

(1923) 08 CAL CK 0040
In the Calcutta High Court

Rai Satyendra Nath Sen Bahadur and Others

APPELLANT

Vs

Narendra Nath Gupta and Others

RESPONDENT

Date of Decision : 27-08-1923

Acts Referred:

Citation : AIR 1924 Cal 806

Hon'ble Judges : Mookerjee, J

Bench : Division Bench

Judgement

Mookerjee, J.—This is an appeal by four of the defendants against the preliminary decree in what is described as a suit for partition and accounts.

2. The suit was instituted on the 31st January 1922. Summonses were served on the 28th March 1922. Written statement was filed on behalf of the defendants-appellants on the 6th June 1922 and the issues were settled on the 13th June 1922. Thereafter the hearing was postponed on several occasions, on the joint application of the plaintiff and the defendants. On one occasion the suit could not be taken up because the presiding officer had been transferred and his successor had not joined. After the case had been thus adjourned from time to time either on the application of the plaintiff or on the joint application of the plaintiff and the defendants, the case was ultimately taken up on the 12th April 1923. "On that date, the entry in the order sheet is to the following effect: Defendants absent. Plaintiff applies for time. Put up on 14th April 1923, for disposal as ex parte. The application which was made by the plaintiff was for adjournment for a month on the ground of his illness and consequent inability to attend Court with his pleader. The Court did not grant the application, but directed the case to be put up two days later for disposal. It will be noticed that the case was put up for disposal as ex parte. This implies that the Subordinate Judge determined on that day that the defendants were to have no opportunity to defend the suit. On the 14th April the defendants appeared and prayed that notwithstanding the order of the 12th April, which had been made without their knowledge, they should be allowed to defend the suit. They stated that it was not necessary for

them to examine witnesses and that they were on that date, as on the previous dates, ready to conduct the defence. The Subordinate Judge came to the conclusion that he should not allow what he described as a harassing petition. The consequence was that the defendants were not allowed to defend the suit and the case was taken up for ex parte disposal. The plaintiff was examined and a preliminary decree was passed ex parte.

3. The defendants have now appealed to this Court and have pressed us to hold that as the suit has been tried in a manner unknown to law, the decree made by the Subordinate Judge should be vacated. We have invited the learned and experienced vakil for the plaintiff-respondent to explain to us under what provisions of the law the Subordinate Judge determined on the 12th April, 1923 that the defendants should be denied an opportunity to defend the suit. The case clearly does not fall within the scope of Order 11, Rule 21, which authorises the trial Court to strike off the defence, when the defendant is in default; for instance, where the defendant has failed to comply with an order to answer interrogatories or for discovery or inspection of documents. It is further clear that the order could not have been made under Order 9 rules 6 and 7. Order 9, Rule 6 provides that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if it is proved that the summons was duly served, the Court may proceed ex parte. Rule 7 provides that where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. It is manifest that the case before us does not fall within the scope of Order 9, Rule 6. The plaintiff did not appear on the 12th April and was not in a position to conduct the case. He was absent and he prayed for time in order that he might bring his witnesses. Consequently, the Court could not proceed ex parte under Order 9, Rule 6, though the Court might have dismissed the suit under Order 9, Rule 3. It follows as a corollary that Rule 7 has no application to the circumstances of this case. Nor could action be taken under Order 16, Rule 20. We are of opinion that the Subordinate Judge was entirely wrong when on the 12th April 1923 he determined that the defendants should have no opportunity to defend the suit. He had no statutory authority to take such a disciplinary measure as to strike out the defence and there is no question of exercise of the inherent jurisdiction of the Court: *Vasudevan v. Sankaran* [1911] 22 M.L.J. 60. We may add that we have carefully examined the order sheet and we are at a loss to find any justification for the action taken by the Subordinate Judge as regards the defendants. The method adopted by him may lead to the speedy disposal of cases, but cannot possibly promote that administration of justice for which alone Courts exist. It is an elementary principle of law, as was observed by Brett, J., in *Sato Koer v. Gopal Sahu* [1907] 34 Cal. 929 that no order should be passed against a person without allowing him reasonable opportunity to be heard and to adduce evidence in his defence. A similar view was emphasised in *Ajant*

Singh v. Sundar Mal 17 C.W.N. 86 where it was pointed out that the rule is of universal application, founded upon the plainest principles of justice, that no one should be condemned, punished or deprived of his property in a judicial proceeding unless he has had fair opportunity to be heard. This was supported by reference to Bagg's Case 11 Cob. 93; Re. Hammers Smith Bent Charge [1849] 4 Ex. 87g R. v. Saddlers [1863] 10 H.L.C. 404 Smith v. R. [1878] 3 A.C. 614 and Balabai v. Ganesh [1902] 27 Bom. 162

4. But apart from this, it is clear that the evidence which was adduced by the plaintiff was wholly insufficient to justify the decree which has been made in his favour. The statements as recorded are indefinite and inconclusive and they do not furnish any foundation for the decree made in his favour. We are surprised to find that the Subordinate Judge has directed the cancellation of a conveyance which has not even been proved in accordance with law. The Subordinate Judge evidently did not realise that great caution should be exercised when suits are heard ex parte. This principle is of universal application: Amritnath v. Dhunpat [1871] 8 B.L.R. 44 and was emphasised by this Court in Ross v. Scriven [1916] 43 Cal. 1001 The fundamental principle of law is that the plaintiff, when he comes to Court must prove his case and he must prove it to the satisfaction of the Court. His burden is not lightened because the defendant is absent; on the other hand the responsibility is increased in one sense, for as observed by Sir Lawrence Jenkins in Deonandan v. Janki Singh AIR 1916 P.C. 227 when a matter is heard ex parte in the absence of one of the contestants who is not represented it is the duty of Counsel to bring to the notice of the Court adverse as well as favourable authorities. To the same effect is the observation of Lord Macnaghten in Champat Singh v. Jangu Singh 16 C.W.N. 793 that if there is a slip in an appeal heard ex parte, the error is attributable to the appellant.

5. There is, in our opinion, no escape from the conclusion that the trial of this case has been conducted in an extraordinary manner and the decree made by the Subordinate Judge cannot possibly be supported.

6. The result is that this appeal is allowed the decree of the Subordinate Judge set aside and the case remitted to the District Judge to be tried by him in accordance with law.

7. The plaintiff-respondent must pay the appellants their costs of this appeal which will be assessed on the valuation of the appeal.