

APPELLATE CIVIL.*Before Page and Graham JJ.***ASWINI KUMAR DUTTA**

1927

*May 27.**v.***SASHI BHUSAN DAS.***

Second Appeal—Second appeal, whether maintainable if fraud not established in an appeal under section 153 of the Bengal Tenancy Act (VIII of 1885)—Civil Procedure Code (Act V of 1908), O. XXI, r. 92.

A second appeal under section 153 of the Bengal Tenancy Act will not lie merely because an appellant makes an allegation of fraud in the original application in respect of which the appeal arises, unless the allegation of fraud has been established.

MISCELLANEOUS APPEAL by Aswini Kumar Dutta and others, judgment debtors.

This miscellaneous appeal is directed against an order reversing the order of the Munsif setting aside an execution sale under Order XXI, rule 92 of the Code of Civil Procedure on the grounds of material irregularity and fraud.

Babu Jatindra Mohan Ghose, for the appellants.

Babu Birendra Kumar Dey, for the respondents.

PAGE J. This is an appeal from an order of the Subordinate Judge of Tipperah reversing an order of the Munsif of Comilla. A preliminary objection is taken that no appeal lies. The order was made upon an application to set aside a sale upon the grounds of material irregularity and fraud under Order XXI, rule

* Appeal from Order, No. 306 of 1926, against the order of Kumud Bandhu Gupta, Subordinate Judge of Tipperah, dated May 26, 1926, reversing the order of Manoranjan Ray, Munsif of Comilla, dated Sep. 16, 1925.

90 of the Code of Civil Procedure. It is conceded by the learned vakil on behalf of the appellants that no second appeal lies from an order made under Order XXI, rule 92, but he contends that a second appeal lies under section 153 of the Bengal Tenancy Act. With respect to this contention, however, he further concedes that unless he can succeed upon the allegation of fraud this appeal is incompetent under section 153. The lower Appellate Court has found that there was no fraud or material irregularity in the conduct of the sale, and that the appellants sustained no substantial injury in consequence of any such fraud or irregularity. The finding of the lower Appellate Court upon the issue of fact as to whether there was fraud is not to be questioned in second appeal. The learned vakil for the appellants contended that in every case in which an appeal will lie only if fraud is established, it is open to a litigant to avail himself of the right of appeal if in the original application in respect of which the appeal arises an allegation of fraud has been made. In my opinion in such a case an appeal will not lie unless the allegation of fraud has been established, and will not lie merely because in addition to other objections what proves to be an unfounded allegation of fraud is made. If the contention of the appellant were held to be the law many rules of procedure could and would be evaded by the simple expedient of inserting in an application an utterly frivolous and unfounded allegation of fraud. In my opinion, the preliminary objection prevails, and this appeal must be dismissed with costs.

GRAHAM J. concurred.

Appeal dismissed.

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