

(1939) 05 CAL CK 0024
In the Calcutta High Court

Surpat Singh and Others

APPELLANT

Vs

Ratan Chand Sreemal

RESPONDENT

Date of Decision : 30-05-1939

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 115, 151, 47

Citation : AIR 1940 Cal 92

Hon'ble Judges : Latifur Rahman, J;Henderson, J

Bench : Full Bench

Judgement

Henderson, J.—This is a rule calling upon the opposite party to show cause why an order restoring him to possession of certain property should not be set aside. The petitioner purchased the property in question in execution of a decree. The opposite party then filed an application under Order 21, Rule 90, Civil P.O. This was rejected as incompetent. The opposite party appealed. In the meantime the sale was confirmed and the petitioner took possession. The Appellate Court allowed the appeal and remanded the case to be heard on the merits. The Subordinate Judge restored possession of the property to the opposite party acting, u/s 151, Civil P.C. The petitioner then obtained this rule. A preliminary objection has been taken by Mr. Das on behalf of the opposite party on the ground that no application u/s 115, Civil P.C., lies. His contention is that it was open to the petitioner to appeal against the order. In support of this proposition, he relied upon the case in Gnanada Sundari Mojumdar Vs. Chandra Kumar De, . In our opinion, it may be necessary to consider that decision on some further appropriate occasion. The reason given by the learned Judges for holding that an appeal lay was that they thought that there ought to be an appeal. As at present advised, we feel compelled to dissent from that reasoning. This decision was followed in a later case, viz. Maharaja Sasikanta Acharjee Vs. Jalil Baksha Munshi and Others, . The former decision was considered but in addition an attempt was made to bring the matter within the terms of Section 47, Civil P.C. If we may say so with respect we doubt whether that, attempt has been successful.

2. In our judgment, the proper test to apply in deciding whether an appeal lies is to consider whether the order comes within the definition of a "decree" as laid down in Section 2, Sub-section (2), Civil P.C. It may be that an examination of the matter made on those lines might reach the same result. But we do not propose to consider the matter in the present case. There is a clear distinction in the present case. We are not now concerned with restitution after a final order setting aside the sale has been made. The present order is really in the nature of an interlocutory order. The sale has not been set aside. It could not be said that the present order is in any sense a "decree" within the meaning of Section 2, Sub-section (2), Civil P.C. The preliminary objection must, accordingly, be overruled. The eventual rights of the parties will depend upon the result of the decision of the application under Order 21, Rule 90.

3. On the merits we are not prepared to interfere in the matter. It cannot be said that the order was made without jurisdiction. Nor is it the sort of order which ought to be interfered with in revision. After all if the application under Order 21, Rule 90 is successful the order will have done justice between the parties. On the other hand, if the sale has been confirmed before the opposite party's application was dismissed, the opposite party might very well have obtained an order for the stay of delivery of possession. There is also little doubt that, if the application is dismissed, the petitioner will have made an extremely good bargain for himself as auction-purchaser. The rule is accordingly discharged. We make no order as to costs.

Latifur Rahman, J.

4. I agree.