

(1904) 04 CAL CK 0014
In the Calcutta High Court
Case No : Rule No. 3518 of 1903

G.P. Cooke and others

APPELLANT

Vs

The Equitable Coal Co., Ltd.

RESPONDENT

Date of Decision : 06-04-1904

Acts Referred:

Citation : (1904) 04 CAL CK 0014

Judgement

Maclean, C.J.—We are invited to interfere in this case under the powers conferred upon us by sec. 622 of the Code of Civil Procedure, on the ground that the Subordinate Judge in setting aside, under sec 108, what he considered to be an ex parte decree, either had no jurisdiction or exceeded his jurisdiction. Stated shortly, the facts are these : There was a suit for partition, in which there were, apparently, a great many Defendants, amongst whom were the present Respondents, the Equitable Coal Co. The case came on for trial on the 13th of May 1903, and on that day, according to the findings of the learned Subordinate Judge, the learned pleader who appeared for the Company practically asked for adjournment for the purpose of the issue of warrants against certain witnesses whom the Company desired to call, and to have certain records sent for. The Court refused that application and the pleader for the Company retired from the case, which then proceeded and judgment was passed. We have not been told what the terms of that judgment are, nor are they material for the present case. The Company feeling aggrieved at this, applied under sec. 108 to have the order which was made against them--treating it as ex parte--set aside, and to have an opportunity given them to defend the suit. The Subordinate Judge acceded to that application. Then the Plaintiffs obtained this rule under the section of the Code, to which I have referred, calling upon the Company to show cause why that order should not be set aside, on the ground, as I have said, that the Judge in making it had exceeded his jurisdiction in the matter. That, shortly, is the history of the case. I am doubtful whether the case falls under sec. 622. There is no doubt that the Court has power to set aside an ex parte decree under certain conditions. It is contended for the present Petitioner that this was not an ex

parte decree. In most cases, the question whether a decree is ex parte or not is a question of fact, and if it is a question of fact, we could not properly interfere under sec. 622. Even if the question were a mixed question of law and of fact, we could not interfere under that section if the Court below has arrived at an erroneous conclusion in the matter. That is a difficulty which faces the Petitioner at the outset of the case. Again, the exercise of jurisdiction under sec. 622 is discretionary and the Court does not usually interfere under the section, if the result of any irregularity in the lower Court has been to promote the justice of the case. On either of those grounds the rule might have been discharged. But I am willing to deal with the case upon the footing that, in making this order, the learned Subordinate Judge acted without jurisdiction. The argument of the Petitioner is that this was not an ex parte decree within the meaning of sec. 108. I do not propose to travel through the numerous cases dealing with the question of what is and what is not an ex parte decree; each case to my mind must depend upon its own circumstances. I am not prepared to say that, under such circumstances as we have here, where a vakil is only instructed to make an application practically for an adjournment, and when that application is refused he leaves the Court and takes no part in the hearing of the case, the decree passed can be regarded as other than an ex parte decree. If the decision which has been relied on in the case of *Watson & Co. v. Ambica Dasi* I. L. R. 27 Cal. 529 (1899) takes the opposite view, I respectfully dissent from it. The Full Bench case [*Jonardan Doby v. Ramdhone Singh* I. L. R. 23 Cal. 738 (1896)] although it is not precisely in point, in principle, points strongly in favour of the view I have expressed above.

2. Then it is said that sec. 108 has no application to the case of one of several Defendants, and that that section only applies to the case of a sole Defendant, or to a case where there are several Defendants, all of whom have not appeared. I cannot accept this interpretation of the section. I do not see why because a Defendant happens to be one of many, he is less "a Defendant" within the meaning of that section. If the Petitioners' contention were to prevail the result would be that if there be one Defendant out of many, against whom a decree has been passed ex parte, he would be deprived of the benefit of the section. There is nothing in sec. 106, which conflicts with sec. 108, nor is there any thing in sec. 106 which limits the operation of sec. 108 in the way suggested by the Petitioner. The rule must, therefore, be discharged with costs--hearing fee five gold mohurs.