(1909) 03 CAL CK 0001

Calcutta High Court

Case No: None

Sital Rai and Another		APPELLANT
	Vs	
Nandalal and Others		RESPONDENT

Date of Decision: March 1, 1909

Judgement

1. This is an appeal on behalf of the judgment-debtors against an order for confirmation of a sale in execution of a decree for arrears of rent, which had been set aside by the Court of First Instance u/s 174 of the Bengal Tenancy Act. The circumstances under which the orders in question wore made may be thus briefly narrated: On the 8th July 1907, the respondent decree-holder in execution of a decree for arrears of rent purchased the holding of the appellant. On the 13th July, the judgment-debtors applied to have the sale set aside u/s 311, C.P.C. On the 5th August following, they applied u/s 174 of the Bengal Tenancy Act and asked for leave to make the necessary deposit. The Court directed the money to be received if the application u/s 311, C.P.C., then pending, was withdrawn. The necessary amount was deposited on the following day. On the 7th August the judgment-debtors applied for leave to withdraw the application u/s 311. On the 24th August, the Court set aside the sale u/s 174 of the Bengal Tenancy Act and dismissed the application u/s 311. The decree-holders auction-purchasers then appealed to the District Judge. A preliminary objection was taken to the hearing of that appeal on the ground that the order was not appealable. The District Judge overruled this objection on the 3rd April 1908, and held on the merits that the order made by the Court of First Instance u/s 174 of the Bengal Tenancy Act could not be sustained inasmuch as the judgment-debtors were not entitled to apply for reversal of the sale u/s 174, after they had applied u/s 311 to set aside the same sale.

2. The judgment-debtors have now appealed to this Court and on their behalf the order of the District Judge has been challenged on the ground that he has taken an erroneous view of the scope of Section 174. On behalf of the respondents, on the other hand, a priliminary objection has been taken that no appeal lies to this Court and it has been broadly contended that an order u/s 174 of the Bengal Tenancy Act

is not appealable as an order u/s 244 of the Civil Procedure Code. It has further been argued on the merits that the view taken by the District Judge as to the scope of Section 174 is correct and is justified by the plain language of the section.

3. In support of the preliminary objection, reliance has been placed on behalf of the respondents upon the decisions of this Court in the cases of Kishori Mohun Roy v. Sarodamani Dasi 1 C.W.N. 30, Bungshidhar Haldar v. Kedar Nath Mondal 1 C.W.N. 114 and Subh Narain Lall v. Goroke Prosad 3 C.W.N. 344. Reliance on the other hand has been placed on behalf of the appellants upon the decisions of this Court in the cases of Kripa Nath Pal v. Ram Laksmi 1C.W.N. 703, Phul Chand v. Nursingh Pershad 28 C. 73 and Kedarnath Sen v. Uma Charan 6 C.W.N. 57. In our opinion, the cases relied upon by the respondents are clearly distinguishable. As pointed out by this Court in Kedar Nath v. Uma Charan 6 C.W.N. 57 and by the Bombay High Court in Pita v. Chuni Lal 31 B. 207, it cannot be affirmed as a general proposition of law either that an order, u/s 174 of the Bengal Tenancy Act, or u/s 310A of the Code of Civil Procedure, is or is not appealable. Whether an order made under either of those sections is appealable, must depend upon the circumstances of the individual case before the Court. The test to be applied is, whether the question raised in the proceedings is one relating to execution, satisfaction or discharge of decree, and if the question is of this description, whether it arises between the parties to the suit or their representatives. Now, in the three cases upon which reliance is placed on behalf of the respondents, the Court proceeded on the basis that the question raised was either not a question relating to the satisfaction of the decree, or if it was a question of that description, it did not arise between the parties to the suit or their representatives. Upon the facts stated in the cases of Kishori Mohun Roy v. Sarodamani Dasi 1 C.W.N. 30 and Bungshidhar Haldar v. Kedar Nath Mondal 1 C.W.N. 114, it is clear that the controversy did not arise between the parties to the suit or their representatives, although, it is doubtful whether upon the facts stated in the report of the decision in Subh Narain Lal v. Goroke Prosad 3 C.W.N. 344, the question might not be rightly regarded as one relating to execution and arising between the parties to the suit or their representatives. As regains the last mentioned case however, the learned Judges simply followed the earlier decision in Kishori Mohun Roy v. Sarodamani Dasi 1 C.W.N. 30 and it cannot, constantly, be rightly suggested that they intended to lay down as a broad general proposition of law that an order u/s 174, B.T.A., or u/s 310 A, C.P.C., is under no circumstances open to appeal. In fact, in view of the decision of a Full Bench of the Court in Chundi Charan Mandal v. Banke Behary Lal Mandal 26 C. 449, such a position cannot possibly be maintained. In that case, the decree-holder was the auction-purchaser and a question arose as to the validity of an order made by the Court below u/s 310 A., C.P.C. In the decision of this question, the Full Bench proceeded on the assumption that the appeal against the order was competent and actually reversed the decision of the Court below on the merits. We must, therefore, consider in the case before us, whether the question is one relating to satisfaction of the decree

