(1932) 06 CAL CK 0016

Calcutta High Court

Case No: None

Nilmoni Pal		APPELLANT
	Vs	
Dakshineswar Pal and Others		RESPONDENT

Date of Decision: June 6, 1932

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 104(1)(c)
- Limitation Act, 1963 - Section 5

Citation: 138 Ind. Cas. 848

Hon'ble Judges: Mukerji, J; Bartley, J

Bench: Division Bench

Judgement

1. This is an appeal from a decree which was based upon an award which the court had modified. It is not suggested that the decree is in excess of the award as modified, but the grounds taken in the appeal are directed against the order by which the modification was made.

2. In our judgment Schedule II, para. 16, sub-para. (2) bars the appeal Apart from the provision contained in sub para. (1) of para. 16, which says, "the court shall proceed to pronounce judgment according to the award", there is no other provision under which judgment may be pronouncsd on a modified award. The judgment in the present case, therefore, must have been pronounced under sub para. (1), and consequently sub para. (2) applies. The appeal therefore cannot be maiutained.

3. But the special facts of this case are that an appeal had been presented in the court of the District Judge, from the order modifying the award, such an appeal being permissible u/s 104(1)(c) of the Code. An attempt was made to get that appeal withdrawn to this Court, but the attempt failed as the District Judge had no jurisdiction to entertain it, and the said appeal was eventually dismissed for non prosecution. No attempt was made by the appellant to take back the appeal from

the court of the District Judge, presumbly because the appellant thought that in the present appeal the order by which the modification was made could be challenged, by reason of the provision contained in Section 103 of the Code. He could never apprehend that the prosent appeal would be held to be incompetent, because the only reported decision on the question is the case of Jowahur v. Mul Raj 8 A. 449 : 1886, A.W.N. 210, which is in favour of its maintainability. In these circumstances, it is clear that if an application is now made to us to convert this appeal into one from the order modifying the award or to allow the appellant to prefer a fresh appeal from that order, the time during which the present case has been pending being deducted as a plausible excuse for extension of time u/s 5 of the Limitation Act, it will not be easy for us to refuse that application. We have, therefore, thought fit to go into the merits of the case

4. On the merits the appellant seems to us to have no case at all. The respondents, as plaintiffs, sued for partition of two items of Immovable property and certain specified moveables. The appellant, as defendant, resisted the claim for partition alleging that all joint properties had not been brought into the hotchpot, and as a motive for the suit, which he alleged had been ''falsely'' instituted, he asserted that the property in suit had been previously partitioned and that some paddy and the funds of a money lending business which had been left unpartitioned had been misappropriated by the plaintiffs. He never asked for a partition of all joint properties or even of the said paddy or the proceeds thereof or of the said money lending business. The issues that were framed never suggested any such course. In these circumstances if the award dealt with the paddy or the money-lending business, as it did, to that extent it must be regarded as having dealt with matters outside the scope of the suit and not the subject-matter of the reference.

5. This is the view which the court below has taken. The appeal, therefore, is dismissed with costs three gold mohurs.