

(1915) 08 CAL CK 0022
In the Calcutta High Court

Chatterjee Brahmin

APPELLANT

Vs

Durgadutt Agarwalla and Others

RESPONDENT

Date of Decision : 23-08-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 5

Citation : 34 Ind. Cas. 394

Hon'ble Judges : N.R. Chatterjea, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Mookerjee, J.—This is an appeal by the Plaintiff in a suit to set aside what has been described as an ex parte decree. The circumstances under which the decree in question was obtained against the plaintiff are beyond controversy. The first three defend ants had a six-annas share in a partner ship business under a deed dated the 21st April 1909, while the plaintiff and the fourth defendant who are relations had each a five annas share. On the 24th May 1912 the first three defendants, who were, at the time, infants, instituted a suit against the plaintiff and the fourth defendant for dissolution of partnership, for adjustment of accounts, for appointment of a Receiver and for other incidental reliefs. The claim was valued at Rs. 22.000. At that time the plaintiff, who was then the second defend ant was stated on the face of the plaint to be resident beyond the limits of British India namely, at Somaser in Rajputana. The fourth defendant, who was the first defendant in that suit, was a resident of the place where the suit was instituted. On the day the plaint was filed, an application was made by the then plaintiffs for the issue of a warrant for arrest of the then first defendant and a warrant for attachment, before judgment, of all the partnership assets. The Subordinate Judge directed the issue of the warrants, ordered summonses to issue, and fixed the 10th June 1912 for the trial of the suit. The warrants of arrest and attachment were issued forthwith. The summons upon the second defendant, which was issued on the day following, reached the Political Agent at Rajputana on or about the 1st June 1912, and was returned by him to the Court with the remark that it was impossible to serve the summons upon the defendant

in time, as the date fixed for hearing the case was too close at hand; at the same time a request was made by him that a more distant date might be fixed; the date suggested was six weeks from the 1st June. Before the summons so returned had reached the Court of the Subordinate Judge, the proceedings had, however, been pushed on behalf of the plaintiffs with extreme rapidity. We find it noted in the order-sheet that on the 27th May, that is, within three days of the institution of the suit, the first defendant had been arrested, and had received intimation from the Court that unless he furnished security for Rs. 15,000, he would be forthwith sent to the Civil Jail. On the 30th May, we find that the suit had been compromised. The first defendant had paid to the plaintiffs Rs. 13,000 and had agreed to pay Rs. 5,800 in specified instalments. A decree was made on these terms and the first defendant was released from arrest. Whether a decree obtained by consent under the circumstances described would be operative against the person who had consented thereto, is a question which does not directly arise for consideration in the present appeal; but we have to determine whether such decree is binding upon the other defendant to the suit who was absent in Rajputana.

2. It appears from the petition of compromise that the first defendant entered into the settlement both for himself and his absent partner. He professed to represent his partner on the basis of a power-of-attorney to which reference will presently be made. The decree, however, does not mention the petition of compromise, and does not even recite that it was made by consent; but it directs both the defendants to pay the plaintiffs the sum of Rs. 5,800 with costs by six monthly instalments on the dates specified, subject to the proviso that if default was made in the payment of a single instalment, the plaintiffs would be at liberty to enforce the entire decree by execution. The decree, consequently, on the face of it binds both the then defendants. The plaintiff was thus driven to institute this suit on the 8th October 1912 to set aside this decree. His contention is that he is not bound by this decree; first, because he was in essence not a party to the suit and the Court had no jurisdiction to make a decree against him; and secondly, because his partner had no authority to bind him by a compromise. In our opinion, these contentions are well founded and must prevail.

3. As regards the first ground, it is plain that this is in no sense a case of an ex parte decree. The Code contemplates service of summons upon the party sought to be made liable. That summons may be duly served or may not be duly served. But the Code does not contemplate the contingency which has happened in this case. The plaintiffs took out summons upon the second defendant in the suit. The summons was sent, as stated, to the Political Agent at Rajputana. No attempt was made by him, rightly or wrongly, to serve the defendant, but the summons was returned to the Court. The position in substance is the same as if no summons had ever been issued for service on the defendant. Under these circumstances a decree made against the defendant cannot possibly bind him.

4. Order IX, Rule 5, of the CPC clearly contemplates that where the summons

has been returned unserved, the plaintiff must within a year from the prescribed date apply for the issue of a fresh summons; if he fails to do so, the suit is liable to be dismissed. The Code obviously does not contemplate the trial of a suit when the summons has been returned unserved. It is obviously just that a man should have notice of any legal proceeding that may be taken against him and a full and fair opportunity to make his defence. As has been well said, the law never acts by stealth, it condemns no one unheard, so that a personal judgment rendered against a defendant without notice to him or an appearance by him is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him.

5. As regards the second ground, it is equally plain that the decree cannot be sustained. An extract from the power-of-attorney, dated the 22nd June 1909, is on the record. Thereby the plaintiff authorised his partner to manage the partnership business, to continue, institute, prosecute, defend or oppose, as the case might be, all the suits that were or might be brought by or against the executant in respect of his business and property. On behalf of the plaintiffs respondents no endeavour has been made to support the view that the compromise of suit can by any stretch of language be included within any of the terms of the power-of-attorney. It is plain beyond controversy that the partner of the plaintiff had no authority to bind him by the compromise.

6. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed. The decree in Suit No. 10 of 1912 is set aside, not only in so far as the plaintiff is concerned but also with regard to the fourth defendant, because the decree, on the face of it, is indivisible and cannot be set aside in part. The question arises, in these circumstances, what is the effect of our order upon the prior suit. The effect is obviously to discharge the entire decree in that suit and to revive it for retrial; *Khajooroonissa v. Rowshan Jehan* 2 C. 184 : 3 I.A. 291 : 26 W.R. 36 : *Neale v. Gordon Lennox* (1902) A.C. 465 : 71 L.J.Q.B. 939 : 66 J.P. 757 : 87 L.T. 341 : 18 T.L.R. 791 : 51 W.R. 140: *Bibee Solomon v. Abdool Azeez* 6 C. 687 : 8 C.L.R. 169 : *Sharat Chunder Ghose v. Kartik Chunder Mitter* 9 C. 810 : 12 C.L.R. 453; *Sdrbesh Chandra v. Hari Dayal Singh* 5 Ind. Cas. 236 : 11 C.L.J. 346 : 14 C.W.N. 451: *Raj Kumar Roy v. Hara Krishna* 10 Ind. Cas. 355 : 15 C.L.J. 217 though there are expressions to the contrary effect in *Bhimaji Govind v. Rakmabai* 10 B. 338 and *Kshetra Mohan v. Man Gobinda Pal* 6 Ind. Cas. 13 : 14 C.W.N. 558. As the then second defendant was not served, he will have to be served, unless he chooses to enter appearance voluntarily. The appellant is entitled to his costs both here and in the Court below; but although the appeal is valued at Rs. 18,000, we assess the hearing fee in this Court at five gold mohurs, as the arguments for the respondents have not been unduly protracted.