

Hem Chandra Bakshi Vs. Jadub Chandra Bakshi

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Court : Kolkata

Decided On : Jun-25-1901

Reported in : 17Ind.Cas.99

Judge : Francis Maclean, C.J. and ;Banerjee, J.

Appellant : Hem Chandra Bakshi

Respondent : Jadub Chandra Bakshi

Judgement :

Francis Maclean, C.J.

1. A preliminary objection has been taken to the hearing of this appeal on the ground that the appeal was improperly admitted. The facts lie within a very narrow compass and they may be stated thus. The present appellant filed a petition for the revocation of the Probate of the Will of his father granted to his brother who is the respondent in the appeal, and a petition of objection was put in by the respondent to the appellant's petition. Eventually, the two brothers agreed to refer, and they did refer, the whole matter to arbitration. The arbitrators made an award on the 24th July 1899, and, shortly afterwards, the matter came before the District Judge of Hughli on the 9th of August 1899 for final disposal in the presence of the Pleaders on both sides, and it was ordered 'that the Will of the late Radha Nath Bakshi, dated the 23rd Chait 1297, be declared to be genuine, and that the revocation case of the plaintiff be dismissed.' No objection was then raised by the

present appellant to the passing of that decree. That decree was signed on the 14th of August 1899. On the 30th of November 1899, the present appellant, who was dissatisfied with the award because the arbitrators had decided against him, filed a memorandum of appeal in this Court, and set forth various grounds upon which he alleged that the order of the District Judge was wrong, and there is this note at the foot of this memorandum of appeal: 'I understand that no decree has been drawn up in this case and that the only final judgment is the order herewith affixed.' That was a statement not based upon fact, as a decree had been drawn up on the 14th of August 1899, and the slightest inquiry would have elicited this fact. The appeal then was admitted by this Court under a misapprehension, and in consequence of the mis-statement at the foot of the memorandum of appeal.

2. An objection is now taken that, having regard to the provisions of Section 541 of the Code of Civil Procedure, read with Section 590, the appellant has not filed his memorandum of appeal in compliance with the provision's of the Code. Section 541 of the Code, which is made applicable to orders by Section 590 read with Section 86 of the Probate and Administration Act, directs that, 'the appeal shall be made in the form of a memorandum in writing presented by the appellant and shall be accompanied by a copy of the decree appealed against, and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.' In this connection, I may refer to the cases of *Chamela Kuar v. Amir Khan* 16 A. 77 : A.W.N. (1893) 223 and *Bhawani Prasad v. Kallu* 17 A. 537 at p. 553 : A.W.N. (.1895) 212. But the language of the Code is sufficiently clear and precise on the point. The provisions of the Code, to which I have referred, have not been complied with by the appellant and, that being so, it seems to me that the preliminary objection must prevail. As I have pointed out, the appellant could have easily ascertained, if he had made any inquiry before filing the memorandum of appeal, that a decree had been drawn up. Under these circumstances, I think that the memorandum of appeal is bad, and it ought not to have been accepted by this Court, and that, consequently, there is no appeal which can be properly entertained by us. No valid memorandum of appeal then has been presented in time. If sufficient cause had been shown, we could have extended the time for appealing under Section 5 of the Limitation Act, but no cause sufficient or otherwise has been suggested. Again, the points which it is now sought to urge on

appeal before us were never raised or even suggested before the Court below, for no objection was taken to the decree of the 9th August 1899. Under these circumstances, we do not think that this is a case in which we ought to exercise the judicial discretion, which is vested in us, by granting further time to appeal. Furthermore, on the merits, the appellant's case does not look very hopeful.

3. The appeal is accordingly dismissed with costs. We assess the hearing fee at seven gold mohurs.

Banerjee J.

4. I concur.

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