
(1916) 05 CAL CK 0034
In the Calcutta High Court

Gangadhar Karmakar and Others

APPELLANT

Vs

Shekharbasini Dasya and Others

RESPONDENT

Date of Decision : 01-05-1916

Acts Referred:

Bengal Tenancy Act, 1885 — Section 153
Limitation Act, 1963 — Section 12

Citation : 35 Ind. Cas. 348

Hon'ble Judges : Lancelot Sanderson, C.J.; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Lancelot Sanderson, C.J.—The whole of this matter arises out of the fact that on the 21st of February 1916, when an application for a review of a certain judgment was made, the fee of Rs. 1-2-0 was paid instead of a fee of Re. 2-4-0. The first point with reference to that, which was made by the learned Vakil for the respondent, was that the Article in the Statute of Limitation says that the time is ninety days from the date of the decree, which must be taken, by reason of another provision, to be the same date as the pronouncement of the judgment. That would be so, but for the fact that Section 12 of the Limitation Act provides that in computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment (as in the case here) the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed shall be excluded." In my judgment, that is a specific direction which has reference not only to an appeal but to an application for a review of judgment and even though the rules do not prescribe that a copy of the decree should be attached to the application, there is this specific direction contained in the Statute that the time requisite for obtaining a copy of the decree shall be excluded; and inasmuch as the decree was not signed until the 6th of January 1916, in my opinion the period of limitation would not commence to run until at all events that day in January 1916. Consequently the payment, which was made on the 8th" of March 1916, of

the additional fee of Re. 1-2-0 would be within time. Therefore the first point which the learned Vakil for the respondent takes fails.

2. The second point is that under Chapter XI, Rule 4, of the High Court Rules, Appellate Side, the appellant, to whom was handed a certificate by the Deputy Registrar that his application was irregular ought to have moved the High Court within seven days from the date upon which the Deputy Registrar handed him the certificate. The words of the rule are, within seven days from the date of such certificate the applicant, either in person or by a Vakil or Advocate, shall present the application by way of motion in open Court to the Division Court of whose judgment a review is sought." The learned Vakil, when I asked him what was meant by the word application, agreed that that could only mean an application for review. I think that is the correct interpretation. It is clear to me that that rule was intended to apply to the case where the Deputy Registrar gives a certificate that all the proceedings were in order and not to cases where the certificate of the Deputy Registrar was to the effect that the proceedings were not in order. As was pointed out by Mr. Justice Mookerjee, if the appellant under these last mentioned circumstances came to the High Court on an application for review of judgment, he would at once be met with the answer that the High Court would not hear the application it not being in order, having regard to the certificate of the Deputy Registrar. Therefore, in my opinion, that point is not a good one. It was next argued the application should not be heard by this Court now, because the Chief Justice of this Court can only hear an application for review if it is impossible for the Court which passed the judgment to hear it, or at all events, if there is not one of the Judges who decided the appeal available for the purpose. It appears that the additional fee was not paid until the 8th of March of this year. Until then the Registrar was not in a position to certify that the proceedings were in order. Until that moment no application could be made for review of judgment and inasmuch as Mr. Justice Mullick retired from this Court on the 29th of February 1916 and Mr. Justice Holmwood went on furlough on the 10th of March, two days after this matter was put in order, there was no time to make the application to either of the Judges. I, therefore, think that the application may be made to this Court and for the reasons above mentioned it is not out of time.

Asutosh Mookerjee, J.

3. I agree.

4. Their Lordships then proceeded to hear the appeal.

5. Babu Baranashi Basi Mukherjee, for the Appellants-Petitioners, relied upon Section 153, Bengal Tenancy Act, Bindeswari Prosad Singh v. Lakpat Nath Singh 8 Ind. Cas. 26 : 15 C.W.N. 25 and the cases therein cited. The case of Bhagabati Bewa v. Nanda Kumar Chuckerbutty (2) upon which reliance had been placed in the judgment under review, was clearly distinguishable, as there the Judge in appeal had not needed any of the questions mentioned in Section 153.

6. Babu Sarat Chandra Roy Chaudhri (with him Babu Dhircndra Krishna Roy for Babu Sasadhar Roy), for the Opposite Party, relied upon Bhagabati Bewa v. Nanda Kumar Chucherbutty 12 C.W.N. 835 and Amrito Lal Mukherjee v Ram Chandra Roy 29 C. 60. At any rate the learned Judge in the lower Appellate Court had jurisdiction to deal with the matter under the proviso to Section 153, Bengal Tenancy Act. He dismissed the application for revision under that proviso only because he thought that my client ought to succeed in the appeal. If the appeal be held to be incompetent, he should be asked to deal with the matter in the exercise of his powers of revision.

