
(1941) 01 CAL CK 0019
In the Calcutta High Court

Raman Chandra Bandopadhyaya and Others	APPELLANT
Vs	
Kedar Nath Bandopadhyaya Chowdhury and Others	RESPONDENT

Date of Decision : 14-01-1941

Acts Referred:

Bengal Tenancy Act, 1885 — Section 149(3), 149(8)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1941 Cal 441

Hon'ble Judges : Henderson, J

Bench : Division Bench

Judgement

Henderson, J.—This appeal is by the plain-tiffs. The respondents instituted a rent suit against pro forma defendant 3 and paid the amount into Court. The plaintiffs then instituted the present suit as provided by S.149, Ben. Ten. Act. The Munsif decided in their favour. The respondents appealed and the plaintiffs now appeal to this Court. As there is some doubt whether the appeal is competent there is an alternative application u/s 115, Civil P.C. The doubt is due to the fact that the first ground taken in support of the appeal is that the appeal in the lower appellate Court was incompetent. The decision in Wajudi Pramanik Vs. Mahomed Balai Morul, lays down that the remedy of the present appellants is by appeal and not by revision. I am bound to say that I myself share the doubts expressed by my learned brother Mitter J., in Amirul Islam v. Sarada Kumar Sen ("36) 40 CWN 149, as to the correctness of that decision. I find it difficult to accept the position that a right of appeal can be created by the act of a Judge in doing something which the law forbids him to do. In the present case, however, I am in the same position as my learned brother Mitter J., and sitting alone must follow the decision of the Division Bench. On that view the present appeal is competent and the application in revision would be incompetent. This question is really only of academic interest as a question of jurisdiction can be raised in revision just as well in appeal. It is, therefore, necessary to consider whether the appeal in the lower appellate Court was competent. In the case in Tirthabasi Singh Rai v. Puma Chandra Nag ("12) 15 CLJ 501, the learned Chief Justice said:

It is not for us now to say whether an appeal would lie from such an order (an order under Sub-section (8) of Section 149, Ben. Ten. Act), but I feel constrained to say that the language of S.153 does not sustain the argument that an appeal would lie under that section.

2. Although this remark is an obiter dictum, I respectfully agree with the conclusion that no appeal lies from an order under Sub-section (3) of S.149, Ben. Ten. Act. The learned Chief Justice pointed out that such an order is not finally decisive of the substantial rights of the parties but provides machinery for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment. There is no reason why there should be an appeal against an order of that sort. The Act which creates the machinery does not provide for an appeal. It is, therefore, necessary to examine whether the present suit was merely one u/s 149, Ben. Ten. Act, or whether other questions are superadded. If it was the former, it will not be concerned with the plaintiffs' title to the disputed land but merely with their right to receive rent from the defendants. In the plaint there was no prayer for the declaration of the plaintiffs' title. No issue was framed with regard to it. Issue 2 was in these terms : Is there any relation of landlord and tenant between the plaintiffs and pro-forma defendant 3? It is quite true that the Court had incidentally to consider the allegation of the parties with regard to title in dealing with the plaintiffs' case that they were actually in possession. That question only came in incidentally. As the suit was merely one under Sub-section (3) of S.149, Ben. Ten. Act, the conclusion must be that the appeal in the lower appellate Court was incompetent, and that the remedy of the respondents is by suit and not by appeal. The appeal is accordingly allowed. The decree of the lower appellate Court is set aside and that of the Munsif restored. As this point was not raised in the lower appellate Court, I make no order as to costs.