
(1898) 09 CAL CK 0005

In the Calcutta High Court

Case No : Appeal From Original Order No. 430 of 1897

Jotindra Mohun Poddar and another

APPELLANT

Vs

Raja Sri Nath Roy and Others

RESPONDENT

Date of Decision : 08-09-1898

Acts Referred:

Citation : (1898) 09 CAL CK 0005

Final Decision : Allowed

Judgement

1. This appeal arises out of an application by the Appellants, under sec. 108 of the Code of Civil Procedure, for setting aside an ex-parte decree obtained by the Respondents against the Appellants and certain other persons. The Court below has rejected the application, holding that summonses had been duly served on the Petitioners under sec. 76 of the Code of Civil Procedure; that the appearance entered by the Defendant Srinath Poddar was appearance entered by all the Defendants; that the Petitioners were aware of the institution of this suit; and that the application was not a bond-fide one. Against this order of the Court below the Petitioners have preferred this appeal, and it is contended on their behalf, -- first, that the Court below is wrong in holding that summonses had been duly served on the Petitioners under sec. 76 of the Code of Civil Procedure, and that it ought to have held that no effective service of the summonses had been made on them; and secondly, that the Court below is wrong in holding that the appearance entered by the Defendant Srinath Poddar was an appearance entered on behalf of all the Defendants as their recognized agent, and that it ought to have held that, so far as the Petitioners being minors are concerned, appearance on their behalf could only have been entered by their guardian ad litem duly constituted.

2. The Respondents raised a preliminary objection that the present application could not be entertained in the absence of the auction-purchasers of the property sold in execution of the ex-parte decree.

3. We are of opinion that the preliminary objection cannot prevail.

4. The parties entitled to notice of an application under sec. 108 of the CPC are those that come under the description of opposite party in sec. 109; and they are, in our opinion, such of the parties to the suit as are interested in opposing the application.

5. An auction-purchaser does not come within this description. It was urged that the auction-purchasers are interested in opposing an application of this nature as their position may be affected by the ex-parte decree being set aside. The answer, however, to this argument is that, as the sale has been confirmed, their rights, whatever they may be, cannot be affected in any way by the present proceeding to which they are not parties, and which is instituted with the object of setting aside the ex-parte decree, and not of setting aside the sale held in execution of it. The preliminary objection must be overruled.

6. The following are the facts material to be stated. The two Petitioners, who are minors, represented by their mother and guardian appointed by the Civil Court, were, as sued, represented by her as their guardian, but no order appointing her as guardian ad litem for the purposes of the suit was made under sec. 443 of the Code of Civil Procedure. This fact is undisputed. The suit was brought in 1895 against the minors and certain other persons, who constituted a firm carrying on business at Baliaghatta within the jurisdiction of the Court in which the suit was brought, but the minors resided outside its jurisdiction; and the suit was for the enforcement of an equitable mortgage of certain property belonging to the partnership. The firm fell into financial difficulties about the year 1891, but the partnership was not dissolved until May 1896; and though it was contended for the present Appellants that the partnership had ceased to exist since July 1894, we consider, though in the view we take the point is not very material, that the balance of evidence supports the contention that the firm continued to carry on business down to the 20th of March 1895. It is not disputed that the summonses in the suit were neither served upon the minors nor" upon their mother personally. The summonses on the Defendants were taken to their place of business at Baliaghatta, and sought to be served personally on some of them, who were at that place, and on their refusal to sign the acknowledgment of service, they were affixed on the 9th of March 1895, on the house in which the business of the firm was carried on.

7. These being the facts of the case, the first question is whether the summonses were duly served on the Petitioners. If that question is answered in the negative, the mere fact of the certificated guardian of the Petitioners being aware of the institution of the suit is a matter of no importance and cannot affect the rights of the minors. It must be borne in mind that sec. 108 of the CPC is imperative, and enacts that, if the applicant for setting aside an ex-parte decree "satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree, etc."

