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**(1910) 03 CAL CK 0049**

**Calcutta High Court**

**Case No:** None

Mrinalini Chowdhurani

APPELLANT

Vs

Benode Chandra Mitra

RESPONDENT

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**Date of Decision:** March 9, 1910

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 103

**Citation:** 6 Ind. Cas. 148

**Hon'ble Judges:** Teunon, J; Mookerjee, J

**Bench:** Division Bench

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### **Judgement**

1. This appeal, which has been preferred by the judgment-debtors, is directed against two orders made by the Court below, one u/s 312 of the Code of 1882, confirming an execution sale and the other u/s 103 read with Section 647 refusing to vacate an ex parte order of dismissal of an application to set aside that sale u/s 311 of the Code.

2. The learned Vakil for the respondent, decree-holder auction-purchaser, has taken a preliminary objection to the hearing of the appeal on the ground that it is incompetent. In so far as the appeal is directed against the order confirming the sale u/s 312, it has been argued that as the application to set aside the sale was dismissed for default, it cannot be said to have been disallowed within the meaning of Section 312, and consequently the order of confirmation is not appealable under Clause 16 of Section 588. In our opinion this contention is not well-founded. Clause 16 of Section 588 provides that an order for confirming or setting aside or refusing to set aside a sale of immovable property made u/s 312 or 313 is appealable. There can be no question that the order of confirmation here was made u/s 312. In fact that was the only section of the Code, under which an order of confirmation could have been made. That section contemplates two possibilities: there may be an application such as is mentioned in Section 311 or there may be no application under that section. In the former event the application may be disallowed or it may be granted. If the application is disallowed, the sale is confirmed; if the application is

allowed, the sale is set aside. If no application is made u/s 311, the sale is confirmed. Consequently, whichever of these contingencies may happen, the order of confirmation is made u/s 312 and is appealable under Clause 16 of Section 588. In so far, therefore, as the appeal is directed against the order of confirmation, it is perfectly competent. In so far, however, as the appeal is directed against the order refusing to set aside the ex parte order of dismissal of the application u/s 311, the appeal is incompetent. This is obvious from the decision of this Court in *Sujauddin v. Reazuddin* 27 C. 414, and *Jung Bahadur v. Mahadeo Prasad* 31 C. 207, and of the Allahabad High Court in *Gahsiti Bibi v. Abdul Samad* 29 A. 596 : A.W.N. (1907) 186. But the learned Vakil for the appellant has suggested that the appeal is competent under Clause 8 of Section 588. In our opinion, there is no foundation for this contention. Clause (8) only provides that an order rejecting an application u/s 103 (in cases open to appeal) for an order to set aside the dismissal of a suit is appealable. When, however, Section 103, read with Section 647, is applied to an application u/s 311, the ex parte order of dismissal is not a dismissal of a suit within the meaning of Clause (8) of Section 588, and consequently an appeal does not lie from an order refusing to set aside such ex parte order of dismissal. The preliminary objection, therefore, prevails in part, and, we proceed to hear the appeal in so far as it is directed against the order confirming the sale.

3. The circumstances under which the sale was confirmed are fairly clear from the evidence on the record. The judgment-debtor had made an application to set aside the sale, which had been directed to be heard on the 19th September. On that date, her officer Sudhir Ranjan Roy was present in Court, and as appears from his sworn testimony, he had come to Court to conduct the case and not to have it postponed. His story is that he went out of the Court room to see if the witnesses who had been summoned were present and that meanwhile the case was taken up and dismissed in his absence. Sanat Kumar Roy Chowdhury, the pleader by whom the application u/s 311 had been filed, was present in the Court room at the time when the case was taken up for hearing. He states that he had met the officer of his client that morning and had been informed by him that he was going to Jagadish Babu who was the senior pleader engaged in the case, as appeared from the Vakalatnama on the record. Sanat Kumar, however, when the case was called on for hearing, intimated to the Court that he had seen his client's man in the morning who could not be found. The impression thus created was that he was the sole pleader in the case and that he had no instructions to go on with it. The Court, thereupon, recorded the following order: "The judgment-debtor applied for setting aside the sale. She is not present and her pleader states that he has no instructions. The application for setting aside the sale is, therefore, rejected for default with costs. The sale is confirmed and the execution case dismissed on part satisfaction." It is clear, however, from the evidence that Jagadish Babu immediately afterwards came into Court room; indeed Sanat Kumar Roy Chowdhury states that after mentioning to the Court that he had no instructions he went to Jagadish Babu and returned with him, when the judgment was being delivered. Later on in the day, an application was made on behalf of the judgment-debtor to set aside the ex parte order of dismissal. The evidence of

Sudhir Ranjan Roy Chowdhury, the manager of the appellant, does not, however, show that he had gone to fetch Jagadish Babu. He appears to have gone to another pleader, Hari Jibun Babu, whose services were retained that very day, and got him to draft an application for postponement on the ground that two of the important witnesses on the side of the applicant had not come and fresh processes were needed to enforce their attendance. This application has been produced, and the explanation offered is that before it could be presented to the Court, the order of dismissal had been recorded. To us the conduct of Sudhir seems inexplicable. He did not act with as much care and caution as he ought to have done seeing that he was looking after the case on behalf of his mistress to whom he was related. A suggestion has been made that this lack of diligence on the part of Sudhir may, perhaps, be traceable to not very honest motives. This, however, need not be determined, because there is not the remotest suggestion that the decree-holder acted with unfairness. Our view is that the case on behalf of the appellant was negligently and foolishly managed in the Court below and that although she had her officer to look after the case and at least three pleaders had been engaged to conduct it, two of them could not appear in Court in time, while the one who did appear in Court did not make a full statement of the circumstances and rather created the impression that he was the sole pleader engaged and had no instructions. Under these circumstances, we think, that the application to set aside the sale should be investigated on the merits, specially as the property in dispute is of considerable value.

4. The result, therefore, is that this appeal is allowed and the order of the 19th September, 1908, set aside. The case is remanded to the Subordinate Judge in order that he may hear the application to set aside the sale on the merits in the presence of both parties. As the respondent, however, was not to blame for the difficulty in which the appellant found herself, he is entitled to his costs both here and in the Court below. We assess the hearing fee in this Court at three gold mohurs and that in the lower Court at one gold mohur. We further direct that these costs be deposited in the Court below before the application to set aside the sale is heard on the merits.