

BasiruddIn Mondal Vs. Sonauallah Mondal

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Court : Kolkata

Decided On : Feb-18-1910

Reported in : 6Ind.Cas.154

Judge : Mookerjee and ;Teunon, JJ.

Appellant : BasiruddIn Mondal

Respondent : Sonauallah Mondal

Judgement :

1. We are invited in this Rule to discharge an order made by the Small Cause Court Judge of Jhenidah, the effect of which is to set aside an ex parte decree made on the 7th August 1908. The facts material for our decision are all matters of record and are really not open to doubt or dispute. The petitioner brought a suit in the Small Cause Court at Jhenidah against the defendant for recovery of a sum of money, and on the 7th August 1908, obtained an ex parte decree. His case is that execution was subsequently taken out and on the 14th December, a sum of Rs. 4 Was realised by the attachment and sale of some movables of the judgment-debtor. On the 15th March 1909, the defendant made an application to set aside the ex parte decree., which is the foundation of the proceedings now before us. In this application, he alleged that he had never taken a loan from the plaintiff, that he had no knowledge of the suit, that the processes had been suppressed, that an ex parte decree had been fraudulently obtained and that subsequently without the issue of any process in execution, a fraudulent entry had been made in the

execution records to the effect that a sum had been realised by attachment and sale of his movable properties. He further alleged that he became aware of these circumstances on the 26th February 1909 and prayed that the ex parte decree might be set aside. This application was originally presented in the Court of the first Munsif at Jhenidah but was returned in the first instance for a fuller statement of details. The information required was furnished. But subsequently the application was returned for presentation to the proper Court. On the 27th March 1909, the application was re-filed in the Court of the second Munsif who had made the ex parte decree which was sought to be set aside, The application, however, was treated as one to set aside an ex parte decree in an ordinary money suit and was apparently registered as such by the Court officer. The mistake was not discovered, so far as we can gather from the materials on the record, till the 7th August 1909, and on that date the officer of the Court, upon discovery of the mistake, amended the petition so as to convert it into an application to set aside an ex parte decree made by the Court in the exercise of its Small Cause Court jurisdiction. On the 7th August, upon objection verbally taken by the plaintiff, the defendant was asked to deposit the necessary security under Section 17 of the Small Cause Courts Act, and was in the first instance allowed time till the 14th August. On that date, he obtained further time; on the 28th August he carried out the order of the Court and deposited Rs. 78-12, which represents the entire amount of the judgment debt. His application was then heard on the merits and the Small Cause Court Judge set aside the ex parte decree. We are now invited to discharge that order substantially on two grounds, namely, first, that the application was on the face of it barred by limitation and ought not to have been entertained; and, secondly, that the judgment-debt was deposited after the expiry of the time prescribed by Section 17 of the Small Cause Courts Act, and that the Court had no power to extend the time for such deposit.

2. In support of the first ground upon which the order of the Small Cause Court Judge has been challenged, the learned Vakil for the petitioner has relied upon Article 164 of the second Schedule of the Limitation Act of 1877. He has assumed that the provisions of the Act of 1877 are applicable, inasmuch as the ex parte decree was made at a time when that Act was in force, although the application to set aside the decree was made after the Act of 1908 came into operation. It is not

necessary for us to consider whether the provisions of the Act of 1877 or those of 1908 are applicable, because we are of opinion that whichever provision is applied, the application to set aside the ex parte decree is not open to objection on the ground of limitation. If we examine Article 164 of the Act of 1877, it becomes clear that the application has been made amply within time. Article 164 provides that an application by the defendant for an order to set aside judgment exparte must be made within thirty days from the date of executing any process for enforcing the judgment. The learned Vakil for the petitioner has contended that on the 14th December 1908, a process in execution was enforced, and that consequently time runs from that date. But it must not be overlooked that the defendant, in his application to set aside the ex parte decree, alleged that the proceedings of the 14th December 1908, were fraudulent, and that there was in fact at that time no attachment or sale of any of his movable properties. The learned Vakil for the petitioner has, however, argued that when a party comes into Court and alleges that an entry made in a judicial record is fraudulent, his application ought not to be entertained till the Court has held a preliminary enquiry and has satisfied itself that the charge is true. In support of this position, reliance has been placed upon the case of Bhoobunessury v. Judobendra Narain Mullick 9 C. 869. It is not necessary for our present purpose to consider whether the rule laid down in that case may not be open to criticism, because the present case is clearly distinguishable. In that case, there was no evidence adduced on the part of the applicant to show that the processes of the Court had not been served as shown by the record, and under these circumstances, the learned Judge held that the provisions of Section 114 of the Indian Evidence Act raised a presumption in favour of the legality, of the proceedings. In the case before us, on the other hand, the petitioner alleged and proved by his own sworn testimony that the proceedings in the suit as well as in the execution were fraudulent. We may further point out that in the case of Rahimbhoy Habibbhoy v. Turner 17 B. 341 : 20 I.A. 1, it was ruled by the Judicial Committee that in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought; and mere suggestion of his having been defrauded, does not amount to such