7. Babu Baranashi Bashi Mukherjee, being, called upon to reply only on the question of revival of the petition for revision before the District Judge, said:

8. The jurisdiction under the proviso to Section 153 is entirely discretionary, and when the lower Appellate Court dismissed the application under that section your Lordships should not interfere. Moreover, the application before the District Judge did not raise any question of jurisdiction and was as such incompetent. The decision of the Munsif might have been wrong in fact or in law or in both. But that would not give jurisdiction to the District Judge to correct the decision in exercise of his powers under the proviso to Section 153, which is exactly the same in its terms with Section 115 of the Code of Civil Procedure.

Lancelot Sanderson, C.J.

9. In this case the facts are a little peculiar. The action was brought by the plaintiff against the first defendant who is her father and the second defendant who is her husband, and the action was brought for arrears of rent. The plaintiff alleged that she had purchased the property from the superior landlord of the first defendant, her father, on the 1st September 1908, and she sued for four years' arrears of rent--two before the purchase and two after the purchase.

10. The defence set up by the first defendant, the plaintiff's father, was that the land had not been purchased by the plaintiff at all but that he himself was the purchaser and that the purchase had been carried through in the name of his daughter, the plaintiff. When the case came before the Court of first instance, this issue, as to whether the plaintiff was the owner in her own right and in the interest which she claimed or whether she was simply a nominee of her father, was raised; but the learned Munsif did not deal with it. He expressly said that he did not deal with the question of title; but he said that inasmuch as the plaintiff had not proved the receipt of any rent from the first defendant he was justified in giving judgment for the defendant against the plaintiff. Thereupon the plaintiff appealed to the District Judge and, besides appealing, she made an application at the same time as the appeal under the proviso of Section 153 of the Bengal Tenancy Act.

11. On the hearing of the appeal it was urged before the learned District Judge on behalf of the defendant that it was not competent for the plaintiff to appeal, because the case had been heard by the Munsif in pursuance of Section 153,

Clause (&), the Munsif being a Judicial Officer especially empowered by the Local Government to exercise final jurisdiction under this section and the amount claimed in the suit not exceeding fifty rupees. It was urged that those being the facts no appeal lay from the decision of the learned Munsif. On the other hand, the plaintiff said that an appeal did lie, because, she urged, the learned Munsif had decided a question relating to the title to the land, and the learned District Judge came to the conclusion that the learned Munsif had decided a question relating to the title to the land and, therefore, he held that an appeal lay and he heard the appeal and decided that the truth lay on the side of the plaintiff, that she, in fact, was the purchaser of the superior landlord's interest in the land, and her father was liable to pay the rent for which she was suing. The application for revision under the proviso of Section 153 naturally, was not pressed, because the plaintiff got all that she wanted, she having succeeded in the appeal, and that application was dismissed each party paying his own costs. Then the defendant appealed to the High Court and the High Court decided, first, that the learned District Judge was wrong in holding that there was an appeal from the learned Munsif to himself, and inasmuch as there was no appeal from the Court of first instance to the learned District Judge there was no appeal from the learned District Judge to the High Court and, on these grounds, the two learned Judges of this Court dismissed the appeal. An application was made to those two learned Judges on behalf of the defendant to exercise their powers of revision u/s 115 of the Civil Procedure Code, but they said that having regard to the nature of the case and the facts which the learned District Judge found, they did not intend to exercise their power of revision u/s 115.

12. Under those circumstances the defendant obtained a Rule from this Court for a review of the judgment of the two learned Judges of the High Court.

13. The first question we have to consider is whether the learned Judges were right in holding that inasmuch as there was no appeal from the learned Munsif to the District Judge there was no appeal from the District Judge to the High Court.

14. I agree with the decision that there was in this case no appeal from the Court of first instance to the learned District Judge, because the section says that an appeal shall not lie from any decree or order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent where (b)."(I have already read Clause (6) and I need not read it again)" unless in either case the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.... " As I have already said, in my opinion there was raised before the Court of first instance a question relating to title to land as between parties having conflicting claims thereto, but the Munsif expressly refrained from deciding that question. Therefore that question did not come within the words of the section, viz., where the decree or order decided a question relating to title to land as between parties having conflicting claims thereto. "

