
(1917) 07 CAL CK 0008
In the Calcutta High Court

Nistarini Dasi

APPELLANT

Vs

Mohendra Nath Kar

RESPONDENT

Date of Decision : 03-07-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3

Citation : 47 Ind. Cas. 535

Hon'ble Judges : Walmsley, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This appeal is directed against an order of remand made in a suit for recovery of arrears of rent and for ejection. The suit was decreed ex parte, by the trial Court, on the 1st June 1910. The defendants thereupon instituted a suit to set aside the ex parte decree on the ground of fraud. The specific fraud alleged was to the effect that the plaintiff had agreed, on receipt of Rs. 44 from the defendants, to withdraw from the suit, but that - he had not intimated this arrangement to the Court and had on the other hand taken advantage of the absence of the defendants to secure against them an ex parte decree. This allegation was fully established and the ex parte decree was set aside on the ground of fraud. An appeal was preferred against this decree, but the finding of the Court of first instance was not challenged. At the instance of the then appellant, an addition, however, was made to the decree to the effect that the original suit do stand revived. The propriety of this direction has not been challenged before us, and in view of the decision of the Judicial Committee in *Khajooroonissa v. Rowshan Jehan* 2 C. 184 at p. 191 : 3 I.A. 291 : 26 W.R. 36 : 1 Ind. Dec. (N.S.) 412 (P.C.) , which has been repeatedly followed in this Court, cannot be successfully questioned. The position, consequently, is that the ex parte decree which concluded the suit has been vacated and the suit has been revived. Here the defendant argues, as regards the further progress of the suit, that the parties have been restored to the position they occupied on the day the ex parte decree was made. This contention is obviously sound and was accepted by the first Court; the Subordinate Judge on appeal has, however, taken a

different view, and has remanded the case for trial on the merits. This is clearly erroneous. On the day the ex parte decree (subsequently vacated) was made, the true-position was that the plaintiff had in fact agreed to withdraw from the suit on receipt of a certain sum of .money. Whether the agreement between the parties was to this effect or not, cannot be investigated afresh in this suit. This was the precise subject of investigation in the suit to set aside the ex parte decree on the ground of fraud; indeed, this formed the sole material point for determination in that litigation. Consequently, it must be taken as conclusively decided between the parties that on the day the ex parte decree was made in favour of the plaintiff no ex parte decree should have been made, but the arrangement between the parties, namely, that the plaintiff do withdraw from the suit, should have been carried into effect by a decree of the Court, under Order XXIII, Rule 3 of the Civil Procedure Code. We must accordingly now give effect to this adjustment of the suit.

2. The result is that this appeal must be allowed, the order of remand set aside and a decree drawn up to the effect, that the plaintiff withdraws from the suit. The appellant is entitled to her costs in all the Courts. We assess the hearing-fee in this Court at two gold mohurs.