CIVIL REVISION.

Before Edgley J.

HAJI MAHAMMAD KAZIBULLA MANDAL

v.

HUMAYUN REZA CHAUDHURI.*

1938

Feb. 23.

Landlord and Tenant—Order dismissing for default application to set aside a sale, if appealable—Bengal Tenancy Act (VIII of 1885), s. 174 (5).

Where an application to set aside a sale is dismissed for default on the applicant failing to appear after his prayer for an adjournment is refused, the order is one refusing to set aside a sale within the meaning of s. 174 (5) of the Bengal Tenancy Act and is appealable.

Debrani Debya v. *Sarat Kumar Roy* (1) and *Basaratulla Mia* v. *Reajuddin Mia* (2) dissented from.

Basanta Kumar Adak v. *Khirode Chandra Ghose* (3) referred to.

Ansarali v. *Bhim Shankar Datta Tewari* (4) followed.

CIVIL RULE obtained by the judgment-debtor.

The facts of the case and the arguments at the hearing of the Rule are sufficiently stated in the judgment.

Nirmal Chandra Chakrabarti for *Abul Hussain* for the petitioner.

Phani Bhusan Chakravarti for the Opposite Party.

EDGLEY J. The only point for decision which arises in connection with this Rule is whether or not an appeal lies against the order of the learned Munsif of Jangipur, dated June 2, 1937, by which he dismissed for default an application to set aside a civil Court sale under s. 174 of the Bengal Tenancy

*Civil Revision, No. 1396 of 1937, against the orders of D. N. Pal, Subordinate Judge of Murshidabad, dated June 14, 1937, affirming the order of Nripendra Kumar Ghosh, Second Munsif of Jangipur, dated Mar. 6, 1937.

(1) (1924) 39 C. L. J. 522.
(2) (1926) I. L. R. 53 Cal. 679.
(3) (1927) I. L. R. 55 Cal 616.
(4) (1929) I. L. R. 56 Cal. 969.

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Act. The view taken by the learned Subordinate Judge of Murshidabad in his order dated June 14, 1937, is that no appeal lay against the order of the learned Munsif.

The learned advocate for the opposite parties places some reliance upon decisions of Mukerji J. in the case of *Debrani Debya* v. *Sarat Kumar Roy* (1) in which the learned Judge held, while sitting singly, that an order dismissing for non-prosecution an application for setting aside an execution sale under s. 174 of the Bengal Tenancy Act was not appealable. In that case, however, Mukerji J. gave no reasons for coming to this conclusion and he proceeded to deal with the matter before him under s. 115 of the Code of Civil Procedure.

In a later case, namely, in the case of *Basaratulla Mia* v. *Reajuddin Mia* (2), Page J. recorded certain observations to the effect that in dismissing an application for default, when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but, in the absence of the parties, refuses to consider whether the sale should be set aside or not. Such an order, in the opinion of the learned Judge, is not appealable under O. XLIII, r. 1(*i*) of the Code of Civil Procedure. In the following year, Page J. was a party to another decision of this Court in the case of *Basanta Kumar Adak* v. *Khirode Chandra Ghose* (3). In that case his Lordship referred to the observations which he had recorded in *Basaratulla's* case but he remarked that—

> The position is entirely different where the application under O. XXI, r. 90, is dismissed either on the merits, or when the applicant does not appear but the opposite party appears and is ready to contest the application. In either of those circumstances, in my opinion, the order dismissing the application to set aside the sale is an order "refusing to set aside a sale".

It was, therefore, held in that case that the order in question was appealable.

(1) (1924) 39 C. L. J. 522. (2) (1926) I. L. R. 53 Cal. 679.
(3) (1927) I. L. R. 55 Cal. 616, 617-8.

A similar question was raised in the case of *Ansarali* v. *Bhim Shankar Datta Tewari* (1). In his judgment in that case, Mukerji J. referred to the observations made by Page J. in *Basaratulla's* case and he said with reference thereto :—

> I am of opinion that there is no distinction on principle between an order passed on an application under O. XXI, r. 90, dismissing it for default either for non-appearance of one or for non-appearance of both the parties.

He, therefore, held that, in either case, an appeal lay from an order dismissing an application under O. XXI, r. 90 for default.

In the case, with which we are now dealing, the opposite parties were ready, but the applicants did not appear, after their application for time had been refused. The application under s. 174 of the Bengal Tenancy Act was, thereupon, dismissed for default. In my opinion, this dismissal for default clearly amounts to a refusal to set aside the sale and, in my view, this case should be governed by the principles laid down by Mukerji J. in the case of *Ansarali* v. *Bhim Shankar Datta Tewari* cited above.

In this connection it is conceded by the learned advocate for the opposite parties that, if it be admitted that the reasoning which has been adopted in *Ansarali's* case be correct on the question of whether an appeal lies from an order dismissing for default an application under O. XXI, r. 90 of the Civil Procedure Code, it cannot be contended that different principles should be applied in the interpretation of sub-s. (*5*) of s. 174 of the Bengal Tenancy Act, which reads as follows :—

> An appeal shall lie against an order setting aside or refusing to set aside a sale.

With regard to this point it may be noted that the language used in s. 174(*5*) of the Bengal Tenancy Act corresponds almost exactly with the language of O. XLIII, r. 1(*1*) (*j*) of the Code of Civil Procedure, under which a right of appeal has been granted

(1) (1929) I. L. R. 56 Cal. 969, 974.

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against an order under r. 92 of O. XXI of the Code of Civil Procedure setting aside or refusing to set aside a sale.

In the circumstances stated above, I am of opinion that an order dismissing for default an application under s. 174 of the Bengal Tenancy Act is appealable. I am fortified in this view by an unreported decision of S. K. Ghose J. in *Debendra Nath Goldar* v. *Gopal Chandra Das* (1) in which the learned Judge adopted a similar view. This Rule must, therefore, be made absolute. The petitioners are entitled to the costs of this Rule, the hearing-fee being assessed at one gold mohur.

It is ordered that the decision of the learned Subordinate Judge, dated June 14, 1937, be set aside and the case be remanded to his Court with a direction that the appeal be re-heard by him in accordance with law.

Rule absolute.

A. A.

(1) (1937) Civil Revision, No. 320 of 1937, decided on 25th Aug.