

Bhadreswar Goloi and Others Vs Bishnu Charan Sen and Others

Court: Calcutta High Court

Date of Decision: Aug. 26, 1910

Final Decision: Allowed

Judgement

1. This is an Appeal against an order refusing to set aside an execution sale. The sale was held in execution of a rent-decree on the 15th August

1908. On the 23rd December, 1908, an application was made by a person who claimed to be the transferee of a portion of the holding to set

aside the sale on the ground of material irregularity in publishing and conducting it and also on the ground that the sale had been brought about by

fraud. On the 23rd August 1909, the Court of first instance granted this application and set aside the sale. On the 24th January 1910, the learned

District Judge made the order now under consideration by which he allowed the appeal and dismissed the application for reversal of the sale. It is

clear that no appeal lies to this Court against the appellate order of the District Judge. But the learned Vakil for the Appellants has suggested that

as the application was made on the 23rd December 1908, when the Code of 1882 was in force, under secs. 244 and 311 of that Code, the

Appellant is entitled to prefer an appeal to this Court against the appellate order of the District Judge. In our opinion there is no foundation for this

contention. The order of the Court of first instance was made after the Code of 1908 had come into operation. The order therefore must be

treated as one made under Or. 21, r. 92, sub-r (1). The application must have been treated by the Original Court as one under r. 90 which has

effected a material alteration in the law and has placed cases in which a sale is impeached on the ground of fraud on the same footing as cases in

which the sale is impeached on the ground of material irregularity. If therefore the order was made under r. 92 sec. 104 of the Code read with Or.

43, r. 1, cl (7), allowed an appeal to the Court of the District Judge; but under sec. 104, sub-sec. (2) no appeal is allowed from the order passed

in appeal. It is also clear that sec. 154 is of no assistance to the Appellant. That section only saves a right of appeal which had accrued to a party

at the commencement of the new Code Sec. 2 is equally ineffectual, because it excludes from the definition of "decree" any adjudication under sec.

47 from which an appeal lies as an appeal from an order. The result, therefore, is that this Appeal must be dismissed on the ground that no appeal

is allowed by law.