CIVIL REVISION.

Before R. C. Mitter J.

1936

April 28; May 6.

MAHENDRA CHANDRA DATTA RAY

v.

BASIR UDDIN.*

Appeal—*Order refusing to set aside* ex parte *decree—Bengal Tenancy Act (VIII of 1885), ss. 143, 153—Code of Civil Procedure (Act V of 1908), s. 104; O. IX, r. 13; O. XLIII, r. 1, cl.* (d).

An order rejecting an application to set aside an *ex parte* decree passed by a Munsif having no final jurisdiction under s. 153 of the Bengal Tenancy Act is appealable.

The words "in a case open to appeal" in O. XLIII, r. (*1*) (*d*) of the Code of Civil Procedure are general words and have no reference to the appeal against the decree *actually passed*.

Nihal Singh v. *Khushhal Singh* (1) and *Selvarayan Samson* v. *S. Amalorpavanandam* (2) followed.

CIVIL RULE obtained by the plaintiff.

The plaintiff instituted a suit for less than Rs. 50 against the opposite parties for rent of an agricultural holding. The suit was decreed *ex parte* by a Munsif vested with final jurisdiction under s. 153(*b*) of the Bengal Tenancy Act. The application to set aside the *ex parte* decree by some of the defendants opposite parties was dismissed by another Munsif having no final jurisdiction under the said section of the Act. An appeal being taken against this order of dismissal, it was allowed by the Subordinate Judge who heard the same. Hence the plaintiff petitioner obtained this Rule against the said order of the learned Subordinate Judge.

*Civil Revision, No. 689 of 1935, against the order of Subodh Chandra Datta, Subordinate Judge of Mymensingh, dated Feb. 23, 1935, reversing the order of Surendra Chandra Basu, Munsif of Ishwarganj, dated Sept. 16, 1930.

(1) (1916) I. L. R. 38 All. 297. (2) [1928] A. I. R. (Mad.) 969.

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Beerendra Kumar De (with him *Upendra Kumar Ray* for *Nani Gopal Das*) for the petitioner.

Jyotish Chandra Banerji (with him *Kali Kinkar Chakrabarti*) for the opposite parties.

Ramendra Mohan Majumdar for the Deputy Registrar.

Cur. adv. vult.

R. C. MITTER J. The petitioner before me instituted a rent suit against the opposite parties in respect of an agricultural holding. The suit was valued at less than Rs. 50. None of the opposite parties appeared, so the said suit was decreed *ex parte* by the learned Munsif, Mr. S. C. Basu, who had been vested with final jurisdiction under s. 153(*b*) of the Bengal Tenancy Act. None of the questions coming within the proviso to that section was decided. Accordingly an appeal against his decree would not have been maintainable. Some of the defendants, namely, opposite parties Nos. 1 to 15 applied to set aside the said *ex parte* decree by an application made under O. IX, r. 13, of the Code. The said application was heard by another learned Munsif, Mr. A. B. Ganguli, who had no final jurisdiction under s. 153(*b*) of the Tenancy Act. He dismissed it holding that the summons of the suit had been served on all the defendants and that it was time-barred. An appeal was taken against this order to the Court of the learned District Judge. The said appeal was heard by the learned Subordinate Judge who allowed it, he holding that the application under O. IX, r. 13, was not time-barred and that no summons had been served on opposite parties Nos. 1 to 15. He set aside the *ex parte* decree in its entirety. It is against this order that the plaintiff petitioner has obtained this Rule.

Two points have been taken before me in support of the Rule, namely :—

(i) that the appeal to the lower appellate Court was incompetent, and

(ii) that the *ex parte* decree, at any rate, ought not to have been disturbed so far as the other defendants, namely, opposite parties Nos. 16 to 19, were concerned.

I do not consider the second ground to be substantial. Having regard to the defence which will be taken by the opposite parties Nos. 1 to 15, if the *ex parte* decree be set aside, of which defence there are indications in the orders of the Munsif by which he refused to set aside the *ex parte* decree, the *ex parte* decree, if it has to be set aside, must be set aside in its entirety.

