CIVIL REVISION.

Before Nasim Ali and Rau JJ.

NAPHAR CHANDRA SARDAR

v.

KALI PADA DAS.*

1939

Dec. 6; 1940

Jan. 15, 16.

Appeal—*Execution of decree—Order of stay of execution, whether temporarily or permanently by virtue of any special law, if appealable—High Court's power of revision in appealable cases—Code of Civil Procedure (Act V of 1908), ss. 2(2), 47, 115.*

An order staying or refusing to stay execution of a decree upon the ground that execution is or is not barred by a special law, *e.g.*, an order made on notice under s. 34 of the Bengal Agricultural Debtors Act, is an order made under s. 47 of the Code of Civil Procedure, and, is subject to appeal as a decree.

Jogodishury Debea v. *Kailash Chundra Lahiry* (1) referred to.

Per NASIM ALI J. The words "appeal lies thereto" in s. 115 of the Civil Procedure Code indicate that when a relief can be given by the High Court in exercise of its appellate jurisdiction under ss. 96, 100, 104 or O. XLIII of the Code or any other statute, its revisional jurisdiction under s. 115 cannot be invoked. These words mean "appeal *is allowed* under "the Code or any other law."

Sashi Kanta Acharyya v. *Nasirabad Loan Office Co.* (2) distinguished.

Bani Madho Ram v. *Mahadeo Pandey* (3) followed.

Per RAU J. When a case is at a stage at which the next appeal is to some Court subordinate to the High Court with a possibility of a Second Appeal to the High Court at some future date, it is not certain that revision by the High Court is barred; but whether the High Court will exercise this jurisdiction or not will depend upon the urgency of the need for intervention. Revision under s. 115 is barred only where an appeal, whether first or second, lies immediately to the High Court.

CIVIL RULES obtained by the judgment-debtors under s. 115 of the Civil Procedure Code.

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

*Civil Revision Nos. 963, 1506 and 1650 of 1939, against the order of Enayetur Rahaman, First Munsif of Howrah, dated May 29, 1939.

(1) (1897) I. L. R. 24 Cal. 725. (2) (1936) 63 C. L. J. 105.
(3) [1930] A. I. R. (All.) 604.

1940

Naphar Chandra Sarkar v. *Kali Pada Das.*

Gopendra Nath Das and *Satindra Nath Chatterjee* for petitioner in No. 963;

Probodh Chandra Chatterji and *Bireswar Chatterji* in No. 1506; and

Naresh Chandra Sen Gupta and *Jogesh Chandra Sinha* in No. 1650.

Hiralal Chakravarti and *Shyamadas Bhattacharya* for opposite party in No. 963;

Atul Chandra Gupta and *Bansari Lal Sarkar* in No. 1506; and

Asita Ranjan Ghose and *Gopesh Chandra Chatterjee* in No. 1650.

NASIM ALI J. The facts which are not in dispute in this Rule are as follows:—

On November 10, 1937, the petitioners filed an application for settlement of their debts before the Debt Settlement Board, Howrah, under s. 8 of the Bengal Agricultural Debtors Act. The application was dismissed by the Board on January 19, 1938, on the ground that the petitioners were not "agricul- "turists". They appealed against the decision to the appellate officer. This appeal was dismissed on May 25, 1938. They applied for review under s. 44(*b*) of the Act, but this application was also rejected. The petitioners Nos. 1 to 4 thereafter filed another application before the Special Debt Settlement Board, Howrah, under s. 8 of the Act for settlement of their debts. This application was dismissed on November 27, 1938, on the ground that a fresh application was not maintainable. They applied for a review of this order. The opposite party creditor was not present on the date of the hearing of this application. On March 19, 1939, the Board allowed the application for review and fixed April 16, 1939, for hearing on the merits. On May 1, 1939, the Board issued a notice under s. 34 of the Bengal Agricultural Debtors Act for staying execution proceedings against the

1940

Nabar Chandra Sardar
v.
Kali Pada Das.

