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**(1869) 06 CAL CK 0049**

**Calcutta High Court**

**Case No:** Miscellaneous Special Appeal No. 157 of 1869

Nilambar Sen

APPELLANT

Vs

Kali Kishor Sen

RESPONDENT

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**Date of Decision:** June 8, 1869

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### **Judgement**

Bayley, J.

In this case it appears that the appellant, Nilambar Sen, was co-sharer of certain property with his brother Pitambar Sen, and was sued by him (Pitambar) for certain money expended in the improvement of that property. The Court in that case passed a decree in favour of Pitambar, or rather in favour of his son Kali Kishor Sen, to the effect that should the defendant, Nilambar, judgment-debtor, contribute towards the payment of the expenses of "Bharati," or, improvement of the soil, by filling up cavities, he would be entitled to a proportionate share of the profits, but that if he did not, he should pay rent in proportion to the extent of land previously held, and of rent before paid by him, and that the decree-bolder, Pitambar, would continue to get the whole extra profit derived from the improvement above referred to. This decree was struck off in the year 1863, and has never since been revived by the decree-holder; and it may be here noticed that with the exception of this decree of the Munsiff, there was no other decree given to the judgment-debtor, Nilambar Sen. The present appellant, Nilambar, now in miscellaneous special appeal asks from us, firstly, that the decree obtained by the decree-holder, Pitambar, against him and struck off in 1863, as above stated, may be restored to the file; and, secondly, that after paying the Ameen's fees and the share of expense of the "Bharati," he the petitioner may be put in possession of the homestead of Kandarpa Khan. The Munsiff and the Judge have both rejected this prayer. The Judge has held that under no circumstances could the judgment-debtor be put in possession of the lands, as the decree does not provide for such possession, but only for a share in the extra profits.

2. The judgment-debtor appeals against this order, and urges that he is so far a decree-holder as that by the decree it has been ordered that he shall participate in the profits of the property if he be paid a certain sum of money, and that therefore on payment of

that sum, which he is ready to pay, he is entitled to be put in possession.

3. Now, in the first place, we cannot allow that when a decree-holder himself allows his decree to be struck off, and does nothing to revive it, the decree should be revived on the motion of the judgment-debtor; and in the next place, as the judgment-debtor in this case can show us no cross suit or decree in which any order has been passed in his favor for the possession he seeks for, we cannot grant his prayer for possession. But we think that the whole proceedings taken in this case from the date of the revival of the execution of the decree up to the present moment have been taken without jurisdiction. No application of the judgment-debtor could restore a decree of the judgment-creditor which that creditor, for reasons best known to himself, refused to execute, and no Court could revive a decree abandoned by the only person who could execute it, viz., the decree-holder, or one precisely in his place. We therefore quash the whole proceedings of the lower Courts subsequent to the revival of the execution of the decree as being without jurisdiction. As the special appellant, however, had no reason to come to this Court to revive a decree of which he was not the holder, we think that he must pay the costs in this Court.