

(1905) 12 CAL CK 0019
In the Calcutta High Court
Case No : Rev. No. 1116 of 1905

Dilbasi Koer

APPELLANT

Vs

Deorati Koer

RESPONDENT

Date of Decision : 19-12-1905

Acts Referred:

Citation : (1905) 12 CAL CK 0019

Judgement

1. It Appears that on the 24th August 1904, certain proceedings in which the Petitioners were the first party terminated in an order in their favor; and in that order it was directed that they should recover costs from the opposite party. The costs were not then assessed and it was not till an application was made on the 15th June 1905 that costs were finally assessed on the 26th July 1905. That order, we understand, was passed without notice to the opposite party and on the 2nd September the opposite party put in a petition of objection praying (4) ILR 28 Cal. 302 (1900) that the order should be set aside. On the same date, the Deputy Magistrate cancelled the order of the 26th July relying on the case of Bhojal Sonar v. Nirban Singh ILR 21 Cal. 609 (1894). The Petitioner applied to this Court and obtained a rule on the District Magistrate to show cause why the order of the Sub-divisional Magistrate of Aurangabad, dated the 2nd September 1905, should not be set aside on the ground that after he had passed on the 26th July 1905 an order assessing costs in favor of the Petitioners and had directed the issue of a distress warrant for the realization of those costs, he had no jurisdiction subsequently to withdraw the warrant or set aside his order assessing costs.

2. The attention of the Magistrate does not appear to have been drawn to the case of Binoda Sundari v. Kali Kristo ILR 22 Cal. 387 (1895) or to the case of Mahomed Ershad Ali Khan v. Saroda Prosad ILR 23 Cal. 37 (1895) which would have satisfied him that though he was not the Magistrate who actually passed the order under sec. 145, he still had jurisdiction to assess the costs.

3. The only question which it might have been necessary for him to consider was

whether, if there had been an unreasonable delay in applying for the costs, he would have been justified in the exercise of his discretion in refusing to assess the costs then. This, however, he does not appear to have considered; and we hold that after he had passed an order on the 26th July assessing the costs, he had no jurisdiction on the 2nd September to set aside that order.

4. We make the rule absolute to the extent of setting aside the order passed on the 2nd September.

5. It has, however, been brought to our notice that as the order of the 26th July was passed without notice to the opposite party, that order should be cancelled on the authority of the decision of this Court in the case of Prokash Chandra Sarkar v. Ram Prosad Pattuk (4).

6. The order of the 2nd September was passed on a petition objecting to the order passed on the 26th July on the ground that it had been issued without notice; and we, therefore, think that in making the rule absolute and setting aside the order of the 2nd September, we should also follow the course adopted by this Court in the case of Prokash Chandra Sarkar v. Ram Prosad Pattuk (4) and set aside the order passed on the 28th July on the ground that it was passed without notice to the opposite party. We direct that the Magistrate do now proceed after due notice to both the parties to fix a date and then to determine the costs the Petitioners are entitled to, and issue orders accordingly.