
(1924) 03 CAL CK 0011
In the Calcutta High Court

Narendra Nath Chatterji and Rakhal Das Tarafdar	APPELLANT
Vs	
Srinata Chatterji and Others	RESPONDENT

Date of Decision : 05-03-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 141

Citation : 79 Ind. Cas. 351

Hon'ble Judges : Suhrawardy, J;Chotzner, J

Bench : Division Bench

Judgement

1. This Rule is directed against an order of the Court below dated the 14th January, 1924 rejecting an application made by the petitioner under Order IX, Rule 4, for restoration of an application which was dismissed for default. The original application was under Order XXI, Rule 90 for setting aside a sale on the ground of material irregularity in the publication of sale processes. On the date of hearing neither party appeared and the Court, having disallowed the petitioner's prayer for further time, dismissed the application and confirmed the sale. The petitioner thereupon applied to the learned Subordinate Judge for its restoration. The learned Judge being of opinion that Order IX, Code of Civil Procedure, was not applicable to an application under Order XXI, Rule 90 dismissed the petition without entering into its merits.

2. It is argued before us that the view taken by the Court below is wrong and that Order IX is applicable to an application under Order XXI, Rule 90. This question has been before this Court on many occasions and there has been a divergence of opinion on the point. There is a class of cases, such as the cases of Diljan-mihha Bibi v. Hemanta Kumar Roy 29 Ind. Cas. 395 : 19 C.W.N. 758, Bhuban Behari Nag v. Dharendra Nath Banerjee 33 Ind. Cas. 581 : 10 C.W.N. 1203 and Bepin Behary Saha v. Abdul Barik 35 Ind. Cas. 613 : 21 C.W.N. 30 : 24 C.L.J. 446 : 44 C. 950, which follows the view that Order IX is applicable to matters arising out of execution proceedings. On the other hand, a large number of cases support the view of Richard-son, J., that Order IX is inapplicable to any

"matter arising in the course of execution of a decree. Charu Chandra Ghose v. Chandi Charan Roy 27 Ind. Cas. 492 : 19 C.W.N. 25, Hari charan Ghose v. Manmatha Nath Sen 19 Ind. Cas. 688 : 41 C. 1 : 18 C.W.N. 348, Hansesiwari Dasi v. Radhika Dasi 63 Ind. Cas. 855, and Kala Chand Bishard v. Sheikh Admat Ali (S.A. 521 and 522 of 1923 decided on the 26th November, 1923). We have to the ratio decidendi stated. We have come to the conclusion that the view that Order IX, Code of Civil Procedure, is not applicable to applications arising out of execution proceedings is correct and shall be adopted. The recent Full Bench decision of the Patna High Court in the case of Bhubaneswar Prasad Singh v. Tilakdhari Lal 49 Ind. Cas. 617 : P.L.J. 135 : (1919) Pat. 75 (F.B.) has stated the case comprehensively and we entirely agree with the reasons given therein. It is, however, still argued that Section 141, CPC makes Order IX applicable to cases like the present. The argument is based on the ground that an application under Order XXI, Rule 90 is numbered separately as a miscellaneous case and this makes the provisions of the CPC applicable to any proceeding so numbered and treated as a separate proceeding in execution. This argument found favour with the learned Judge who decided the case of Diljanmihha Bibi v. Hemanta Kumar Roy 29 Ind. Cas. 395 : 19 C.W.N. 758. We do not think that there is much force in it. The objections that are made under Order XXI to the execution of a decree, as where the adjustment of a decree has not been certified under Order XXI, Rule(2), as in the case of Hansesioari Dasi v. Badhika Dasi 63 Ind. Cas. 855 or objections under Rules 100 and 103, as in the case of Hari Char an Ghose v. Manmatha. Naih Sen 19 Ind. Cas. 683 : 41 C. 1 : 18 C.W.N. 348, or under such other circumstances, are no doubt numbered separately but they are virtually proceedings in execution. In the case of ChaRU Chandra Ghose v. Chandi Charon Roy 27 Ind. Cas. 492 : 19 C.W.N. 25, the application under consideration was one under Order XXI, Rule 90. It was there held that Order IX, Code of Civil Procedure, was not applicable. It is next urged that the cases which have held that Order IX is not, applicable to execution proceedings have proceeded upon the view that there are other remedies open to the applicant and, therefore, the Legislature has purposely made Order IX inapplicable to such cases; and it is argued that in the present case there is no remedy open to the petitioner as no separate suit lies in which the order under Order XXI, Rule 90 can be challenged. It is contended, therefore, that Order IX ought to be made applicable to cases like this. We do not think that there is any substance in the contention. The reason for holding that Order IX is not applicable to a case under Rule 101 applies equally to a case under Order XXI, Rule 90.

3. There is one other difficulty in the petitioner's way. The order passed by the learned Subordinate Judge on the 29th November 1923 is in these terms: "Neither party appears though called. Ordered that the objection be disallowed for default. The sale be confirmed and the execution case be dismissed in part satisfaction." By this order the Court, disallowing the petitioner's objection under Rule 90, confirms the sale. That last portion of the order must be taken to have been passed under Rule 92. If that be so, an appeal lies from that order under

Order XLIII, Rule 1(f). The proper course which the petitioner should have followed was to appeal against the order of the Court below and not to come to this Court to seek the exercise of our revisional jurisdiction. The question whether an order dismissing an objection under Rule 90 ex parte is appealable or not came up for consideration in the case of Charu Chandra Ghose v. Chandi Charan Roy, 27 Ind. Cas. 492 : 19 C.W.N. 25. There it was argued that the order passed by the Court below was one under Order IX, Rule 13 and, therefore, it was appealable under Order XIII, Rule 1(e). The learned Judges held that O. IX does not apply to such cases. The point was also considered in the case of Kali Kanta v. Shyam Lal 38 Ind. Cas. 598 : 25 C.W.N., and Richardson and Smither, JJ., without deciding, whether Order IX was applicable under Order XXI, Rule 90, held that the effect of the dismissal of an application under Rule 90 even for default was to confirm the sale under Rule 92 and hence an appeal lay to the lower Appellate Court. The present case is stronger than the case quoted. The order of the Court below dated the 24th November 1923 not only disallowed the petitioner's objection but also confirmed the sale. In our judgment the order was passed under Rule 92 and was, therefore, appealable. The present application invoking our interference under our revisional jurisdiction cannot be maintained.

4. We are, in conclusion, asked by the learned Vakil for the petitioners to exercise our revisional jurisdiction by treating this application for restoration as one under Order XLVII, Rule 1 or u/s 151, Code of Civil Procedure. We are not prepared to adopt this course. Besides, if we are correct in the view that we have expressed, namely, that an appeal lies in this matter, we have no jurisdiction to interfere with the order of the Court below u/s 115, Civil Procedure Code.

5. This rule accordingly fails and is discharged with costs. We assess the hearing fee at two gold mohurs.