1917

NALINI KANTA LAHA v. ANUKUL CHANDRA LAHA.

Emperor v. *Bhawani Das* (1), and is also supported by the course of reasoning followed in *Re Parameswaran Nambudri* (2). With these decisions we agree, and in this view the prosecution of the principal petitioners, Nalini and Fakir Chandra, cannot proceed without sanction. The other three petitioners, who are charged as accessories, were not parties to the case under section 145 of the Code of Criminal Procedure, but it is not desirable that proceedings should be taken piecemeal or against the abettors while there is still a bar to the prosecution of the principals.

In this view, it is unnecessary to discuss the second contention advanced on behalf of the petitioners.

For the reasons given, we quash the proceedings now taken against the petitioners, Nalini and Fakir, and stay the proceedings against the remaining three petitioners until the bar to a prosecution of the principals has been removed.

E. H. M. *Rule absolute.*

(1) (1915) I. L. R. 38 All. 169. (2) (1915) I. L. R. 39 Mad. 677.

CIVIL RULE.

Before N. R. Chatterjea and Newbould JJ.

PYARI MOHAN KUNDU

v.

KALU KHAN.*

1917

Feb. 12.

Review—Application for review subsequent to filing of second appeal—Civil Procedure Code (Act V of 1908) s. 114 ; O. XLVII, r. 1.

Where an application for review of judgment is filed and later, during the pendency of the same, an appeal is preferred :—

Held, that the Court has power and in fact is bound to proceed with the

* Civil Rule No. 732 of 1916, against the order of Achinta Nath Mitra, Subordinate Judge of Barisal, dated Aug. 5, 1916.

1917

PYARI MOHAN KUNDU v. KALU KHAN.

application for review of judgment notwithstanding the fact that an appeal has been subsequently filed. But the power exists so long as the appeal is not heard.

Bharat Chandra Mazumdar v. *Ramgunga Sen* (1), *Chenna Reddi* v. *Peddaobi Reddi* (2) followed.

Thacoor Prosad v. *Baluck Ram* (3), *Sarat Chandra Dhal* v. *Damodar Manna* (4), *Narayan Purushottam Gargote* v. *Laxmibai* (5) referred to.

On the other hand, if the application is successful, the appeal cannot proceed.

Kanhaiya Lal v. *Baldeo Prasad* (6) referred to.

CIVIL RULE obtained by Pyari Mohan Kundu, the petitioner.

The facts briefly are these. A decree was obtained against the petitioner, Pyari Mohan Kundu, who preferred an appeal. The appeal was heard and dismissed on the 24th March 1916. The petitioner thereupon filed an application for review of judgment on the 26th June 1916. During the pendency of that application the petitioner on the 4th July 1916 filed an appeal to the High Court. On the 5th August 1916, the application for review came up for hearing and the lower Appellate Court dismissed the same holding that an appeal having been preferred it could not entertain the application for review.

From this order the petitioner moved the High Court and obtained this Rule.

Babu Dwarka Nath Chuckerbutty (with him *Babu Ramesh Chandra Sen*), for the petitioner, contended that the lower Appellate Court had jurisdiction to dispose of the application for review on the merits and it had failed to exercise that jurisdiction. The subsequent filing of the appeal did not make the application for review incompetent, though the appeal

(1) (1866) B. L. R. (F. B.) 362.
(2) (1909) I. L. R. 32 Mad. 416.
(3) (1882) 12 C. L. R. 64.
(4) (1908) 12 C. W. N. 885.
(5) (1914) I. L. R. 38 Bom. 416.
(6) (1905) I. L. R. 28 All. 240.

could not proceed. If that application succeeded and the judgment and decree were set aside or modified, the questions raised in the application for review may be questions of law as well as facts which could not be challenged on second appeal. If the filing of the second appeal were delayed until the disposal of the application for review, the time for filing an appeal may have expired. The only practical course was to apply for review first, then to file the second appeal, and if the former succeeded then to withdraw the latter, but if it failed to proceed with the appeal. The Court was bound to dispose of the application for review which was filed before the appeal: *Bharat Chandra Mazumdar* v. *Ramgunga Sen* (1), *Thacoor Prosad* v. *Baluck Ram* (2), *Sarat Chandra Dhal* v. *Damodar Manna* (3), *Narayan Purushottam Gargote* v. *Laxmibai* (4), *Chenna Reddi* v. *Peddaobi Reddi* (5), *Kanhaiya Lal* v. *Baldeo Prasad* (6).

Babu Ramani Mohan Chatterjee, for the opposite party, contended that the petitioner did not want to press the application for review hence he filed the second appeal. The order showed that the petitioner's *karmachari* informed the Court that a second appeal had been filed.

[CHATTERJEA J. The application was rejected on the ground that the Court had no jurisdiction to entertain it and not on the ground that it was not pressed. The *karmachari* only stated what was a fact.]