8. As we have pointed out, there was no personal service of the summons on the

minors or upon their guardian, nor was the summons affixed to the house in which the minors or their guardian actually resided; but the Court below has held that the summons was duly served on the Petitioners under sec. 76 of the Code. It is contended for the Appellants that this view is wrong because there could be no service of summons, actual or constructive, on the Petitioners before any guardian was appointed for them under sec. 443, and the suit was properly instituted against them; and further because the partnership business at Baliaghatta had stopped payment before the institution of this suit. As in point of fact there was no service on the certificated guardian, the mother, this point is not very material, but as the person by whom the minors were said to be represented was their guardian appointed by the Civil Court, and there is no suggestion that she was not the proper person to represent them, the Court was under sec. 443 bound to appoint her as the guardian for the suit, and under such circumstances, it may well be, having regard to the view expressed in the Full Bench case of *Suresh v. Juggut I. L. R. 14 Cal. 204 (1887)* that the absence of a formal order would not vitiate the proceedings. As for the second branch of the contention, the evidence, as we have said above, indicates that the business of the firm was being carried on when the summonses were served.

9. The question then is whether there was due service of the summons under either sec. 70 or sec. 74 of the Code, and whether either of those sections applies to a case in which a minor is sued along with other persons, or whether secs. 74 and 76 are not controlled by sec. 443.

10. It is, we think, abundantly clear from the evidence that the service of the summons in this case was not made and was not intended to be made on any of the Defendants for himself and for the other Defendants as their partner, or as manager of their joint business, or as agent under sec. 74 or sec. 76. There having been no personal service on any guardian ad litem of the minors, the suggestion that the service, such as it was, was one under secs. 74 and 76 savours somewhat of an afterthought. The service sought to be effected, and the judgment of the Court below supports this view, was personal service on certain of the Defendants (other than the Petitioners) in their personal and not in any representative character, and upon their refusal to sign the acknowledgment of service, the summonses were apparently under sec. 80 of the Code, affixed to the place of business at Baliaghatta.

11. In our opinion there was no service of the summons under either sec. 74 or sec. 76, even assuming that those sections can apply to a case in which some of the Defendants who were interested in the partnership or business are minors. Though it is unnecessary for us to decide the point, it is by no means clear, that those sections apply to a case like the present. Sec. 443 of the Code requires that a minor Defendant shall be represented by a guardian appointed for the suit, in other words, by a guardian ad litem, and although that section does not expressly say anything about the service of summonses, it speaks of the person so appointed as being appointed "to put in the defence for such minor and

generally to act on his behalf in the conduct of the case; " and it would be anomalous to hold that though the Code requires the appointment of a proper person as guardian to act for a minor generally in the conduct of the case, service of the summons on a person other than such person may be sufficient service on the minor. In our opinion there has been neither personal nor substituted service of the summons upon the minor Defendants, and if so, they are entitled to have the decree set aside under sec. 108. It follows from the above that the appearance which Srinath Poddar purported to enter on behalf of the minors is quite ineffectual. He had no power or authority to enter any appearance on their behalf.

12. The result is that the appeal must be allowed, the order of the Court below must be reversed, and the ex-parte decree made in this case must be set aside, and the Court below directed to proceed with the hearing of the suit. We cannot however part with the case without impressing upon Plaintiff litigants absolute necessity of proceeding with strictness in accordance with the Code, in cases where minors are Defendants. The inconvenience, difficulties, loss of time and money by not so proceeding are aptly illustrated by the present case, but all this difficulty might have been avoided if the Plaintiff had complied with the Code and had seen that a proper guardian ad litem had been appointed in the first instance. His present position is attributable to his lack of due diligence and care at the outset of the suit. The Court ought to be jealous in seeing that in the case of minor Defendants the provisions made for their protection are strictly complied with. We should have been better satisfied if we could have taken a different view of the law applicable to this case as there is ground at least for suspecting the sincerity of the application in the true interests of the minors, and we may add that it will be for the advisers of the minors to consider, and most carefully, whether any real benefit is likely to accrue from a rehearing of the suit especially having regard to the question of subsequent costs. The Respondents must pay the Appellants their costs of this appeal.