

(1938) 02 CAL CK 0021
In the Calcutta High Court

Haji Mohammad Kazibulla Mondal and Others

APPELLANT

Vs

Humayun Reza Chaudhury and Another

RESPONDENT

Date of Decision : 23-02-1938

Acts Referred:

Bengal Tenancy Act, 1885 — Section 174, 174(5)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1938 Cal 454

Hon'ble Judges : Edgley, J

Bench : Division Bench

Judgement

Edgley, J.—The only point for decision which arises in connexion with this rule is whether or not an appeal lies against the order of the learned Munsif of Jangipur, dated 2nd June 1937, by which he dismissed for default an application to set aside a Civil Court sale u/s 174, Ben. Ten. Act. The view taken by the learned Subordinate Judge of Murshidabad in his order dated 14th June 1937 is that no appeal lay against the order of the learned Munsif.

2. The learned advocate for the opposite parties places some reliance upon a decision of Mukherjee J. in Debrani Debya Vs. Kumar Sarat Kumar Roy and Others, in which the learned Judge held while sitting singly, that an "order dismissing for non-prosecution an application for setting aside an execution sale u/s 174, Ben. Ten. Act was not appealable. In that case however, Mukherjee J. gave no reasons for coming to this conclusion and he proceeded to deal with the matter before him u/s 115, Civil P.C.

3. In a later case, namely in Basaratulla Mean and Others Vs. Reazuddin Mean and Others, Page J. recorded certain observations to the effect that in dismissing an application for default when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not. Such an order in the opinion of the learned Judge is not appealable under Order 43, Rule 1 (i), Civil P.C. In the following year Page J. was a party to another decision of

this Court in *Basanta Kumar Adak Vs. Khirode Chandra Ghose*, . In that case his Lordship referred to the observations which he had recorded in *Basaratulla Mean and Others Vs. Reazuddin Mean and Others*, but he remarked that:

The position is entirely different where the application under Order 21, Rule 90, is dismissed either on the merits, or when the applicant does not appear but the opposite party appears and is ready to contest the application. In either of those circumstances, in my opinion, the order dismissing the application to set aside the sale is an order refusing to set aside a sale.

4. It was therefore held in that case that the order in question was appealable. A similar question was raised in *Banshidhar Durga Das Dutta Vs. Ishan Chandra Chatterji*, . In his judgment in that case, Mukherjee J. referred to the observations made by Judge J. in *Basaratulla Mean and Others Vs. Reazuddin Mean and Others*, and he said with reference thereto:

I am of opinion that there is no distinction in principle between an order passed on an application under Order 21, Rule 90 dismissing it for default either for non-appearance of one or for non-appearance of both the parties.

5. He therefore held that in either case an appeal lay from an order dismissing an application under Order 21, Rule 90 for default. In the case with which we are now dealing, the opposite parties were ready but the applicants did not appear after their application for time had been refused. The application u/s 174, Ben. Ten. Act was thereupon dismissed for default. In my opinion, this dismissal for default clearly amounts to a refusal to set aside the sale and in my view this case should be governed by the principles laid down by Mukherjee J. in *Banshidhar Durga Das Dutta Vs. Ishan Chandra Chatterji*, cited above. In this connexion, it is conceded by the learned advocate for the opposite parties that if it be admitted that the reasoning which has been adopted in *Banshidhar Durga Das Dutta Vs. Ishan Chandra Chatterji*, be correct on the question of whether an appeal lies from an order dismissing for default an application under Order 21, Rule 90, Civil P.C., it cannot be contended that different principles should be applied in the interpretation of Sub-section (5) of Section 174, Ben. Ten. Act, which reads as follows : "An appeal shall lie against an order setting aside or refusing to set aside a sale." With regard to this point, it may be noted that the language used in Section 174 (5), Ben. Ten. Act corresponds almost exactly with the language of Order 43, Rule 1 (i), Civil P.C. under which a right of appeal has been granted against an order under Rule 92, Order 21, Civil P.C. setting aside or refusing to set aside a sale.

6. In these circumstances stated above, I am of opinion that an order dismissing for default an application u/s 174, Ben. Ten. Act is appealable. I am fortified in this view by an unreported decision of S. K. Ghose J., in *Debendra Nath Goldar v. Gopal Chandra Das*, Civil Revn No. 320 of 1937 in which the learned Judge adopted a similar view. This rule must therefore be made absolute. The petitioners are entitled to the costs of this rule the hearing fee being assessed at

one gold mohur. It is ordered that the decision of the learned Subordinate Judge dated 14th June 1937 be set aside and the case be remanded to his Court with a direction that the appeal be reheard by him in accordance with law.