

(2004) 03 CAL CK 0007

Calcutta High Court

Case No: F.M.A. No. 2817 of 2002 with C.O.T. No. 3116 of 2002

Mrs. Rekha Mukherjee

APPELLANT

Vs

Ashish Kumar Das and Others

RESPONDENT

Date of Decision: March 31, 2004**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22, Order 47 Rule 1, Order 47 Rule 4, Order 47 Rule 8, 100

Citation: AIR 2005 Cal 74 : (1999) 3 CALLT 112**Hon'ble Judges:** Rajendra Nath Sinha, J; Dilip Kumar Seth, J**Bench:** Division Bench**Advocate:** Santanu Mukherjee and Tarun Kanti Ghosh, for the Appellant; Barun Roy-Chowdhury and Jahar Dey, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

D. K. Seth, J.

Mr. Roychowdhury submits that the review application was preferred before the appeal against the decree (FAT No. 3011 of 2002) was presented and contends further that the appeal was preferred after the review was allowed. The learned Counsel for the respondents takes a preliminary objection that after the review was allowed, the appeal could not be maintained since on passing of the order allowing the review of the judgment to the extent of which review is allowed, become open for re-hearing. There would be conflict and confusion if parallel proceedings of review and appeal out of the same judgment are pursued. Section 114 and Order 47, Rule 1 of the CPC (CPC) prescribes that if any person considers himself aggrieved of by a decree or order from which no appeal has been preferred, may apply for review of such decree. In this case, admittedly, review was prayed for and allowed before the appeal was filed which satisfy the requirement for review. But at the same time the appeal having not been preferred before the review was allowed, the

question arises as to whether still the review can be pursued after the appeal is preferred or the appeal can be maintained after the review is allowed.

2. On the presentation of a review application, a rule is issued at the first stage and then the rule is heard at the second stage. Once the review is rejected, the decree against which the review was preferred continues to survive. An appeal against such decree can very well be maintained and there would be no confusion or conflict if such appeal is filed after the review is rejected. Once the review is allowed, the procedure for review reaches the third stage. This is done under Rule 4, Order 47, CPC. Then the case is re-heard on merit under Rule 8. Upon such hearing on merit, it may result in a repetition of the former decree or order or in some variation of it. Though the result may be same whether the rule is ultimately discharged at the third stage or on re-hearing the original decree is repeated, but in law, there is a material difference. In the latter case, the matter having been reopened, there is a fresh decree. In the former case, the parties are relegated and still rest on the old decree. This distinction is of fundamental importance. It was so held in *Vadilal v. Fulchand* 1905 ILR 30 Bom 56 and *Nanhe v. Mangat Rai* (1913) 20 IC 647. The failure to recognize this distinction between the second stage and the third stage led to the embarrassment to litigants in many instances. Once the review is granted, the earlier decree or order stands recalled and the suit or appeal revives and the matter is re-heard in the third stage. This rehearing is of the suit or the appeal was revived is something distinct from the original decree or order under review. An order passed under Rule 8 is a decree or order passed in the original suit or the appeal. It is subject to an appeal u/s 96 or 100 or 104, CPC or under the Letters Patent or such other law, as the case may be. Even if after the third stage the old decree or order is repeated, even then it would be a fresh order or decree passed in the suit or the appeal after re-hearing. When the review application is allowed, the original decree or order in law stands vacated and the suit or the appeal stands revived. In support of the above proposition, reliance may be placed upon the observation made by Sir Ashutosh Mukherjee, J. in [Gour Krishna Sircar and Another Vs. Nilmadhab Saha and Others](#), relied upon by a Full Bench of this Court in [K.N. Mishra Vs. Union of India \(UOI\) and Others](#), .

3. In our view once review is allowed, part of the decree becomes open and at the same time if the appeal is preferred against the order allowing the review filed by the appellant, he is, in fact, entitled to re-open the part of the decree allowed to be reviewed whereas the appeal against the decree (FAT No. 3011 of 2002) relates to the whole of the decree which does not survive. Therefore, if the review is pursued, the appeal FAT No. 3011 of 2002 cannot be proceeded with. Review and appeal cannot go together even if appeal is filed after the review is allowed by the same party, he has to stick to one or the other. An option of electing either of the two is to be exercised. Order 47 clearly lays down a provision in respect of remedy where an appeal is not filed. Even if an appeal is filed during the pendency of the review provision provided in Order 47 was attracted. In this case Mr. Roychowdhury elects

to pursue his remedy through appeal in FAT No. 3011 of 2002.

4. In the circumstances, this first miscellaneous appeal, being FMA No. 2817 of 2002 stands allowed. The order appealed against is hereby set aside. The review application is hereby dismissed as not pressed. Mr. Roychowdhury also does not press the cross-objection filed by him, which, however, according to Mr. Mukherjee, is not maintainable since it has been preferred only against part of the decree. Relying on Order 41, Rule 22, he submits that cross-objection lies against the decree not against a finding. The adverse finding may entitle the cross-objector to defend the cross-objection against the decree. He relied on AIR 1926 93 (Privy Council)) where it was so held. It is not necessary to go into this question since Mr. Roychowdhury is opting not to press this cross-objection. The cross-objection is dismissed for non-prosecution.

5. In view of the above, the FMA No. 2817 of 2002 stands allowed and the order dated 9th January, 2002 passed in Miscellaneous Case No. 1 of 2002 in connection with TS No. 49 of 1990 is hereby set aside and C.O.T. No. 3116 of 2002 stand dismissed.

6. Urgent xerox certified copy, if applied for, be supplied to the parties on priority basis.