

(1902) 04 CAL CK 0029

In the Calcutta High Court

Case No : Rule No. 3070 of 1901 in Connection With Appeal from Original
Decree No. 93 of 1901

Ram Golam Lal Sahu and Another

APPELLANT

Vs

Chowdhry Babu Barsati Singh and Others

RESPONDENT

Date of Decision : 14-04-1902

Acts Referred:

Citation : (1902) 04 CAL CK 0029

Judgement

1. It appears that the present Petitioners, as Plaintiffs, brought a suit on a mortgage against the opposite party to recover the sum of Rs. 1,45,000, and obtained a decree on the 20th December 1900 for Rs. 1,14,000. Against that decree the Plaintiffs appealed to this Court with regard to the portion of the claim which had been disallowed by the Court of first instance. That appeal is numbered 93 of 1901, and is still pending before this Court. On the 20th August 1901, that is after the expiry of six months from the date of the decree of the Court of first instance passed on the 20th December 1900, they applied in the Court of the Subordinate Judge who gave him the decree for an order absolute under sec. 89 of the Transfer of Property Act for the sale of the mortgaged property. On that application, the Subordinate Judge passed the following order : " The decree is in appeal before the High Court. So long as the appeal is not disposed of, the petition cannot be entertained." Another application to the same effect was made on the 21st August to the Subordinate Judge but that was rejected on the 26th August. The Petitioners then applied to this Court and obtained a rule on the 9th December 1901 on the opposite party to show cause why the orders of the Subordinate Judge, dated respectively 20th August and 26th August 1901, should not be set aside. In support of the rule, it has been argued that the Subordinate Judge was bound, under the provisions of sec. 89 of the Transfer of Property Act, to make an order absolute for the sale and that, in his order of the 20th August 1901, refusing to exercise his jurisdiction under sec. 89, he has given as the only reason for his refusal the fact that an appeal was pending before the High Court. It is urged that the reason given is no sufficient

reason for his refusing to exercise his jurisdiction. It has been further argued that his refusal to comply with the terms of the law has caused considerable hardship to the decree-holders and that no discretion is given him under sec. 89 of the Transfer of Property Act at his own instance to enlarge the time given by that section, within which an order absolute should be passed.

2. On behalf of the other side, it has been suggested that this application under sec. 622, Civil Procedure Code, should have been made at an earlier date and not after the expiry of about 31/2 months from the date of the orders complained of. Further, that if this order of the Subordinate Judge is a final order, then it will be appealable as a decree and if it is not a final order but an interlocutory order, it is not open to appeal.

3. As regards the delay in preferring the application to this Court, an affidavit to explain the circumstances has been put in and apparently the reason given in that affidavit for the delay was accepted by the Bench of this Court which issued the rule and we see no reason to differ from their opinion on this point.

4. As regards the second point, viz., that this order should be treated as a final order, it is only necessary to observe that the Subordinate Judge does, not in his order profess finally to refuse to make the order absolute but simply postpones the issue of any order to that effect. It is clearly, therefore, not a final order. It is also not an interlocutory order. What it appears to be is an order of refusal on the part of the Subordinate Judge to exercise his jurisdiction under sec. 89 of the Transfer of Property Act for the reasons stated in that order and as such, it is open to revision by this Court under sec. 622, Civil Procedure Code.

5. As regards the points taken in support of this rule, we are of opinion that the learned pleader is correct in his contention that the mere fact of an appeal being preferred to this Court is in itself no ground for the Subordinate Judge's refusal to proceed under sec. 89 of the Transfer of Property Act and to make the order absolute in the decree passed by his Court. It is suggested that in the appeal to this Court there may be an order or a decree for a further sum in favour of the Petitioners and some confusion may result. But we have not to consider that matter at present nor is it clear that any confusion will arise. With reference to the other point taken, we consider that the refusal of the Subordinate Judge to pass an order will undoubtedly cause hardship to the decree-holders, and as no application had been made to him for any enlargement of the time provided in sec. 89, for making an order absolute, we think he had no power at his own instance to extend the time for an order under that section. We find, therefore, that the Subordinate Judge's orders of the 20th August and 26th August 1901 cannot be (sic) We are (sic) he refused without sufficient reason to exercise a jurisdiction which he ought to have exercised under sec.89 of the Transfer of Property Act and we direct that this rule be made absolute with costs-two gold mohurs.