. *Rangasamy Mudelliar v. Sirangan* (1), *Anantharama Patter v. Madhava Paniker* (2). Section 157 of the Code makes the provisions of section 108 of the Code (Chapter VII) applicable to orders under that section. But there is no such provision in regard to orders under section 158, which are final. The observations of the learned Judges in *Mariannissa v. Ramkalpa Gorain* (3) support my contention. The words "proceed to decide the suit forthwith" does not exclude the taking of evidence: *Sitara Begam v. Tulshi Singh* (4). Lastly, assuming that the

(1) (1869) 4 Mad. H. C. 254.

(3) (1907) I. L. R. 34 Calc. 236.

(2) (1881) I. L. R. 3 Mad. 264.

(4) (1901) I. L. R. 23 All. 462.

Munsif had no jurisdiction to set aside the order, unless "sufficient cause" was shown, there is not a word in the judgment to indicate that he was satisfied that there was sufficient cause.

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COXE AND DOSS JJ. In this case the plaintiffs on the 19th December 1906 brought a suit against the defendants in the Court of the Munsif of Basirhat. The 22nd January was fixed for the hearing of the case. On that date the defendant prayed for time and the case was adjourned to the 19th February. The 19th February being a holiday the case was taken up on the 25th February, when it was again adjourned to the 5th March. On the 5th March the following order was passed: "The defendants do not appear; examined Kali Krishna Chandra and decreed *ex parte*." Subsequently the defendants applied to have this decree set aside under section 108 of the Civil Procedure Code, and that application was ultimately granted.

The plaintiffs now apply to this Court under section 622 of the Code of Civil Procedure, and ask that the order of the Munsif reviving the case may be set aside on two grounds. The first ground is that the order of the 5th March 1907 is really an order under section 158 of the Code of Civil Procedure and therefore cannot be set aside on an application under section 108 of the Code of Civil Procedure. It appears to us that the case is completely governed by the general principles laid down in the cases of *Mariannissa v. Rankalpa Gorain* (1) and *G. P. Cooke v. The Equitable Coal Company* (2). It seems to us that the Court did not, as a matter of fact, on the 5th March 1907, dispose of the case under section 158 of the Code of Civil Procedure. That section authorises the Court to proceed to decide a suit forthwith. But in this case the Court did not decide the case forthwith, but proceeded to take evidence and decided the case on the evidence so taken. We have been referred to the case of *Sitara Begam v. Tulshi Singh* (3) as an authority for the proposition that the Court may under section

(1) (1907) I. L. R. 34 Calc. 235.

(2) (1904) 8 C. W. N. 621.

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158 of the Code of Civil Procedure, take further evidence and decide the case on that evidence. But after reading the decision we do not think that this conclusion follows necessarily from the terms of the judgment. We think, therefore, that the first point fails, and hold that the order of the 5th March 1907 was passed under section 100 read with section 157 of the Civil Procedure Code, and could be set aside by an application under section 108.

The second point taken is that the order of the Munsif reviving the case is bad under section 108 of the Code of Civil Procedure, inasmuch as the Munsif has not found that the defendants were prevented by sufficient cause from appearing on the day fixed. It is impossible to deny that the enquiry made by the Munsif into the matter was perfunctory and the order passed very defective and irregular in form. But it appears on examining the proceedings that that order was an *ex parte* order. The case under section 108 was taken up on the 20th February, 21st March and the 11th April. On none of these days were the plaintiffs ready to proceed with the case. The order of the 21st March directed the issue of summonses on the plaintiffs' witnesses at their own risk and so conveyed to them a fair warning that further time would not be given. Then on the 11th April the plaintiffs applied for further time and their application being refused, one of the defendants was examined. The plaintiffs apparently did not cross-examine him and acting on the statement of one of the defendants that he had never heard of the decree, until it was executed, the Munsiff directed the restoration of the suit and a trial *de novo*. Although, as we have said, we cannot regard the order of the Munsif as in form a proper order, yet we do not think that we ought, in the exercise of the discretion given us by section 622 of the Code of Civil Procedure, to interfere with it.

The result is that this Rule is discharged with costs.

Rule discharged.