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thereafter made applications for execution here. These plaintiffs are, therefore, entitled to share rateably with the plaintiffs in this suit in the proceeds of the property sold in execution by the Sheriff.

Attorneys:—Messrs. *Matubhai and Jamietrám*; Messrs. *Payne, Gilbert and Sayáni*; and Messrs. *Chalk, Walker and Smetham.*

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

1895. *February* 21.

R. A. HILDRETH (ORIGINAL DEFENDANT), APPLICANT, *v.* SAYA'JI PIRA'JI CONTRACTOR (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), *Secs.* 100, 108 *and* 157—*Presidency Court of Small Causes—Adjourned hearing—Absence of defendant—Ex-parte decree—Practice—Procedure.*

A defendant is entitled to avail himself of section 108 of the Civil Procedure Code (Act XIV of 1882) where an *ex-parte* decree is passed against him at an adjourned hearing.

THIS was an application, under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), against the decision of the Full Court (consisting of C. W. Chitty, First Judge, and M. H. Hakim, Fifth Judge) of the Bombay Court of Small Causes.

The applicant (defendant) was sued by the opponent (plaintiff) in the Court of the Fifth Judge of the Bombay Court of Small Causes to recover the sum of Rs. 507. At the first hearing of the case on the 7th May, 1894, the defendant appeared, denied the plaintiff's claim, and applied for a postponement to enable him to produce his witnesses. The case was consequently adjourned till the 14th June. The defendant did not appear in the Court on that day, and a decree was passed in the plaintiff's favour.

On the 16th June the defendant went to the Court, and he was then informed that a decree had been passed against him. On the 11th July he applied to the Judge that the decree should be set aside, and obtained a rule *nisi* for a new trial. The rule was subsequently made absolute, and a day was fixed for the re-trial of the case.

*Application No. 219 of 1894 under the extraordinary jurisdiction.

In the meantime the plaintiff applied to the Full Court to set aside the order for re-trial under section 108 of the Civil Procedure Code (Act XIV of 1882), and obtained a rule *nisi* calling on the defendant to show cause why the order for re-trial should not be set aside, and after argument of the rule the Full Court set aside the order for re-trial, holding on the authority of *Sitálál Hari* v. *Hirálál*(1) that as the decree was passed at an adjourned hearing it was not *ex parte*.

The defendant now applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling on the plaintiff to show cause why the order of the Full Court should not be set aside.

R. A. Hildreth (the applicant) appeared in person in support of the rule:—The Full Court was wrong in holding that the decree was not *ex parte*. I submit that the decree is *ex parte*, and I am entitled to relief under section 108 of the Civil Procedure Code. Section 157 of the Civil Procedure Code (Act XIV of 1882) is applicable to the present case, and it provides that the Court should dispose of the suit in one of the modes prescribed by Chapter VII. Section 108 is included in Chapter VII, and, therefore, I am entitled to the benefit of that section. See *Doyal Maistree* v. *Kupoorchund* (2); *Rámtahal Rám* v. *Rámeshar Rám* (3); *Hirá Dái* v. *Hirá Lál* (4).

B. R. Bamanji (with *S. F. Billimoria*) appeared for the opponent (plaintiff) to show cause:—It was at the request of the defendant that an adjournment was granted in order that he might be able to produce his witnesses. He had, therefore, notice of the adjourned hearing, and having failed to appear on the appointed day it is not now open to him to say that the decree is *ex parte*. The reference in section 157 to Chapter VII of the Code indicates merely the procedure to be followed. It does not necessarily give to the defendant the relief which he would have been entitled to if the decree had been passed under that chapter. The Privy Council have in *Zain-ul-abdin Khán* v. *Ahmad Raza Khán* pointed out the distinction between a case de-

(1) I. L. R., 21 Cal., 269.
(2) I. L. R., 4 Cal., 318.
(3) I. L. R., 8 All., 140.
(4) I. L. R., 7 All., 538.
(5) L. R., 5 I. App., 233.

