

(1869) 06 CAL CK 0046
In the Calcutta High Court

Ewing and Co.

APPELLANT

Vs

Gosaidas Ghose Two and Others

RESPONDENT

Date of Decision : 17-06-1869

Acts Referred:

Citation : (1869) 06 CAL CK 0046

Judgement

Phear, J.—There is one point, I think I must reserve for consideration. But it appears to me that Mr. Jackson has not brought his case within the provisions of section 119 of Act VIII of 1859. I think when that section speaks of the summons not being duly served, it refers to service on that defendant only who complains and does not refer to service on his co-defendants. And the other alternative, provided for by that section, namely, that he had been prevented by any sufficient cause from appearing, is not made out, because he was in truth prevented from appearing by the Act of the Legislature, unless he got the leave of the Court to appear, and that leave he never asked for. As I have already pointed out, the defendant might procure the decree to be set aside by appealing to the equitable discretion of the Court, if he made out a sufficient case for the exercise of that discretion. For this purpose he must show that it is inequitable or improper, as between him and the plaintiff, that the decree should be allowed to stand. Now by the circumstances of the case the defendant can plead no merits as regards the plaintiffs' cause of action. It must be assumed he has no defence to offer to it, because he has not availed himself of the provision of Act V of 1866 by applying for leave to defend. There remains, however, the question, whether as a matter of procedure a decree should be allowed to stand, which has been passed in a suit against one defendant only on a joint cause of action, while the other persons liable on that cause of action have not been served, and the Court has not given leave for the maintenance of such a suit, and also where the defendant against whom the decree is passed without any fault of his own, has had no opportunity to object to the want of regularity. I am not prepared to give any decision upon this question without further consideration.

2. On the following day Phear, J., said, the question is whether I ought to let the

decree stand. I think on the whole I ought not to interfere : the other defendants might object to the decree as they were not duly served, but not the first defendant. He has the same remedies over against the co-makers of the note as if the decree were valid against him and them jointly, and I cannot discover that as between himself and the plaintiff he has any equity entitling him to have the decree set aside. I think the rule must be discharged with costs.