Luckmidas Vithaldas Vs. Ebrahim Oosman

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Court : Mumbai

Decided On : Jul-05-1878

Reported in : (1878)ILR2Bom644

Judge : Michael Westropp, C.J. and ;Bayley, J.

Appellant : Luckmidas Vithaldas

Respondent : Ebrahim Oosman

Judgement :

Michael Westropp, C.J.

1. The Civil Procedure Code of 1859, Section 119, provided that no appeal should lie from a judgment passed ex parte against a defendant who did not appear, or from a judgment against a plaintiff by default for non-appearance; but it gave power to the parties to apply to the Court, by which the judgment was passed, to set aside the judgment. The concluding portion of the section is in these words: 'In all cases in which the Court shall pass an order, under this section for setting aside a judgment, the order shall be final; but in all appealable cases, in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision of the suit would be appealable.' It, therefore, appears that, although there was no appeal against the judgment, yet there was an appeal where the Court rejected an application to set aside a judgment. That was the rule as to ex parte decrees generally.

2. Section 363 of the same Code (VIII of 1859) provided that no appeal should lie from any order passed in the course of a suit and relating thereto prior to decree; but, if the decree were appealed against, any error, defect, or irregularity in any such order affecting the merits of the case, or the jurisdiction of the Court, might be set forth as a ground of objection in the memorandum of appeal. Section 364 of the same Code runs thus: 'No appeal shall lie from any order passed after decree and relating to the execution thereof except as is hereinbefore expressly provided.' That latter section was afterwards varied by Section 11 of Act XXIII of 1861.

3. Subsequently to the passing of the Code of 1859, the Bills of Exchange Act (V of 1866) was passed. One of the provisions of that Act (section 4) gave this Court power, under special circumstances, to set aside the decree made in a suit brought under that Act, and to give leave to the defendant to appear and to defend the suit: so that, although a defendant had not come in within seven days, as required by the Act, yet he might, under this section, appear and make his defence on the decree against him being set aside.

4. The Legislature in the new Code of 1877 has consolidated the provisions of the old Code of 1859 and of the summary Bills of Exchange Act (V of 1866).

5. In the provisions relating to the setting aside of ex-parte decrees, the new Code of 1877 departs from the provisions contained in the Code of 1859. This latter, by Section 119, expressly prohibited appeals against ex-parte decrees. The former does not contain any such prohibition; and Section 540 is wide enough to sanction such appeals. Section 108 embodies a portion of Section 119 of the old Code, and permits a defendant, against whom an ex parte decree has been passed, to apply to the Court to set it aside; but it contains no provision forbidding an appeal against the Court's refusal of such an application. Section 534, which is a portion of the chapter (XXXIX) of the Code of 1877 substituted for Act V of 1866, provides that the Court may, under special circumstances, set aside the decree, stay execution and give the defendant leave to appear and defend the suit.

6. If the Court make an order to set aside the decree, stay execution, and give leave to the defendant to appear and defend the suit, we think the Court 'affects the decision of the case,' and by refusing to do so it also 'affects the decision of

the case,' inasmuch as it thereby upholds the decree against the party applying to have it set aside. We make this observation with especial regard to Section 591 to which we shall presently advert.

7. Section 588 deals with what may be styled immediate appeals from orders, and it specifies the cases in which such appeals are allowed, amongst which our attention has been particularly called to those mentioned in clauses f and u; but we do not perceive how any argument can be founded on them, which ought to lead us to infer that Section 591 is inapplicable to such an order made after decree as that sought to be appealed against in the present case. Section 588 also contains an express prohibition of immediate appeals from any other orders than those specified in that section. The term 'immediate appeal' is not used; but Section 591 shows that such an appeal is meant, for it provides that if any decree be appealed against, any error, defect, or irregularity in such order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. That provision is, in substance, the grant of an ultimate appeal against any order affecting the decision of the case, but making such ultimate appeal contemporaneous with an appeal against the decree.

8. It is most important to observe that the words 'prior to decree,' which appeared in Section 363 of the old Code, are omitted from Section 591 of the Code of 1877, and thus that section is left applicable to orders affecting the decision of the case, whether such orders were made before or after the decree. The words 'affecting the decision of the case' are substituted for the words 'affecting the merits,' which appear in Section 363 of the Code of 1859. This latter alteration appears to us to be rather more verbal than material.

9. Section 7 of Act V of 1866 rendered the provisions of the Civil Procedure Code of 1859 and the rules made under it, applicable to proceedings taken under Act V of 1866, so that a defendant, against whom an ex parts decree under that Act had been passed, was entitled, under Section 7, to take advantage of the provisions of Section 119 of the Civil Procedure Code of 1859 and to apply to the Court to set such decree aside. If he did not succeed in his application, he had the right, under the same section, to appeal against the order of refusal. It appears to us that the

object of the Legislature in omitting from Section 591 of the new Code the words 'prior to decree,' which were in Section 363 of the old Code, was to allow the defendant, when appealing--as we think he has a right to do--against the decree, to appeal also against the order made after the decree refusing to set the decree aside. That is probably the reason why a special provision was not made, in Section 588, for an immediate appeal in cases of this kind. It would be useless to give the right to appeal against the order of refusal, unless there was also given an appeal against the decree. We have consulted our brother Sargent, and he has come to the same conclusion upon this question, which we admit to be not free from doubt and difficulty, but we think we are giving the proper construction to the provisions of the Code. The appeal must be admitted. Costs of this motion to be costs in the appeal.