

(1919) 06 CAL CK 0029
In the Calcutta High Court

Hazari Lal alias Amrita Lal Ghosh

APPELLANT

Vs

Alap Sundari Dasi

RESPONDENT

Date of Decision : 24-06-1919

Acts Referred:

Citation : AIR 1919 Cal 16 : 53 Ind. Cas. 558

Hon'ble Judges : Ernest Fletcher, J; Cumming, J

Bench : Division Bench

Judgement

Fletcher, J.—This is an appeal preferred by the defendant. The plaintiff, who is a Hindu widow and the owner of 8-annas of a certain property with a limited interest, brought a suit against the brother of her husband to whose property she succeeded. The matter was referred to arbitration and agreement was arrived at between every body and was approved of by the arbitrators, and a decree was made with the consent of the parties. It was provided by the decree that the plaintiff had to execute in favour of the defendant a lease of the property in suit and on her doing so she would get certain nazars and certain rents. She then applied for execution of this decree. The application failed. The defendant, being successful, has appealed against the order of the learned Judge dismissing the application for execution, and the reason for the appeal is this, that although the learned Judge dismissing the application remarked that it was premature for the plaintiff to apply to execute the decree unless and until she had performed the duty cast upon her by the terms of the decree by executing and registering the lease in favour of the defendant, yet the learned Judge stated that if and when that happened, the decree was one that was capable of being put into execution. That is what the Judge means, because the Judge could not adjudicate on what would happen to the decree when the plaintiff had performed the duty cast upon her by the decree. The foundation of the appeal is this: The defendant says that he is aggrieved by the Judge having found that the decree was one which could at some subsequent date, if and when the plaintiff complied with the terms cast on her by the consent decree, be capable of execution. But in order to give the defendant right of appeal not only must he be aggrieved by the reasons given by

the Judge but the finding must be one that would operate as res judicata. It seems to me quite dear that the finding could by no possibility operate as res judicata. The Judge held that this application was premature and could not be determined by the Court until the plaintiff had complied with the conditions mentioned in the decree. Directly the Judge held that the plaintiff had not performed the duty cast upon her by the decree, the other remark that he made as to what would happen when the plaintiff had complied with the terms of the decree-whether the decree would be capable or incapable of being executed - is clearly not binding on the defendant and is obiter. I think there is no appeal in this case. The present appeal, therefore, fails and must be dismissed with costs; hearing fee three gold mohurs.

Cuming, J.—I agree.