The first point urged before me, however, raises, so far as I am aware, a question of first impression in this Court, and depends upon the interpretation to be put on O. XLIII, r. (*1*), cl. (*d*) of the Code of Civil Procedure.

There cannot be any doubt that the right of appeal is a creature of statute, and when no such right is expressly conferred by the statute there is no such right. The right of appeal against decrees and orders passed in rent suits for agricultural lands have been conferred by the provisions of the Code of Civil Procedure [see s. 143(*2*) of the Bengal Tenancy Act] and s. 153 of the Bengal Tenancy restricts that right so conferred by the Code in certain cases. To establish the right to appeal to the lower appellate Court against the order passed in this case the opposite parties must show in the first instance that they come within the provisions of O. XLIII, r. 1, cl. (*d*) of the Code of Civil Procedure and in the second instance that s. 153, para. 1 of the Tenancy Act, does not affect him. O. XLIII, r. 1, cl. (*d*) of the Code runs thus :—

> An appeal shall lie from the following orders under the provisions of s. 104, namely,
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> (*d*) an order under r. 13 of O. IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*.

The controversy in the case before me is as to the meaning to be attached to the words "in a case open "to appeal." Section 153 of the Bengal Tenancy Act

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by itself does not bar the appeal in the case before me as Mr. A. B. Ganguli had no final jurisdiction and it is for this reason that I consider that the case of *Bodiur Rahaman* v. *Mokram Ali* (1) does not touch the point which I have to consider. There, the order refusing to set aside the *ex parte* decree in the rent suit valued at less than Rs. 50 was passed by a Munsif who had final jurisdiction under s. 153(*b*) of the Tenancy Act. All that was decided there was that such an order was an order passed *in a suit*, and so came within the provisions of para. 1 of s. 153 which took away the right of appeal. Nor do I consider the cases of *Shyama Charan Mitter* v. *Debendra Nath Mukherjee* (2) and *Chamed Sheikh* v. *Naba Gopal Ghosh* (3) relevant to the point in controversy before me. The first case decided that an order passed in a proceeding for execution of a rent decree passed under the provisions of the Tenancy Act is an order passed in a *suit*, the word suit used in s. 153 of the Tenancy Act being not used in a limited sense of a proceeding in the Court of first instance before the decree. It accordingly held that there was no Second Appeal against an order passed in appeal in execution proceedings by a Subordinate Judge in a rent suit valued at Rs. 100 or less. The second of these cases also related to the interpretation of the word "suit" as used in s. 153. It was held that an order refusing to set aside an *ex parte* decree passed in appeal by a Subordinate Judge in a rent suit valued at Rs. 100 or less was not appealable as it was an order by such an officer passed in a *rent suit*. All the abovementioned three cases hold that the right of appeal which the aggrieved party had under the provisions of the Code of Civil Procedure had been taken away by s. 153 of the Bengal Tenancy Act. In the case before me the order refusing to set aside the *ex parte* decree was passed by a Munsif who had not been vested with final jurisdiction by the Local Government under s. 153(*b*). Here in the case before

(1) (1932) 36 C. W. N. 540. (2) (1900) I. L. R. 27 Cal. 484.
(3) (1914) 19 C. W. N. 359.

me the question is whether the Civil Procedure Code has given the opposite parties the right to appeal.

The learned advocate for the petitioner has argued before me that the words "in a case open to appeal" occurring in O. XLIII, r. 1, cl. (*d*), mean that if there is no appeal against the *ex parte* decree *actually passed* in the suit, there is no appeal against the order refusing to set it aside. He says that s. 153 barred the appeal against decree passed by Mr. S. C. Basu, as that officer had been vested with final jurisdiction under s. 153(*b*), and there is accordingly no appeal against the order of Mr. A. B. Ganguli, although the latter had no such final jurisdiction. In support of this proposition he has referred to the observations made in the case of *Raghunath Rai Dilsuk Rai* v. *Bridhi Chan Sri Lal* (1). There, a reference to arbitration was made through the intervention of Court and an award was made. The defendant filed an objection to the award but at the date of the final hearing of his objection did not appear in Court with the result that the Court passed a decree on the award. The defendant's application under O. IX, r. 13, was dismissed and it was against this order of dismissal that the appeal was preferred to the High Court at Patna. Das J. pointed out that it was not a case of an *ex parte* decree being passed but was really a case of dismissal of the defendant's petition of objection to the award. The correctness of this view of the matter need not be considered in this case. But the other point that was raised has a material bearing on the point which I have to decide. On the assumption that the decree was an *ex parte* decree it was contended successfully by the respondent in the Patna High Court that the appeal was incompetent. Das J. at page 841 of the report said thus :—