15. Then comes the second branch of the question whether the learned Judges

were right in holding that there was no appeal to this Court. In my judgment, with every respect to them, they were wrong. The judgment was based upon a decision, to which our attention was drawn this morning, in *Bhagabati Bewa v. Nanda Kumar Chuckerbutty* 12 C.W.N. 835 In that case the head-note is to this effect: "A suit by a co-sharer landlord for his share of the rent only, without making the other co-sharers parties, is a suit instituted by a landlord for the recovery of rent within the meaning of Section 153, Bengal Tenancy Act. Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsif who was especially empowered under Clause (b) of Section 153: Held, that no appeal lay to the Subordinate Judge and hence no second appeal from his decision reversing that of the Munsif." Now at the first sight that would appear to be material to this case. But when we look at the facts of the case it is clear that neither the learned Munsif nor the learned Judge of the first Appellate Court had decided a question of title to land: and as in that case neither of the Courts had decided that point, it may have been right to have held that if no appeal lies from the Munsif to the Subordinate Judge no appeal lies from the Subordinate Judge to the High Court." I express no opinion on that question, as it is not necessary for the purpose of this case to do so: for in the present case the learned District Judge had decided a question of title between the parties and, therefore, in my judgment the case clearly comes within Section 153 which, I may repeat, says that an appeal shall not lie from any decree or order passed, whether in the first instance or on appeal...unless in either case the decree or order has decided a question relating to title to land. In this case it seems to be obvious that on appeal there was a question of title decided by the learned District Judge. Therefore, the case comes within the express provision of that section and an appeal did lie from the learned District Judge to this Court. Therefore, the position is this. It being decided that an appeal does lie from the District Judge to this Court and it having been already decided that there was no appeal from the learned Munsif to the learned District Judge, the consequence is that the decision of this Court must be set aside and as a natural consequence the decision of the learned District Judge must also be set aside.

16. I should be sorry if the matter had to rest there, because one cannot disregard the finding of the learned District Judge, who has investigated the case and has come to the conclusion that the plaintiff is entitled to the relief which she sought in this case and has found that the truth lay on her side and that she was the real purchaser of this property, and I am glad to find that it is open to us to direct further investigation of the matter. It is not disputed by the learned Vakil for the defendant that we have jurisdiction to send this case back to the District Judge for further enquiry to be made either by himself or, if he thinks right, by the learned Munsif, and we think that the proper course to adopt is that this matter should be sent back to the learned District Judge in order that he may investigate the application, which was made under the proviso of Section 153 for the revision of the judgment of the learned Munsif. That proviso is to this effect: "The District Judge may call for the record of any case in which a judicial officer

as aforesaid has passed a decree or order to which this section applies, if it appears that the Judicial Officer has exercised a jurisdiction not vested in him by law, or has failed to exercise a jurisdiction so vested or has acted in the exercise of his jurisdiction illegally or with material irregularity, and may pass such order as the District Judge thinks fit."

17. Therefore, this case will go back to the District Judge, and if he has sufficient material already before him to enable him to deal with the application under the proviso of Section 153, of course he will deal with it. But if he thinks that it will be necessary to refer the matter to the learned Munsif for taking evidence as to the facts which may be necessary for making the further enquiry, he will do so.

18. The result of my decision is that the judgment of the High Court and that of the District Judge must be set aside, and the defendant must have the costs of this Rule (hearing fee two gold mohurs) and also the costs of the appeal to the High Court as well as the costs of the appeal to the learned District Judge.

Asutosh Mookerjee, J.

19. I agree that this application for review of judgment must be granted, as the proceedings throughout this litigation have been characterized by a succession of inexplicable errors.

20. The plaintiff instituted the suit to recover arrears of rent from her father. The amount claimed did not exceed Rs. 50 and the suit was tried by a judicial officer specially empowered by the Local Government to exercise final jurisdiction u/s 153 of the Bengal Tenancy Act. The defendant pleaded that the plaintiff had no title to the rent claimed, inasmuch as the interest of the superior landlord had been purchased not by the plaintiff but by himself. On this state of the pleadings, a question clearly arose "relating to an interest in the land as between parties having conflicting claims thereto." The Trial Court, however, declined to investigate this point and dismissed the suit, on the ground that as the plaintiff had failed to prove realization of rent from the defendant in previous years, she was not entitled to succeed in her present claim. The first question is, did an appeal lie against this decree. Now in order to determine whether an appeal lies from a judgment passed by a Judicial Officer specially empowered by the Local Government to exercise final jurisdiction u/s 153 of the Bengal Tenancy Act, the test to be applied is, not whether one of the special questions mentioned in the section has been in controversy between the parties, but whether the decree has actually decided such a question. In the case before us, the judgment of the Trial Court makes it clear that the question of conflicting title was not decided. Consequently no appeal lay to the District Judge; yet an appeal was preferred to him. A preliminary objection that the appeal was incompetent was erroneously overruled; the appeal was heard on the merits, the judgment of the Trial Court was reversed and a decree was made in favour of the plaintiff on the ground that the interest of the superior landlord had been purchased by her and not by the defendant. A second appeal was then preferred to this Court, and a decree of the

