

Devendra Nath Basu and ors. Vs. Kailash Chandra Kalu and ors.

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Court : Kolkata

Decided On : May-16-1924

Reported in : AIR1925Cal318

Appellant : Devendra Nath Basu and ors.

Respondent : Kailash Chandra Kalu and ors.

Judgement :

Pearson, J.

1. This is an appeal from an order of the District Judge of Nadia, confirming an order of the Munsiff of Ranaghat.
2. The appellants obtained a decree for rent and applied in execution for sale of the lands. A notice was served on the judgment-debtors under Order 21, Rule 66 upon which the latter appeared and objected that the lands were not properly described in the sale proclamation. The objection related to the western boundary which was stated to be certain accreted lands whereas the judgment-debtors contended that the accretions should be included in the sale, the boundary on that side being in that case the river. Upon a hearing of the application the Munsiff decided in favour of the judgment-debtors and ordered the decree-holders to furnish a true description of the rent lands within a week, failing which the execution case would be dismissed. From that order an appeal was preferred, and the learned Judge upheld the order of the Munsiff, holding upon a preliminary

objection that no appeal lay, inasmuch as the order was one under Order 21, Rule 66 which did not judicially determine any matters between the parties.

3. I am not prepared to say that the determination of a question arising upon an application under Order 21, Rule 66 may not also be an order passed under Section 47, Civil Procedure Code. The test in each case would be whether there had been a judicial adjudication binding on the parties in a subsequent proceeding, finally determining the rights of the parties: *Deoki Nandan Singh v. Bansi Singh* (1911) 16 C.W.N. 124, *Baishnab Charan Shaha v. Bank of Bengal* (1914) 19 C.L.J. 581. An estimate of value is on a different footing from a fixing of definite boundaries. These were arrived at by the Munsiff after full consideration of the evidence adduced and it is difficult to see how the question so determined could be reopened and reagitated upon that particular ground in subsequent proceedings under Order 21, Rule 90. In my opinion the Munsiff's order amounted to a Judicial determination of the rights of the parties and was a final order under Section 47 and so appealable. Some support also is lent to this conclusion by the case of *Rambhadra Naidu v. Kadiriyasami Naicker* A.I.R. 1922 P.C. 252. The appeal is, therefore allowed the order of the District Judge set aside and the case must go back to be disposed of on the merits. The appellants will get their costs in this Court. Hearing fee two gold mohurs.

Graham, J.

4. This appeal is directed against the judgment and decree of the District Judge of Nadia confirming the decision of the Munsiff of Ranaghat and arises out of an execution of a rent decree. The decree-holders, now appellants, wanted to put the holding in question up for sale in accordance with the boundaries given in the plaint where in one of the boundaries is described as an accretion and not as the river itself. Notice was served on the judgment-debtors under Order 21, Rule 66 and they then objected that the boundaries had not been properly described, their contention briefly being that the river was the boundary and not the accretion.

5. Two points arose before the Court of first instance firstly, whether the application was maintainable under Section 47 of the Code of Civil Procedure and

whether the matter could be gone into in the execution stage, and secondly, on the merits, whether, if it could be gone into, the disputed portion was an accretion.

6. The Munsiff decided both points in favour of the tenants and the decree-holders were directed to give correct boundaries within a week failing which the execution case would be dismissed.

7. The decree-holders then appealed to the District Judge who dismissed the appeal on a preliminary objection holding that the order of the Munsiff had been made under Order 21, Rule 66 and that, therefore, no appeal lay.

8. Against that order the decree-holders have now preferred this second appeal and the substantial contention urged on their behalf is that the learned District Judge erred in law in holding that no appeal lay, and that inasmuch as the order of the Munsiff conclusively determined the rights of the parties in regard to the accreted portion it was a decree within the meaning of Section 2 (2), Civil Procedure Code, and therefore, an appeal was competent.

9. In my opinion this contention is well founded and must prevail. There can be no question that if the order falls within Section 47, Civil Procedure Code, and is a final order it is a decree within the meaning of the Code, and can be challenged by way of appeal. In order to determine whether the order falls within the terms of Section 47, Sub-section (1) it is necessary to see whether the order decides a question arising between the parties to the suit in which the decree was passed and relates to the execution of the decree. There is no room for controversy that the order relates to the execution of the decree, and that the question does arise between the parties to the suit. The only essential which remains, therefore, to be fulfilled is that the order decided something, As to that it seems to me to be plain, that the order finally determined the liability of the judgment-debtors to have execution issued against them on the basis of the decree. Such an order seems to me to be plainly a final order made under Section 47, Civil Procedure Code. In my judgment the learned District Judge erred in giving effect to the preliminary objection and the case must go back to the Court below for an investigation on the merits. I agree that the appeal must be allowed with costs.

