

(1940) 12 CAL CK 0008
In the Calcutta High Court

Sm. Mukimannessa Chowdhurani and Others

APPELLANT

Vs

Rameswar Shukul and Others

RESPONDENT

Date of Decision : 02-12-1940

Acts Referred:

Bengal Agricultural Debtors Act, 1936 — Section 34
Bengal Tenancy Act, 1885 — Section 174
Limitation Act, 1963 — Section 5

Citation : AIR 1941 Cal 264

Judgement

1. A preliminary objection has been taken to the competency of this rule that the order against which it is directed is an appealable order and that consequently no revision lies. We are of opinion that this objection should prevail. The facts are shortly these: The decree-holder opposite party obtained a rent decree against the petitioner and in execution of that decree, brought the holding to sale. The auction-purchaser thereafter deposited in Court the whole of the purchase money. The judgment-debtor then applied for setting aside the sale u/s 174, Ben. Ten. Act. This was in November 1939. On 12th February 1940 the judgment-debtor made an application before a Debt Settlement Board for the settlement of his debts in which he included the debt due under the rent decree referred to above. Upon that, a notice was issued by the Board u/s 34, Bengal Agricultural Debtors' Act, to the Court in which the execution case was proceeding. The execution Court held, on the law as it then stood, that as the sale had already taken place, there was no debt and that therefore there was no proceeding to stay. On 7th July 1940, however, an amendment of Section 34, Bengal Agricultural Debtors' Act, came into force, and an explanation was added to this section to the effect that an execution proceeding for the sale of any property shall be deemed to be pending and the debt in respect of which the sale takes place shall be deemed to exist until such sale becomes [absolute. Four days later another notice u/s 34 as amended was issued by the Debt Settlement Board, which was received by the executing Court on 18th July. The learned subordinate Judge, however, declined to accept this notice as made within jurisdiction, and in the result, made an order in these terms. "I hold that the execution case cannot

be stayed. It will proceed." In other words, by this order he decided to proceed with the application u/s 174, Ben. Ten. Act which had been made to him. It is against this order refusing to stay further proceedings in the execution case that the present rule has been obtained.

2. In our opinion, there can be no question that on the authority of the decision of a Division Bench of this Court in Nafar Chandra Sardar and Others Vs. Kali Pada Das, it must be held that the order complained of is an order relating to execution, and that although the auction-purchaser is a party to the proceeding, it is still an order which comes within Section 47 of the Code, the question at issue being one in which the judgment-debtor on the one hand and the decree-holder on the other are really interested. This being so, we must hold that the order "was open to appeal and the application u/s 115 of the Code was not, accordingly, competent. The result is that the rule must be discharged. There will be no order as to costs. This will not prevent the petitioner from filing an appeal before the District Judge from the order if he is so advised, and it will be for him to consider whether, having regard to the pendency of the proceedings in this Court, a proper case may be said to have been made out u/s 5, Limitation Act. Let the record be sent down without delay.