District Judge was assailed on the ground that it had been made without jurisdiction. This was controverted by the respondent, who argued that the appeal to the District Judge was competent. This contention was rightly overruled on the authority of the decision in *Shilabati Debi v. Roderigues* 35 O. 547 : 12 C.W.N. 448. This Court, (Holmwood and Mullick, JJ.) however, did not give effect to the view that the appeal to the District Judge was incompetent, but proceeded to hold on the basis of the decision in *Bhagabati Bewa v. Nanda Kumar Chuckerbutty* 12 C.W.N. 835 that inasmuch as the decree of the District Judge had been passed without jurisdiction, the appeal to this Court was incompetent. The result was that the appeal to this Court was dismissed and the decree of the District Judge stood untouched. On the present application for review of judgment, we are invited to consider the correctness of this decision.

21. On behalf of the respondent, the view has been maintained that if an appeal has been heard without jurisdiction, no appeal lies from the appellate decree which must be deemed a nullity; reliance has been placed on the decision in *Bhagabati Bewa v. Nanda Kumar Chuckerbutty* 12 C.W.N. 835 and the observations in *Amrito Lal Mnkherjee v. Ram Chandra Roy* (3) 29 C. 60. In my opinion, the proposition formulated by the respondent is unsound in principle and is opposed to the authorities. It is clear that the observations in *Bhagabati Bewa v. Nanda Kugnar Chuckerbutty* 12 C.W.N. 835 though expressed in general terms, must be limited by the facts of the case then before the Court. The facts were such as made an appeal from the decision of the Trial Court to the Subordinate Judge incompetent, and the decision of the Subordinate Judge was also of such a character as made a second appeal to this Court incompetent u/s 153. That decision, when analysed, cannot rightly be regarded as an authority for the general proposition that if an appeal has been heard without jurisdiction no appeal lies against the appellate decree. The observations in *Amrito Lal Muhherjee v. Ram Chandra Roy* 29 C. 60 are also capable of a similarly limited interpretation. On the other hand, we have the decision in *Abdul Hossein v. Kasi Sahu* 27 C. 362 : 4 C.W.N. 41 where this Court heard an appeal against an appellate decree made without jurisdiction, and reversed the decision of the Court of Appeal below. That the Court was competent to do so is plain from the decision of the Judicial Committee in *Minakshi Naidu v. Subramanya Sastri* 14 I.A. 160 : 11 M. 26 : 5 Sur. P.C.J. 54 : 11 Ind Jur. 393. We have finally the decision in *Ranjit Misser v. Ramudar Singh* 6 Ind. Cas. 940 : 16 C.L.J. 77 in which this very question was discussed and the rule was laid down that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. See also *Jwala Prasad v. Salig Ram* 13 A. 575 : A.W.N. (1891) 158; *Walayat Husain v. Ram Lal* 25 Ind. Cas. 643 : 12 A.L.J. 1113. A decree made without jurisdiction possesses nonetheless the qualities of a decree as between the parties thereto, and if there is a statutory appeal from decrees made in suits of that character the decree does not become unassailable because it has been

made without jurisdiction. That an appeal lies against a decree made without jurisdiction is indeed also clear from the terms of Sections 99 and 115 of the Civil Procedure Code. In the case before us, as the Subordinate Judge had decided a question of interest in the land as between parties having conflicting claims thereto, an appeal did lie to this Court against his decree under the express provisions of Section 153. It is difficult to appreciate how that appeal could be nullified because the decree was vitiated by absence of jurisdiction in addition to other possible errors. I am clearly of opinion that the decision of this Court passed in appeal was consequently erroneous and that this Court should have reversed the decision of the District Judge on the ground that it had been passed without jurisdiction. This application for review must accordingly succeed and the decision of this Court must be set aside.

22. The result of our order is that the appeal to this Court stands revived for disposal under Order XLVII, Rule 8, of the Code of Civil Procedure. For reasons already assigned, that appeal must be allowed, the decree of the lower Appellate Court discharged and that of the Court of first instance restored. But the question arises, what further course, if any, should be adopted in the interest of justice. It is plain that the decision of the Trial Court was liable to be revised by the District Judge u/s 153 of the Bengal Tenancy Act. As a matter of fact an application for revision was presented to him, but when the appeal succeeded, the application was abandoned. Now that it has been held that the appeal was incompetent, the plaintiff should clearly be allowed to fall back upon the application, which may be deemed to stand revived; it will consequently be open to the District Judge to proceed on the basis of that application and to make such order as he is competent to pass u/s 153 of the Bengal Tenancy Act.

23. On these grounds I agree with the order proposed by the Chief Justice in this matter.