and whether it arises between the parties to the suit. There can be no doubt as to the answer to be given to either branch of this question. The question before the Court is, whether the decree is to be satisfied by the deposit made by the judgment-debtor u/s 174 of the Bengal Tenancy Act, and that question arises directly between the judgment-debtor on one side and the decree-holder on the other. We must, consequently, hold that the order made by the District Judge is appealable, and thus overrule the preliminary objection.

4. As regards the merits, the answer to be given to the question raised, depends upon the true construction of the proviso to Sub-section 2 of Section 174 of the Bengal Tenancy Act. That sub-section, as it stood at the time when the order in question was made by the Court of First Instance, was in these terms:

Provided that if a judgment-debtor applies u/s 311, C.P.C., to set aside the sale of his tenure or holding, he shall not be entitled to make an application under this section.

5. It is contended on behalf of the respondents that as the judgment-debtor had applied u/s 311, C.P.C., he was not entitled to make an application u/s 174, B.T. Act. It is argued on the other hand, on be half of the appellant, that the real object of the section is to prevent a judgment-debtor from applying u/s 174, only so long as he is an applicant u/s 311, C.P.C., so that if a judgment-debtor has applied under see. 311, it is open to him to withdraw the application and thus qualify himself for an application u/s 174, B.T.A. The question, in substance, is, whether we should take a narrow view of this section and hold that so soon as a judgment-debtor applies u/s 311, he permanently disqualifies himself from applying u/s 174. We do not think that we should put upon the section such a restricted construction, which cannot be supported upon any intelligible principle. We observe that with regard to the latter part of the section, the words, make an application," have been construed to mean make and prosecute an application" in the case of Rajendra Nath Haldar v. Nilratan Mitter 23 C. 958. In that case an application had been made u/s 310A., C.P.C., and during the pendency thereof, another application was made u/s 311 of the Code. It was argued on behalf of the judgment-debtor that it was quite competent to him to adopt this procedure which did not contravene the strict letter of the law. The Court, however, negatived this contention and in our opinion, rightly, for if the judgment-debtor had been allowed to succeed in his contention, the very object of the law would clearly have been defeated. That object is that the judgment-debtor should not be allowed to avail himself simultaneously of the benefit of the provisions of Sections 310A and 311, C.P.C. If that principle is borne in mind we may hold by analogy that the term, "applies," means "applies and prosecutes"; in this view, the judgment-debtor should obviously be allowed, after he has made an application u/s 311 of the Code, to withdraw that application and to prefer one u/s 174, B.T.A. It is argued, however, that in the case before us, strictly speaking, at the time when the application under see. 174 was made, the application, previously made u/s 311, had not been formally withdrawn. But leave had been asked for

withdrawal of that application on the 7th August 1907, and if we treat the application u/s 174, B.T.A., as one made on the latter day, no question as to limitation arises. Upon a reasonable view, then, of all the circumstances of the case, we are of opinion that the application made by the judgment-debtor u/s 174 ought to be treated as a valid application, on the ground that treating it as one made on the last day allowed by law for the purpose of making such an application, it was made after he had applied for leave to withdraw the application u/s 311, C.P.C. The result, therefore, is that this appeal must be allowed, the order of the District Judge discharged and that of the Court of First Instance restored.

6. Under the circumstances, we direct each party to pay his own costs throughout the litigation.