

(1936) 02 CAL CK 0002
In the Calcutta High Court

Bhola Nath Roy Chaudhury and Others	APPELLANT
Vs	
Haji Syed Muhammad Mashud and Others	RESPONDENT

Date of Decision : 04-02-1936

Acts Referred:

Bengal Tenancy Act, 1885 — Section 174(3)
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : 171 Ind. Cas. 479

Hon'ble Judges : S.K. Ghose, J;Edgley, J

Bench : Division Bench

Judgement

1. The petitioners in this Rule are the judgment-debtors in a rent execution case. They made an application u/s 47 of the CPC and Section 174 of the Bengal Tenancy Act for having a sale set aside on the ground inter alia that the execution proceedings were without jurisdiction and that there was suppression of the sale processes, in consequence of which the tenancy in arrears was sold at an inadequate price. On February 16 1935, the learned Munsif passed the following order upon the application:

Register. Inform Pleader. Put on March 30, 1935, for hearing. Petitioner to deposit the decretal amount before that date. In default, the case will stand rejected. Confirmation be stayed till that date.

2. Subsequently the petitioners applied to the Court for a re-consideration of the order for deposit. But on March 30, the learned Judge decided that the application could not be entertained without such deposit. Against that decision the present Rule has been obtained.

3. It may be stated at the outset that the order of February 16, does not purport to have been made in the exercise of the Court's inherent jurisdiction. The subsequent order of March 30, which is complained against makes it quite clear that the learned Judge proceeded upon an interpretation of Section 174, Sub-section (3) of the Bengal Tenancy Act, taking the view that he was bound to follow the decision in Kuloda Prasad Majumdar and Another Vs. Kumar Prativa

Nath Roy and Others, rather than that in Mofijuddin Muhuri Vs. Mofizuddin, . The question therefore, arises whether under the provisions of Sub-section (3) of Section 174, the applicant is bound to make the deposit at the time of making the application. The question turns upon the interpretation of the word 'allowed', in Clause (6) of Sub-section (3). In Mofijuddin Muhuri Vs. Mofizuddin, it was held that 'allowed' is equivalent to 'granted' and is not the same thing as 'admitted' occurring in Sub-section (5). The judgment in Kuloda Prasad Majumdar and Another Vs. Kumar Prativa Nath Roy and Others, to which I was a party, expressed a doubt as to the correctness of the above view and suggested that the word 'allowed' should be read in the sense of 'entertained'. This, however, was not a decision in that case and it was successfully distinguished in a subsequent case, namely the case of Gunarberinissa Choudhurani and Others Vs. Gopendra Prasad Sukul and Another, . Our attention has been drawn to the fact that the same view has been taken by Cunliffe and Henderson, JJ. in a subsequent case, namely Ajit Kumar Basu Vs. Surendra Nath Mandal and Others, . All the direct decisions, therefore, are to the effect that the word allowed in Clause (6) means 'granted' and that it is not necessary for the applicant to make the deposit at the time of making the application as a condition precedent to his application being entertained. Speaking for myself, I do not feel pressed by the doubt which has given expression to in Kuloda Prasad Majumdar and Another Vs. Kumar Prativa Nath Roy and Others, and having had an opportunity of re-considering the matter, I am not prepared to hold that the direct decisions on the point in the cases mentioned above should not be followed. The difficulty has arisen because it has been necessary to consider the intention of the Legislature which is to discourage frivolous applications. If 'allowed' were read in the sense of 'entertained', the procedure would be simpler than if it was read in the sense of "granted". But the difficulty created by the language remains. At the same time it seems to me that the aforesaid intention of the Legislature is not inconsistent with the position that there should be a distinction made between the initial stage of the application and the subsequent stage of appeal. At the initial stage the applicant has got to establish, first, his locus standi to make the application; secondly, that there has been material irregularity or fraud, and thirdly, that there has been substantial injury resultant therefrom when he has established these three things the Court may 'allow' the application subject to his making the deposit, unless he satisfies the Court for reasons to be recorded by it in writing that no such deposit is necessary. As Lord-Williams, J. pointed out in Mofijuddin Muhuri Vs. Mofizuddin, this very provision connotes that there should be same consideration on the merits, otherwise the Court may not be in a position to decide whether the deposit is necessary or not. It is not unreasonable that at the appeal stage the condition as to deposit should be more stringent, the applicant having once failed at the initial stage. So whether the appeal is heard on the merits or not, he must make the deposit at the time of making the appeal. Otherwise no such appeal shall be admitted unless the appellant deposits such amount in Court. By way of analogy I may refer to the provisions, of Section 148(k)(4) where the language

of the section makes it quite clear that after the application had been made and heard

and the Court, if it is satisfied that summons was not duly served and that there is prima facie evidence of a bona fide defence, may, upon his depositing one-half of the amount recoverable under the decree, make an order setting aside the decree, as against him...etc.

4. I may also refer to Section 153A for a contrary position. There it is clearly stated that the application shall not be admitted

unless the applicant, has at or before the time when the application is admitted, deposited in the Court to which the application is presented the amount if any, which he admitted to be due from him to the decree-holder, or such amount as the Court may, for reasons to be recorded by it in writing, direct ?or? unless the Court, after considering the statement of injury, is satisfied, for reasons to be recorded by it in writing, that no such deposit is necessary.

5. It is noteworthy that this statement upon which the deposit may be excused is to be contained in the application itself. In these two sections the language used does not leave any doubt as to the meaning which cannot be said with regard to the section under notice. But as has been pointed out in the decided cases, the language of the proviso to Sub-section (3) of Section 174, as also the language used in the succeeding Section 174(A)(1) and (2) gives an indication that there is a difference between ?allowing? an application and ?admitting? it. It seems to us, therefore, that the view taken in the decided cases should be followed and it is not necessary that the deposit should be made before or at the time of making the application.

6. In this view the Rule must be made absolute and the order complained against must be set aside. The case will be remitted to the trial Court to proceed according to law.

7. There will be no order for costs.