The petitioner was availing himself of two remedies simultaneously. He could raise the same questions on second appeal. The application for review was unnecessary. A party who had appealed could not proceed with an application for review, such a

(1) (1866) B. L. R. (F. B.) 362.
(2) (1882) 12 C. L. R. 64.
(3) (1908) 12 C. W. N. 885.
(4) (1914) I. L. R. 38 Bom. 416.
(5) (1909) I. L. R. 32 Mad. 416.
(6) (1905) I. L. R. 28 All. 240.

1917

PYARI MOHAN KUNDU v. KALU KHAN.

course would come within the prohibition of s. 114 and O. XLVII, r. 1 of the Code of Civil Procedure.

N. R. CHATTERJEA AND NEWBOULD JJ. We are invited in this Rule to set aside an order passed by the Court below refusing to hear an application for review of a judgment presented to it by the petitioner, on the ground that an appeal had been preferred against the decree to this Court. The application for review, it appears, was filed on the 26th June 1916 and the appeal to this Court was not preferred until the 4th of July. The application for review, therefore, was filed before any appeal was preferred to this Court. Section 114 of the Civil Procedure Code lays down that "any person considering himself aggrieved by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, may apply for a review of judgment." It is clear from that section that an application for review can be made before any appeal has been preferred. That being so the question is whether there is anything in the Civil Procedure Code to prevent the Court from proceeding with the application for review notwithstanding the pendency of the appeal. The question has been considered in several cases. One of the earliest cases in this Court is *Bharat Chandra Mazumdar* v. *Ramgunga Sen* (1), where, in delivering the judgment of the Full Bench, the learned Judges observed: "It is clear that, if a review be applied for in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of appeal, and he has full power, and is bound to proceed under the application for review." That case was decided under Act VIII of 1859; but, so far as this question is

(1) (1866) B. L. R. (F. B.) 362.

concerned, section 376 of that Act has substantially been re-enacted in section 114 of the present Code. [See *Thacoor Prasad* v. *Baluck Ram* (1), *Sarat Chandra Dhal* v. *Damodar Manna* (2)]. The same view has been taken in the Bombay and Madras High Courts. See *Narayan Purushottam Gargote* v. *Laxmibai* (3) and *Chenna Reddi* v. *Peddaobi Reddi*(4), the last one being a decision of the Full Bench. We agree with the observations made in that case and which run as follows: "The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by statute in this way it appears to me that they cannot be taken away or cut down except by express words or necessary implication. There are no express words and the question therefore is,—is there any necessary implication? No such implication arises from the terms of section 623 itself which provides, by way of exception, that, in certain cases, an application for review may be made even after an appeal has been filed and if the Court can proceed to hear such an application why not also an application made before the filing of an appeal?" Having regard to the terms of the section and the cases referred to above, we are of opinion that the Court has power, and in fact is bound to proceed with the application for review notwithstanding the fact that an appeal has been subsequently filed in the case. But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded

(1) (1882) 12 C. L. R. 64.
(2) (1908) 12 C. W. N. 885.
(3) (1914) I. L. R. 38 Bom. 416.
(4) (1909) I. L. R. 32 Mad. 416.

1917

PYARI MOHAN KUNDU v. KALU KHAN.

with. Whether it can be so proceeded with (after the appeal is heard) in cases coming under Order XLVII, r. 1 (*2*), it is unnecessary for us to consider. On the other hand, if the application for review is successful, the appeal cannot proceed. See *Kanhaiya Lal* v. *Baldeo Prasad* (1). The appeal in the present case has not yet been heard under Order XLI, rule 11 of the Civil Procedure Code. The appellant undertakes to have the hearing of the appeal stayed until the decision of the application for review. We. therefore, make the Rule absolute, set aside the order of the lower Court and direct that the application for review be taken up and disposed of without delay. The petitioner is entitled to his costs in this Rule from the opposite party.

Let the record be sent down without delay.

L. R. *Rule absolute.*

(1) (1905) I. L. R. 28 All. 240.

INSOLVENCY JURISDICTION.

Before Greaves J.

1917

March 23.

Re PREM LAL DHAR.
Ex parte THE OFFICIAL ASSIGNEE.*

Insolvency—Order of administration—Attachment by creditor prior to order—Sale after order—Rights of attaching creditor—Presidency Towns Insolvency Act (III of 1909), ss. 53 (1), 108, 109.

Section 53 (*1*) of the Presidency Towns Insolvency Act does not apply to an administration of the insolvent estate of a deceased person under sections 108 and 109 of the Act. But as an attachment in this country only prevents alienation and does not confer any title or create any charge or lien on the attached property such as attaches in England upon seizure

* Ordinary Original Insolvency Suit No. 24 of 1917.