

(1917) 08 CAL CK 0053

Calcutta High Court

Case No: None

Jagat Chandra Acharji and
Another

APPELLANT

Vs

Syama Charan Bhattacharjee
and Others

RESPONDENT

Date of Decision: Aug. 22, 1917

Citation: 44 Ind. Cas. 999

Hon'ble Judges: Lancelot Sanderson, C.J; Walmsley, J; Teunon, J

Bench: Full Bench

Judgement

Lancelot Sanderson, C.J.

In these two cases the point which has been raised (the same point has been raised in each case), is a very unusual point, and one upon which there is no authority.

2. What happened is as follows: Mr. Justice Holmwood sitting with Mr. Justice Chapman heard these second appeals under Order XLI, Rule 11, of the CPC and dismissed them. After that Mr. Justice Chapman took a month's leave immediately before the long vacation, and while he was away applications were made to Mr. Justice Holmwood for a review of the judgments which had been delivered by him and Mr. Justice Chapman. Mr. Justice Holmwood heard the applications for review and dismissed them. As far as I understand the facts, the parties did not object at the time of his hearing the applications on the ground that he had no jurisdiction so to do: but, of course, that fact or the consent of parties will not give jurisdiction if he had no jurisdiction under the Act.

3. The learned Vakil who appeared in the first of these cases mentioned to us a case which was decided by Mr. Justice Woodroffe and Mr. Justice Mookerjee and seemed to think that his case was covered by that decision. But in that case the facts were materially different from those in this case. There Mr. Justice Teunon sitting with Mr. Justice Smither, who was then acting as a Judge of the High Court, had dealt with a second appeal. Then after Mr. Justice Smither left the Court, i. e., after his officiating

period had come to an end and he ceased to be a member of the Court, an application was made to Mr. Justice Teunon for a review of the judgment delivered by him and Mr. Justice Smither, and he dealt with that application; and then an appeal was filed against the decision of Mr. Justice Teunon u/s 15 of the Letters Patent. That appeal came on for hearing before Mr. Justice Woodroffe and Mr. Justice Mookerjee who came to the conclusion that no appeal lay. They referred to the Code, and amongst other reasons they referred to the fact that if they had heard the appeal from Mr. Justice Teunon they would in effect be hearing an appeal from a decision of two Judges, because after Mr. Justice Smither had ceased to be a member of the Court. Mr. Justice Teunon represented the Court which had been constituted by the two Judges, and, therefore, to hear an appeal from Mr. Justice Teunon would be to hear an appeal from the two Judges, which, of course, they could not. If I may say so, I entirely agree with the judgment of Mr. Justice Woodroffe and Mr. Justice Mookerjee, but that judgment does not cover the present cases, because Mr. Justice Chapman did not cease to be a member of this Court, nor was he in the words of the rule "precluded by absence or other cause for a period of six months next after the application from considering the decree to which the application referred"--he was merely away on a month's leave prior to the usual long vacation and, the applications, if they had been postponed, could have been heard by Mr. Justice Holmwood and Mr. Justice Chapman after the expiration of the long vacation in the beginning of the next term. In my judgment, therefore, Mr. Justice Holmwood, when he heard the applications and refused them, was acting without jurisdiction. I ought to have mentioned that the rule which applies to this matter is Rule 5 of Order XL VII.

4. Now, if Mr. Justice Holmwood acted without jurisdiction, the next question which arises is whether there is a right of appeal from his judgment. If there was any doubt, the matter has been set at rest by the judgment of the Privy Council in the case of *Hurrish Chunder Chowdhry v. Kali Sunderi Debi* 9 C. 482 at p. 493 : 10 I.A. 4 : 12 C.L.R. 511 : 7 Ind. Jur. 161 : 4 S. P.C.J. 406 : 4 Ind. Dec. (N.S.) 970 (P.C.), the passage which is material being at page 493. There His Lordship Sir R.P. Collier said: "Their Lordships do not think that Mr. Justice Pontifex can be properly treated as having usurped jurisdiction; but if he had; this would have been a valid ground of appeal; and they are unable to agree with the Chief Justice that if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice." Acting on that judgment I am of opinion that we must hear the appeals, even though the learned Vakils in one of the cases brought to our attention--and quite properly brought to our attention--the judgment of Mr. Justice Woodroffe and Mr. Justice Mookerjee, to which I have alluded, and even though he seemed to have thought that his case was covered by that judgment. We must treat both the cases alike, and we will bear both the appeals.

5. We, therefore, direct that notices of the appeals be served on the respondents and that Rules be issued on them to show cause why the applications for review should not be granted.

6. Both the appeals and the review Rules will come for hearing to the same Court at the same time, and they will be heard by the Court taking the Letters Patent Appeals.

Chatterjea, J.

7. I agree.

8. The Letters Patent Appeal and the Rule came on for hearing before the Court taking the Letters Patent Appeals.

9. Babu Khitish Chandra Sen, for the Appellant.--The second appeal was heard under Order XLI, Rule 11, of the CPC by two Judges of this Hon'ble Court, viz., Mr. Justice Holmwood and Mr. Justice Chapman, and was dismissed. Then there was an application for review of judgment which was heard and decided by Mr. Justice Holmwood alone, as Mr. Justice Chapman was then absent on leave. Mr. Justice Holmwood dismissed the application for review of judgment. The present Letters Patent Appeal has been preferred against the decision of Mr. Justice Holmwood dismissing the application for review of judgment, on the ground that Mr. Justice Holmwood acted without jurisdiction in hearing the application and dismissing it, The case in Kailash Chandra Somaddar v. Revati Mohan Roy 41 Ind. Cas. 183 : 25 C.L.J. 360 : 21 C.W.N. 652 does not apply to this case as in that case the circumstances were somewhat different. As regards the competency of this appeal from the judgment of Mr. Justice Holmwood, reference may be made to the case of Hurish Chunder Chowdhry v. Kali Sunderi Debi 9 C. 482 at p. 493 : 10 I.A. 4 : 12 C.L.R. 511 : 7 Ind. Jur. 161 : 4 S. P.C.J. 406 : 4 Ind. Dec. (N.S.) 970 (P.C.).

10. [Walmsley, J.--When the applications were heard by Mr. Justice Holmwood alone did you object to his jurisdiction so to do?]

11. No. But that would not, I submit, give jurisdiction if he had no jurisdiction under the Act.

12. Babu Dhirendra Lal Kastgir, appeared for the Respondents but said he had no instructions).

13. This Letters Patent Appeal is decreed, the judgment of Mr. Justice Holmwood on the application for review is set aside, the Rule is made absolute and the appeal from the appellate decree is admitted.

14. Let the record be sent for and the usual notices be issued.