

(1928) 07 CAL CK 0044

Calcutta High Court

Case No: None

Jnanada Prosad Mukherji

APPELLANT

Vs

G.M. Falkner

RESPONDENT

Date of Decision: July 16, 1928

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115
- Limitation Act, 1963 - Section 5

Citation: AIR 1930 Cal 426

Judgement

1. This Rule is directed against an order of the District Judge of Burdwan dated 17th March 1928. The petitioner who is a pleader at Burdwan brought a suit against the opposite party for recovery of his professional dues. During the progress of the suit he made an application, under Order 11 for discovery of certain documents and order was passed by the Subordinate Judge before whom the case was pending for the production of some of those documents in Court. After a great deal of fight over this matter on both sides the documents were not produced and the petitioner applied under Order 11, Rule 21, to have the defendant's defence struck out for not complying with the order of the Court. The learned Subordinate Judge who had passed the order for the production of the documents refused to strike out the defence on the ground that the documents were not very material and that they could be proved otherwise. From that order an application in revision was filed in this Court u/s 115 and a rule was granted. At the hearing of the rule it transpired that the order passed by the lower Court might be an appealable order and therefore the rule should not have been issued. An appeal from the order of the Subordinate Judge was then lodged in the Court of the District Judge of Burdwan. The learned District Judge has held that the appeal ought to be dismissed on two grounds first, that no appeal lay against the order complained of under Order 43, Rule 1(f) inasmuch as no order was passed under Order 11, Rule 21. In other words the order refusing to strike out a defence was not an order under Order 11. Rule 21;

secondly, that the appeal before him was timebarred and no sufficient cause had been made out u/s 5, Lim. Act, to extend the period for appeal before him with regard to the first point, I do not agree with the learned Judge as in my judgment the order passed by the Subordinate Judge refusing to strike off the defence is an order appealable under Order 43, Rule 1(f). Order 11, Rule 21 says that;

where any party fails to comply with any order to answer interrogatories or for discovery the party interrogating or seeking discovery may apply to the Court for an order to that effect (strike out defence or plaint) and order may be made accordingly.

2. The learned Judge seems to think that the only order that can be passed under Order 11, Rule 21, is an order striking out the defence; and that an order refusing to strike it out is not an order under that rule. This is not the way in which the wording of Order 43 with reference to other matters has been understood by Courts. Clause (1) Order 43, Rule 1, only says "an order under Order 11, Rule 21." It does not specify the nature of the order which is made appealable under that rule. In allowing an appeal from an order either refusing or admitting, Order 43 has specifically mentioned such order when it was intended to give the right of appeal from one sort of order and not from the other. In Clause (e) an order under Rule 9, Order 9, rejecting an application has been made appealable, thus indicating that an order admitting an application is not appealable Similarly in Clauses (h)(k) and (n). In some clauses under Order 43, the legislature has expressly allowed appeal from an order rejecting or granting an application. Under Clause (j), Order 43 an appeal is allowed from an order setting aside or refusing to set aside a sale. Under Clause (1) similarly a right of appeal is given against an order giving or refusing to give leave under Rule 10, Order 22, so also under Clause (m). In interpreting clauses of Order 43, Rule 1 which are worded as Clause (f), the Courts are agreed in holding that an appeal lies from an order made under that special provision and also from the order refusing to make such an order. For instance, Clause (r) gives a right of appeal from an order passed under Ruled 1, 2, 4 or 10, Order 39. Order 39, Rule 1 is almost similarly worded as Order 11, Rule 24. It says that when in any suit it is proved by affidavit or otherwise the Court may by order grant a temporary injunction. Similarly in Rule 2(2), Order 39, the Court may by order grant such injunction. An order made under Order 40, Rule 1 is, appealable under Order 43, Rule 1(s), that is an order relating to the appointment, of a receiver. It has been held, and the question is so well settled that it is beyond controversy, that an appeal also lies from an order refusing to grant an injunction or appoint a receiver. It is useless to pursue this matter further for on a plain reading of the several clauses of Order 43, it must be held that where the legislature, has not specified the sort of order which is made appealable an appeal will lie from an order made under that provision of the code or from an order refusing to make an order under it. The learned advocate who appears for the petitioners has not seriously contested this view.

3. The next question that we have to consider is if the second ground on which the learned Judge has based his judgment, namely, that the petitioner's appeal before him is barred by limitation is correct; and if incorrect, if he has committed such an error in procedure as justifies our interference with-it u/s 115, Civil P.C. The ground for extension of time u/s 5, Lim. Act, is given as the mistake of the lawyer in applying in revision in this Court instead of filing an appeal before the District Judge. Such a ground can under some circumstances be a good ground u/s 5, Lim. Act. But in this particular case the petitioner's lawyers are strenuously contending that the order of the District Judge that no appeal lies in this case is wrong in law. I should have thought that in view of the working of Order 43, Rule 1(f) there could be no ground for doubt with regard to the right of appeal. But the learned District Judge's judgment shows that reasonable doubt may be entertained on this point. However justified the petitioners may be on relying upon the advice of the legal advisers, we cannot say that this is a point which can be investigated by this Court u/s 115 Civil P.C. The Court of appeal below has certainly discretion in this matter and it has held that the petitioner's vakil has failed to make out a case u/s 5, Lim. Act.

4. We have looked into the merits of the case in order to do substantial justice and we are of opinion that it is not a case in which in the interest of justice we should interfere u/s 115, Civil P.C. The rule is discharged with costs 3 gold mohurs. Let the record be sent down at once.