knowledge as is required by Section 18 of the Indian Limitation Act, 1877. In the case before us, if the testimony of the defendant is believed--there is no reason why that testimony should be distrusted--the case is one of gross fraud, and this may be one reason why the petitioner has not ventured to take his oath as to the service of the processes in execution on the 14th December 1908. We must, therefore, hold that if Article 164 of the Act of 1377 applies, the application is not open to the objection of limitation; We may add, however, that we are inclined to the view that the article which is really applicable is Article 164 of the Act of 1908, which was in full force and operation when the application to set aside the ex parte decree was made. That article provides that an application by a defendant for an order to set aside a decree passed ex parte must be made within thirty days from the date of the decree, or where the summons was not duly served, from the time when the applicant has knowledge of the decree. If it is assumed that the applicant had knowledge of the decree on the 26th February 1909, any application presented on the 15th March following would obviously be in time. But it has been suggested that the applicant became aware of the decree before the 26th February 1909. Against this, we have the sworn testimony of the petitioner that his application was presented about fifteen days after the date when he first became aware of the decree. If, therefore, the provisions of the Act of 1908 apply, the application is not open to objection on the ground of limitation. We do not, however, hold that the applicant became aware of the decree before the 26th February 1909. It is obvious from the circumstances already narrated, that he first became aware of the decree as a decree made by a Court of Small Causes so late as the 7th August 1909. Time, therefore, ought to run, in our opinion, from the latter date. In this view, there is no foundation for the objection of limitation. The first ground, therefore, upon which the order of the. Small Cause Court is assailed must be overruled.

3. The second objection appears to us to be equally groundless. It is perfectly true that in the case of *Jogi Ahir v. Bishen Dayal Singh* 18 C. 83, it was ruled by this Court that the provisions of Section 17 of the Provincial Small Cause Courts Act are mandatory and that an application to set aside an ex parte decree must be accompanied by the necessary security or deposit. The same view has been adopted by the Allahabad High Court in the case of *Jagannath v. Chet Ram* 28 A.

470 : 3 A.L.J. 318 : A.W.N. (1906) 93 and by the Bombay High Court in the case of Somabhai Hirachand v. Wadilal Premchand 9 Bom. L.R. 883, although a contrary view had been adopted in Madras in the case of Rama Sami v. Kurisu 13 M. 178. The present case, however, does not fall within the scope of any of these decisions, but is, in our opinion, completely covered by the decision of this Court in the cases of Jeun Muchi v. Budhiram Muchi 32 C. 339 : 1 C.L.J. 43, where it was ruled that if an application under Section 17 of the Provincial Small Cause Courts Act is filed without security, which is subsequently furnished within the time prescribed by the law of limitation for an application and deposit of the decretal amount or security, the applicant has a right to have his application heard on the merits. Now, in the case before us, the application was originally presented in the Court of the first Munsif on the 15th March 1909, where it remained pending for some days. It was then re-filed in the Court of the second Munsif, but it was by oversight registered as an application to set aside an ex parte decree in an ordinary money suit, and it was not till the 7th August that the mistake was discovered. In these circumstances for the purpose of limitation, the petitioner is entitled to the benefit of the provisions of Section 14 of the Limitation Act, which provides that in computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the relief, shall be excluded where such proceeding is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. The learned Munsif would have been in order, if he had directed on 7th August 1909 that the petitioner should file a new application in his Court on the Small Cause Court side. If that had been done on the 7th August, no question of limitation could arise in view of the provisions of Section 14, as the petitioner would have been entitled to a deduction of time from the 15th March to the 7th August. If the application, therefore, is treated as presented on the 7th August 1909, no question arises as to the deposit having been made beyond the period prescribed by Section 17 of the Small Cause Courts Act, because as we have already held, it was on that date that the petitioner first became definitely aware of the fact that an ex parte decree had been made against him by the Small Cause Court Judge. The second ground,

therefore, completely fails.

4. The result is that the order of the Court below must be affirmed and this Rule discharged.

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