

**(1938) 08 CAL CK 0002**  
**In the Calcutta High Court**

Sudhir Chandra Nag and Others

APPELLANT

Vs

Nazir Mamud Sheikh and Others

RESPONDENT

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**Date of Decision :** 10-08-1938

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 174(3)

**Citation :** AIR 1939 Cal 30

**Hon'ble Judges :** Edgley, J

**Bench :** Division Bench

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## Judgement

Edgley, J.—In this case certain judgment-debtors made an application u/s 174(3), Ben. Ten. Act, in order to have an execution case set aside on the ground that there had been material irregularities in publishing the sale and that they had sustained substantial injury as a result thereof. Their application was dismissed by the learned Munsif and the judgment-debtors thereupon appealed to the learned District Judge who set aside the order of the first Court on findings to the effect that the judgment-debtors' property had been sold at an inadequate price and that it had not been established that the requisite processes had been properly served.

2. In this Court the main point taken on behalf of the decree-holders petitioners is that the appeal to the lower Appellate Court was incompetent having regard to the provisions of Section 174(5), Ben. Ten. Act. That Section provides that an appeal shall lie against an order refusing to set aside a sale provided that no such appeal shall be admitted unless the appellant deposits in Court the amount recoverable in execution of a decree. In the present case the order of the learned Munsif is dated 8th October 1936. The appeal was filed in the Court of the District Judge just before the expiry of the prescribed period of limitation after making due allowance for the time required by the appellants for taking copies. The actual date of the presentation of the appeal in the Court below was 17th December 1936. On that date the appeal was registered and the appellants filed an application asking for two months' time to file proof of having made the

deposit as required by Section 174 (5), Ben. Ten. Act. They were allowed time till 2nd January 1937. On that date however the appellants failed to make the necessary deposit and asked for further time which was granted them till 16th January 1937. On that date the deposit was made and an order was passed to the effect that the appeal should be put up for hearing under Order 41, Rule 11, Civil P.C., on 30th January 1937.

3. It is argued on behalf of the opposite parties that the appeal to the lower Appellate Court was in fact competent as the judgment-debtors had sufficiently complied with the requirements of Section 174(5), Ben. Ten. Act, by depositing the amount recoverable in execution of the decree within the period which had been allowed by the Court. With regard to this point it is also argued that the learned District Judge-understood the expression "admitted" which has been used in Sub-section (5) of Section 174, Ben. Ten. Act, to refer to the "admission" of an appeal after a preliminary hearing thereof under Order 41, Rule 11, Civil P.C. These contentions I am unable to accept. In my view, Section 174(5) of the Act contemplates that the amount recoverable in execution of the decree must be deposited with the Appellate Court immediately after the presentation of the appeal to the Court in question and before its registration. In this connexion, reference may be made to Order 41, Rule 9, Civil P.C., which provides that, where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for that purpose. Having regard to the terms of the Rule quoted above an "admission of an appeal" must mean acceptance of the memorandum of appeal by the proper officer of the Court after its presentation with a view to securing its registration. The record in this case shows that the appeal was presented and registered on 17th December 1936 and it is clear that it was on that date that the appeal was admitted. As pointed out by this Court in *Bidhubala Dasi v. Kumud Nath Das* (1937) 67 C.L.J. 211 the deposit of the amount recoverable in execution of the decree is a condition precedent or at any rate a contemporaneous act in connexion with the admission of the appeal. This being the case, it is clear that the requisite deposit should have been made not later than 17th December 1936. It is fairly argued on behalf of the opposite parties in this connexion that the learned District Judge had authority to extend the time within which the deposit might have been made u/s 148, Civil P.C. In my view, however, this Section is not applicable as it only refers to a period fixed or granted by a Court for the doing of an act prescribed or allowed under the Code of Civil Procedure. In this case we are not concerned with an act prescribed or allowed by the CPC but with an act for which a statutory provision is made u/s 174(5), Ben. Ten. Act. It was pointed out, by this Court in *Bibi Sharofan v. Mahmed Habibuddin* (1911) 13 C.L.J. 535 that when a statutory provision has been made with regard to the time in which a certain act must be done, the Court has no power to extend the time allowed under such provision. Having regard to the considerations stated above, I am of opinion that the appeal preferred by the judgment-debtors to the learned District Judge was

incompetent and it follows that the order of the Court below dated 10th June 1937 was made without jurisdiction. This being the case, this rule is made absolute. The order of the learned District Judge is set aside. Other decree of the first Court is restored. I make no order with regard to costs.