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cided *ex parte* in the absence of one of the parties at the first hearing and a case decided in the absence of the defendant on the date to which the hearing of the suit was adjourned at the defendant's request. The Calcutta High Court followed the Privy Council ruling in *Sitálál Hari* v. *Hirálál* [1] which, we submit, is applicable to this case.

SARGENT, C. J. :—The Small Cause Court has decided on the authority of *Sitálál Hari* v. *Hirálál* [1] that section 108 does not apply where an *ex parte* decree has been made at an adjourned hearing.

The question turns upon the construction to be put on the words in section 157, that the "Court may proceed to dispose of the suit in one of the modes directed in that behalf by Chapter VII or make such other order as it thinks fit." Section 100 is the only section in that chapter applicable to the case under which the Court could proceed to dispose of the suit, and one of the modes which the Court may adopt as provided by clause *a* of that section is that it may make a decree *ex parte*. Section 108 of the same chapter, however, says that "in any case in which a decree is made *ex parte* against a defendant he may apply to the Court for an order to set it aside." The Calcutta Court say that "the reference in section 157 to Chapter VII is merely to indicate the procedure of the Court and not to give a defendant the privilege to which he is entitled, if the suit was decided *ex parte* strictly within the terms of section 100." No doubt it provides for the procedure of the Court, but if such procedure includes the making an *ex-parte* decree, there would appear to be no sufficient reason for holding that the decree is not subject to the usual incident of such decrees (*viz.*, an application by the absent defendant to set it aside and have the suit restored, as provided by section 108 of the chapter). It is plain that the absent defendant may be able to show a perfectly good reason for his absence on the day of the adjourned hearing, and if he can do so, the injustice of deciding behind his back would be just as great as on the first hearing.

We think that, in the absence of clear words to show a contrary intention, the defendant is entitled to avail himself of section 108. This is the view taken by the Allahabad High Court in *Hirá Dái*

(1) I. L. R., 21 Cal., 269.

v. *Hirá Lál* (1). In the judgment of Oldfield, J., it is pointed out that the decision of the Privy Council in *Zain-ul-abdin Khán* v. *Ahmad Raza Khán* (2); to which the Calcutta Court refers, is only a decision on the words of section 111 of Act VIII of 1859, and has no bearing on the point in question. In this view of section 157, Civil Procedure Code (Act XIV of 1882), the Small Cause Court has wrongly refused to exercise the power given it by that section, and it is, therefore, a proper case for the exercise of our extraordinary jurisdiction.

We must discharge the order refusing the application, and send back the case for a decision on the merits. Costs to be costs in the application.

Order discharged.

(1) L. R., 7 All., 538. (2) L. R., 5 I. App., 233.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

GOVINDRA'M AND OTHERS, DECREE-HOLDERS, *v.* TA'TIA, JUDGMENT-DEBTOR.*

1895. *March* 12.

Limitation Act (*XV of* 1877), *Secs.* 7 *and* 8, *and Art.* 179—*Decree—Execution—Joint decree-holder—Minority of joint decree-holder—Application for execution after attaining majority—Civil Procedure Code* (*Act XIV of* 1882) *Sec.* 231.

Govindrám and his two minor nephews, Shankarlál and Davlatrám, obtained a decree on 1st December, 1885. Govindrám applied for execution on the 24th November, 1886, and died in May, 1887. Shankarlál attained majority on the 15th December, 1891, and on the 24th July, 1894, applied for execution, no application having been made since May, 1886.

Held, that the application was not barred by limitation. Under section 231 of the Civil Procedure Code (Act XIV of 1882), Shankarlál was entitled equally with the other judgment-creditors to apply for execution of the whole decree for the benefit of all the decree-holders; and as he was a minor when the decree was passed, and when the last application for execution was made, he was entitled to the benefit of section 7 of the Limitation Act (XV of 1877), and could apply for execution within three years of attaining majority. Section 8 of the Limitation Act (XV of 1877) applies only to those cases in which the act of the joint owner is, *per se*, a valid discharge. Section 7 applies where only some of the judgment-creditors, and not all, are affected by a legal disability.

* Civil Reference, No. 1 of 1895.