

(1912) 05 CAL CK 0020
In the Calcutta High Court

Shamsher Ali

APPELLANT

Vs

Jagarnath Thirain and Others

RESPONDENT

Date of Decision : 13-05-1912

Acts Referred:

Citation : 16 Ind. Cas. 203

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. We are invited in this appeal to set aside an order granting an application for review of judgment. The appellant applied on the 6th December 1910 for reversal of an execution sale held on the 9th November 1910. The sale was set aside on the 6th December, upon payment of the sums mentioned in Rule 89 of Order XXI of the Code of 1908. The auction purchaser was dissatisfied with this order and preferred an appeal to the District Judge. The appeal was dismissed on the 6th April 1911. On the 16th May following an application was made for review of this order; it was however, presented before the Subordinate Judge as the District Judge was absent from the station. The Subordinate Judge received the application, registered it and directed notices to issue to the opposite party. Later on, the District Judge returned and passed various orders relating to the postponement of the case and analogous matters. Before the application could be heard on the merits, the learned District Judge unfortunately died. His successor took up the matter on the 6th January 1912 and set aside the order of the 16th December 1910; three days later, in accordance with this order, the sale was confirmed. It is contended on behalf of the appellant that the order passed on review was without jurisdiction, because it was in contravention of Rule 2 of Order XLVII of the Code of 1903, which requires that an application for review of an order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is mentioned in Rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the order, shall be made only to the Judge who made the order sought to be reviewed; but any such application may, if the Judge, who made the order,

has ordered notice to issue under Rule 4, Sub-rule (2), proviso (a), be disposed of by his successor. In our opinion, this contention is well founded.

2. It has been argued on behalf of the respondent that as the Judge was absent from the district, it was competent to the Subordinate Judge, who was in charge of the duties of his office, to receive the application and issue notice thereupon under Rule 4 Sub-rule 2, proviso (a) of Order XLVII. This contention is clearly unfounded. The policy of the Legislature is that, in matters of this description, the application should be received and considered by the Judge who made the original order. It was never intended that the application should be considered by his successor or by some person in charge of the duties of his office. If this view were not accepted, the result would be that practically an appeal would be heard against the original order by the successor-in-office of the Judge who passed the order. In this view, the order of the Court below cannot be supported and this appeal must be allowed.

3. But it has been argued on behalf of the respondents that this appeal is incompetent, first, because it was preferred after the sale had been confirmed on the 9th January 1912; and secondly, because the final order is not liable to be challenged by way of appeal.

4. In support of the first objection, the respondents have placed reliance upon the class of cases where it has been ruled that when an order of remand has been carried out and a decree has been made by the Court of first instance, the order of remand cannot be challenged by way of appeal and that the proper course for the parties to follow is to appeal against the decree of the original Court. There is obviously no analogy between the two class of cases and the principle of the decision to which reference was made, namely *Mackenzie v. Nursing Sahai* 36 C. 762 : 1 Ind. Cas. 413 : 10 C.L.J. 113 has no possible application to the case before us.

5. In so far as the second, objection is concerned, it is clear that an appeal under Rule 7 of Order XLVII is not controlled by Sub-section 2 of Section 104 of the Code of 1908. Here, again, reference was made to the analogy supposed to be deducible from the class of cases already mentioned; but it was overlooked that under Order XLIII, Rule 1, Clause (u) it is stated expressly that an order under Rule 23 of Order XLI remanding a case is appealable only where an appeal would be from the decree of the Appellate Court. No such limitation is to be found in the last paragraph of Sub-rule (1) of Rule 7 of Order XLVII. That paragraph provides as follows: "Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit". In our opinion, even if the final decree or order is one against which no appeal lies, an appeal from the order granting an application for review can be preferred at once and we are not prepared to impose any limitation upon the right of appeal plainly allowed by the Legislature.

6. The result is that this appeal is allowed, the order of the District Judge, made

on the 6th January 1912, set aside and the order of the 6th April 1911, restored. The result will be that the order of the original Court setting aside the sale on the 16th December 1910, will stand confirmed. The appellant is entitled to his costs in this Court. We assess the hearing fee at five gold mohurs.