

Hara Kumar Mitter Vs Murari Mohan Bose and Others

Court: Calcutta High Court

Date of Decision: March 22, 1922

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 43 Rule 1(c), Order 9 Rule 9, 141

Citation: AIR 1922 Cal 572 : 69 Ind. Cas. 1003

Hon'ble Judges: Lancelot Sanderson, C.J; Thomas Richardson, J

Bench: Division Bench

Judgement

Thomas Richardson, J.

In my opinion, this Rule should be discharged on the ground that there is no substance in the contention advanced on the petitioner's behalf; The petitioner brought a suit in ejectment against the opposite parties. The petitioner not appearing when the suit was

called on for hearing the suit was dismissed under Rule 8 of Order IX. The petitioner then applied under Rule 9 of the same Order for an order

setting aside the dismissal. The petitioner again failed to appear at the proper time and application was in its turn dismissed for default. The

petitioner then applied to have the dismissal of the previous application set aside. The second application was heard and refused by the learned

Munsif in the Court of first instance by an order, dated 5th February 1921. From that order the petitioner appealed. The appeal was heard by a

learned Subordinate Judge who dismissed it on the ground that no appeal lay. The petitioner then obtained this Rule setting aside the order of the learned Subordinate Judge.

to show cause why the learned Subordinate Judge's order should not be set aside on the ground he had erred in holding that the appeal was

incompetent.

2. In my opinion, the learned Subordinate Judge was quite right in the view which he took, Clause (c) of Rule 1, of Order XLIII allows an appeal

from an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. The

clause applies, therefore, only in cases when a "suit" has been dismissed. It is clear that while the order dismissing the petitioner's first application

remained in force no fresh application could be made to set aside the dismissal of the suit. It is also clear that the suit came to an end with the order

dismissing it for default and the first application, namely, the application to set aside the dismissal of the suit was not itself a suit. It follows that the

order dismissing the second application was not an order refusing to set aside the dismissal of a suit within the meaning of Clause (c) of Rule 1 of

Order XLIII This reasoning is similar to that adopted in *Charu Chandra Ghosh v. Chandi Charan Boy Chowdhury* 27 Ind. Cas. 492 : 19 C.W.N.

25. It is at least extremely doubtful whether, regard being had to the observations of the Privy Council in the case, there cited, of *Thakar Prasad v.*

Fakir Ullah 22 I.A. 44 : 17 A. 106 : 5 M.L.J. 3 : 6 Sar. P.C.J. 526 : 8 Ind. Dec. 393 , Section 141 of the Code applies at all to proceedings

under Rule 9 of Order IX, but even if the contrary be assumed Section 141 cannot operate to give an appeal from an order not otherwise

appealable under Order XLIII.

3. The Rule must, in my opinion, be discharged with costs, hearing fee two gold mohurs.

Lancelot Sanderson, C.J.

4. I agree.