

(1916) 08 CAL CK 0010
In the Calcutta High Court

Kali Kanta Chuckerbutty

APPELLANT

Vs

Shyam Lal Das Basu and Others

RESPONDENT

Date of Decision : 25-08-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92, Order 43 Rule 1(j), Order 9 Rule 9

Citation : 38 Ind. Cas. 598

Hon'ble Judges : Smither, J;Richardson, J

Bench : Division Bench

Judgement

Richardson, J.—This is a Rule by which the opposite party was called upon to show cause why the order of the District Judge of Backergunge, dated the 11th March 1916 should not be set aside. The order was made in the following circumstances:

In execution of a decree for rent passed on the 29th June 1914, the holding in arrears was sold on the 9th March 1915. The judgment-debtor then applied under Order XXI, Rule 90, to have the sale set aside. After some adjournments, the learned Munsif in the first Court, on the 29th May 1915, directed that the case should come on for final hearing on the 19th June 1915, and seated that no further adjournment would be granted. On the 19th June 1915, the judgment debtor did not appear and the application to have the sale set aside, was, therefor, dismissed for default. From that order the judgment debtor appealed to the District Judge and the District Judge, upon the appeal, made the order complained of.

2. In support of the Rule obtained by the auction-purchaser of the holding, it has been argued that no appeal lay to the District Judge and that the proper course was for the judgment debtor, the opposite party before us, to apply to the Munsif under Order IX, Rule 9 to have the dismissal order set aside.

3. It may be that it was open to the opposite party to take that course: Bhuben Behnri Nag v. Dharendra Nath 33 Ind. Cas. 581 : 20 C.W.N. 1203; but it would

also seem that if he had taken that course and if his application to have the order of dismissal set aside had been dismissed, he would have had no right of appeal under Order XLIII (1)(c) of the Code: Charu Chandra Ghosh v. Chandi Charan Roy 27 Ind. Cas. 492 : 19 C.W.N. 25. In our opinion, the course which he actually took, was also open to him. The order though it was an order, dismissing the application to have the sale set aside for default, was still an order within Rule 92 of Order XXI. Under Order XLIII, Rule (1)(j), an order under Rule 92, Order XXI, setting aside or refusing to set aside a sale is appealable. The language of Order XLIII, Rule (1)(i) is thus wide enough to cover a case where an application to have a sale set aside is dismissed for default. In support of this position, we may refer to the cases of Brojo Sundar Roy Chowdhury v. Moti Lal Mojumdar 5 Ind. Cas. 493 : 14 C.W.N. 573 : 13 C.L.J. 153 and Kumud Kumar Bose v. Hari Mohan Samadar 30 Ind. Cas. 45 : 21 C.L.J. 628. In our opinion, therefore, it cannot be said that no appeal lay to the District Judge, and we are accordingly unable on the ground suggested to interfere with the order made by him.

4. It is unnecessary to decide whether if the appeal had come before us, we should have made the order which the learned District Judge has made. He has set aside the order of dismissal for default and remanded the case for the admission of evidence and disposal on the merits. That order was one which the District Judge had jurisdiction to make and we express no opinion on the question whether his discretion was rightly or wrongly exercised.

5. It was further argued that the application to have the sale set aside was made out of time. That may be so, or it may not. The question is one which it will be for the Munsif to decide when he re-hears the case. On the materials before us, it would not be right that we should deal with this point.

6. The result is that the Rule must be discharged. Costs will abide the result. We assess the hearing-fee at three gold mohurs.

Smither, J.

7. I agree.