
(1940) 05 CAL CK 0023
In the Calcutta High Court

Kiran Chandra Das and Others

APPELLANT

Vs

Mati Lal Biswas and Others

RESPONDENT

Date of Decision : 31-05-1940

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167

Citation : AIR 1940 Cal 450

Hon'ble Judges : Sen, J

Bench : Division Bench

Judgement

Sen, J.—The petitioners purchased a holding with power to annul encumbrances on 21st March 1932. On 2nd February 1933, they applied under Section 167, Ben. Ten. Act, before the Munsif for the issue of two notices on the opposite parties declaring that the encumbrance had been annulled. The notices were issued and an order was recorded by the Munsif "Notices served. Service proved. No objection raised; let the case be disposed." They went to take possession but were resisted. On 1st October 1937, the petitioners instituted a suit for possession of the holding. Objection was taken that the encumbrance had not been annulled as the notices u/s 167 had not been properly served. The objection was upheld by the trial Court and the suit was dismissed. An appeal was taken by the petitioners to the District Judge and it is still pending. On 14th February 1939 the petitioners applied to the Munsif to issue fresh notices on some of the opposite parties. The learned Munsif has refused the application, and the petitioners moved this Court and obtained this rule. The learned Munsif has rejected the application on two grounds. First, he says that the matter being sub judice no fresh notice should issue. Secondly he says that at this late stage the petitioners cannot be permitted to "re-open the question" as this would offend against the principle that there should be a finality to litigation.

2. I am of opinion that the first ground of refusal is sound. The judgment of the Munsif having been appealed against, it cannot be said that it has been finally decided that the notices have not been served, If they have been properly served

they cannot be served again. Until the appeal is disposed of, there should not be any fresh service. I must not be understood as deciding that if the appeal is decided against the petitioners they would have the right to get the notices served again. Whether will they still have the right or not is a matter which will have to be decided later on the facts found by the Court deciding the appeal. All I decide is that while the appeal is pending no fresh notices should be served. The second ground is in my opinion not of any substance. If the application was made in time and the other requisites of Section 167 have been observed, the petitioners may in certain circumstances be entitled to a fresh service of notices if the service was defective for certain reasons. An objection was taken by the opposite parties that no revision lay against the Munsif's order refusing to serve the notices on the ground that the Munsif was acting not as a Judicial Officer but merely in a ministerial capacity. My attention was drawn to the first few lines of Section 115, Civil P.C., which are as follows:

The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto.

3. In my opinion this objection is unsound. The Munsif has really to decide a case. He has to consider matters and arrive at a decision. He has to act as a Court. The words used in Section 167, Ben. Ten. Act, make this quite clear. It says that the application should be made "to the Court which passed the decree or the Revenue Officer, etc." The present order is one passed by a Court and is in my opinion open to revision by this Court u/s 115, Civil P.C. The order of the learned Munsif is in my opinion however a proper order for the reasons given above. The Rule is discharged with costs. Hearing fee one gold mohur.