

(1927) 03 CAL CK 0007
In the Calcutta High Court

Satyendra Nath Choudhury

APPELLANT

Vs

Charu Chandra Majumdar and Others

RESPONDENT

Date of Decision : 11-03-1927

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 95, 115

Citation : AIR 1927 Cal 657

Hon'ble Judges : Roy, J; Mukerji, J

Bench : Full Bench

Judgement

Mukerji, J.—One of the judgment-debtors is the appellant in this appeal. The appeal arises out of certain proceedings under Order 21, Rule 90, Code of Civil Procedure, for setting aside a sale on the ground that there was no proper service of the writ of attachment or the sale proclamation and that property really worth Rs. 1,500 fetched a price of Rs. 100 only at the sale. The decree-holder was the purchaser at the auction so held. The Munsiff allowed the application under Order 21, Rule 90, Code of Civil Procedure, and set aside the sale. On an appeal being preferred from this decision, the District Judge, being of opinion that there were no clear findings upon the questions that arose in the judgment of the learned Munsiff, sent back the record to the Court of the latter with directions to record clear findings on all such points and ordered that the findings should be re-submitted with the record to his Court within a certain period. When the matter went down to the Court of the learned Munsiff, it was taken up by a different officer and he recorded his findings on the point that arose and re-submitted the record with those findings to the appellate Court. The District Judge thereupon transferred the appeal to the file of a Subordinate Judge and the latter allowed the appeal, and dismissed the applications under Order 21, Rule 90, Code of Civil Procedure. It is against this order of the learned Subordinate Judge that the present appeal has been preferred to this Court.

2. The appellant seeks to maintain this appeal, although it arises out of proceedings under Order 21, Rule 90, CPC by a reference to the decision of a Full

Bench of this Court in the case of Kailash Chandra Tarafdar Vs. Gopal Chandra Poddar, . The contention, shortly put, on behalf of the appellant, is that, inasmuch as in the said Full Bench decision it has been held that when the decree-holder is the auction-purchaser an order passed on an application for delivery of possession under Order 21, Rule 95, Code of Civil Procedure, is an order u/s 47 of the Code, there is no reason why under similar circumstances an order setting aside or refusing to set aside a sale should not be regarded as an order relating to the execution or satisfaction of the decree and, therefore, an order coming within the purview of Section 47, Code of Civil Procedure, and appealable as a decree within the meaning of the Civil Procedure Code. I am unable to say that this argument is an altogether ill-conceived one. But the difficulty in accepting this argument is that the Code expressly puts an order under Order 21, Rule 90 upon a different category from orders passed u/s 47 of the Code-Under Section 104 of the Code, an appeal lies from those orders only which are expressly mentioned in the said section, and it is stated that

save as otherwise expressly provided in the body of this Code or by any law for the time being in force, no appeal shall lie from any other orders

and Section 104 Sub-section (1) Clause (1) provides for appeals from orders made under rules from which an appeal is expressly allowed by the rules.

3. Appealable orders provided for by the rules are to be found in Order 43 of the First Schedule to the Code and, under Sub-section (2) of Section 104:

no appeal shall lie from any order passed in appeal under this section.

4. To accede to the petitioner's contention, therefore, would be to nullify the effect of Section 104 read with Order 43 of the First Schedule of the Code to which I have referred. Besides, the Full Bench case deals expressly with an order or application for delivery of possession under Order 21, Rule 95, CPC and, assuming that the contention which the appellant puts forward logically follows from the dictum of the Full Bench, it does not necessarily follow that that contention must be regarded as well founded for, as has been observed by Lord Halsbury, Lord Chancellor, in the case of Queen v. Leatham [1901] A.C. 459,

every judgment must be read as applicable to the particular facts, proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Another thing is that the case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code whereas every lawyer must acknowledge that the law is not always logical at all.

5. I am accordingly of opinion that no second appeal lies in this case. The appeal must, therefore, be dismissed with costs-hearing fee : one gold mohur.

6. The question that then arises is what order should be passed on the application u/s 115 of Civil P.C. that has been filed along with the appeal which is directed against the same order from which the appeal has been preferred. The grounds upon which this application is pressed before us are two. The first ground is to the effect that the order which the learned District Judge passed was really an order made under the provisions of Order 41, Rule 25, of CPC and, therefore, it should have contained a direction upon the Court of first instance to take additional evidence, and that, inasmuch as there was no such direction in the order, and also because the additional evidence that was sought to be adduced was not allowed to be given, the said order was without jurisdiction. This argument assumes that the order was really passed under the provisions of Order 41, Rule 25. There is a good deal no doubt to be said in favour of the view that the only two provisions which the Code provides for making an order of remand, when that order is made by a Court of appeal, are to be found in Order 41, Rule 23 and Order 41, Rule 25 and that the order of the District Judge, by which the case was sent back to the Court of the learned Munsiff, bears greater analogy to an order which the Code contemplates in Order 41, Rule 25; but I am unable to hold, in view of the terms in which that order was passed, that the learned District Judge meant to pass it under the provisions of Order 41, Rule 25. The order appears to me to be one of those anomalous orders which the appellate Courts are very fond of passing notwithstanding that the Code has expressly laid down the form in which these orders should be couched. There is a tendency in the Courts to resort to the provisions of Section 151 of the Code/ notwithstanding that they are not able to find that orders properly passed under Rule 23 or Rule 25 would not meet the ends of justice. Section 151 was not enacted for that purpose, but only to provide remedies in cases where the provisions of the Code are not ample or sufficient to give such remedies, and in case in which a remedy is not provided for by the Code. I am therefore of opinion that the order of the District Judge was not one passed under Order 41, Rule 25, and the petitioner's argument on this head cannot be accepted as well founded.

7. The next ground upon which this application has been pressed is to the effect that the District Judge was wrong in transferring the appeal to the Court of the Subordinate Judge. In this connexion, reference has been made to the provisions of Order 41, Rule 26 of the Code and reliance has been placed upon the decision of the Allahabad High Court in the case of Udit Narain Singh v. Jhanda [1893] 15 All. 315. The answer to this contention again is that it proceeds upon the assumption that the order of the District Judge was passed under Rule 25 of Order 41, which I am unable to accept. In my opinion, therefore, the application u/s 115, Code of Civil Procedure, should also be rejected, and I order accordingly.

Roy, J.

8. I agree.