> Two questions, however, arise ; first, was the case open to appeal ? and, secondly, was the decree passed *ex parte* ? It is clear, to my mind, that an order under O. IX, r. 13, is appealable only where the decree *sought to be set aside* is appealable.

(1) (1924) I. L. R. 3 Pat. 839.

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Having regard to the provisions of para. 16(*2*) of Sch. II of the Code the decree *actually passed* in that case was not appealable, the decree being in accordance with the award made with the intervention of the Court. The case has been explained and distinguished and the correctness of the proposition so laid down by Das J. has been doubted. As for instance when an *ex parte* decree in accordance with the award made *without* the intervention of the Court had been made, and an application made to set aside the said decree was refused by an order, it has been held that an appeal against the said order was competent although the decree actually passed being in accordance with the award was not appealable under para. 21(*2*) of Sch. II of the Code. In my judgment the words "in a "case open to appeal" are general words and have no reference to the appeal against the decree *actually passed*. If there could be no appeal *under any circumstance* against a decree that *could be* passed in the suit or proceeding, there would be no appeal against an order to set aside the *ex parte* decree passed in such a suit proceeding by virtue of the limiting words of O. XLIII, r. 1, cl. (*d*). It has been pointed out that an appeal lies against a decree when the decree is in excess of the award and a view has been expressed that on that footing an appeal would lie against an order refusing an application under O. IX, r. 9, in a proceeding under Sch. II of the Code. In my judgment the correct principle has been laid down by Piggott J. in *Nihal Singh* v. *Khushlal Singh* (1) and by Ramesam J. in *Selvarayan Samson* v. *S. Amalorpavanandam* (2). The observations of Piggott J. are as follows:—

> The words in O. XLIII, r. 1, cl. (*d*), are perfectly general; they are "in a "case open to appeal". Now the case between the parties in the Court below was whether or not an award made without the intervention of the Court should be filed as a decree of the Court. In that case an appeal lay under s. 104, sub-s. (*1*), (*f*), from any order which a Court might pass, filing or refusing to file the award. It was therefore a case open to appeal. Moreover an appeal *might* lie from the decree itself on certain grounds, and to this extent the decree itself was open to appeal. The fact that no appeal has been

(1) (1916) I. L. R. 38 All. 297, 299. (2) [1928] A. I. R. (Mad.) 969.

brought from the decree is irrelevant, because the question before us is merely whether the decree was open to appeal. Nor is it relevant to ask us to consider whether the decree is or is not in fact in accordance with the award, because that only amounts to arguing that any appeal brought against the decree would be bound to fail. The question for determination is not whether an appeal could have been successfully prosecuted against the decree, but whether it was "open to appeal". It seems obvious it was.

There the decree sought to be set aside by an application under O. IX, r. 13, was a decree in accordance with the award.

Ramesam J. agreed with this interpretation put by Piggott J. when he said that a case is to be regarded as "open to appeal" when "though an appeal against "the decree may not lie under certain circumstances, "it will lie under certain other circumstances." In my judgment a case is not open to appeal within the meaning of O. XLIII, r. 1, cl (*d*), when no appeal would lie against a decree under any circumstance. An appeal against a decree in a simple rent suit (*i.e.*, when the proviso to s. 153 does not come into play) valued at Rs. 50 or less would not lie under only one circumstance, namely, when the Munsif has been vested with final jurisdiction and would lie under all other circumstances.

I accordingly hold that the appeal to the lower appellate Court was competent and discharge the Rule with costs, hearing fee one gold mohur.

Rule discharged.

A. K. D.