Nasim Ali J.

petitioners in the first Court of the Munsif at Howrah, which was started by the opposite party for realisation of about Rs. 2,000 on the basis of a decree. A similar notice under s. 34 of the Act was also issued on the same date on the application of petitioner No. 5 before the Debt Settlement Board. The Munsif, thereupon, stayed the proceedings on that date. On May 10, 1939, the opposite party decree-holder applied to the Munsif for vacating the order of stay. On May 21, 1939, the Board decided that the petitioners Nos. 1 to 4 were "agriculturists". On May, 1939, the Munsif arrived at the following findings:—

(i) That the finding of the Board in the proceeding started on the basis of the first application by the judgment-debtor under s. 8 of the Act is binding on the Board and consequently the second petition filed by them is not a petition by debtors within the meaning of the Act; and

(ii) that after the dismissal of the first application under s. 8, a second application under that section was not maintainable in law.

He, accordingly, vacated the order staying the execution proceedings. On June 20, 1939, the present Rule was issued on the decree-holder on the application of the judgment-debtor to show cause why the said order should not be set aside.

The issue between the parties before the Munsif in substance was whether the judgment-debtors were debtors within the meaning of the Bengal Agricultural Debtors Act and were, therefore, entitled to have their debts settled under that Act. This question is a question relating to execution, as no order for attachment and sale of the properties of the judgment-debtors in execution can be made without the determination of this question. This question was, therefore, determined by the Munsif under s. 47 of the Code. By s. 2(2) of the Code, decree includes the determination of any question under

1940

Naphar Chandra Sardar v. *Kali Pada Das.*

Nasim Ali J.

s. 47. The combined effect of s. 47 and s. 2(2) of the Code is that an order in execution proceedings is a decree if, so far as regards the Court passing it, it conclusively determines a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree. *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1). Under the decree the judgment-debtors are liable to pay at once the entire decretal amount. The decision of the Munsif is that the judgment-debtors are not debtors within the meaning of the Bengal Agricultural Debtors Act and are not, therefore, entitled to the benefit of that Act. This decision will preclude them from pleading it in a subsequent stage of the execution-proceedings that their liability under the decree has been reduced by an award under s. 19 of the Bengal Agricultural Debtors Acts or that they have been declared insolvent under s. 22 of the Act and that the execution-proceedings have abated by reason of an award under s. 19 or by an order under s. 22 (*see* s. 34). It, therefore, conclusively determines the question relating to the judgment-debtors' liability with reference to the relief granted by the decree and is a decree.

An appeal against such a decree of a trial Court lies to the District Judge or to the High Court under s. 96 of the Code and an appeal from the decree of the lower appellate Court lies to this Court under s. 100. In this case an appeal against the decision of the Munsif lay to the District Judge and a further appeal to this Court. The judgment-debtors did not appeal to the District Judge but moved this Court under s. 115 of the Code. The question is whether this order can be revised under s. 115 of the Code.

That section authorises this Court to revise an order of a subordinate Court in any case "in which "no appeal lies *thereto*". The appeal referred to in

(1) (1897) I. L. R. 24 Cal. 725, 737.

this section may be an appeal to this Court under ss. 96, 100, 104 or under O. XLIII of the Code of Civil Procedure or under any other statute. In the case of *Sashi Kanta Acharyya* v. *Nasirabad Loan Office Co.* (1), a Second Appeal to this Court was apparently barred under s. 102 of the Code. The decision in that case may be an authority for the proposition that, in cases where an appeal is allowed to the lower appellate Court but no appeal is allowed against an appellate decree to the High Court, the person aggrieved may invoke the jurisdiction of the High Court under s. 115, though he has not preferred any appeal to the lower appellate Court. But that case is no authority for the proposition that, where an appeal is allowed to the High Court, the High Court can interfere under s. 115 of the Code.

The contention of the judgment-debtors is that the word "lies" in s. 115 means "lies" at the time when the High Court is moved under s. 115 and that in this case a Second Appeal to this Court did not lie at the time when this Court was moved under s. 115, as no appeal to the lower appellate Court had been then preferred and decided. In other words, the contention is that the expression "appeal lies" means the right of appeal has already accrued. If this contention be sound the position would be that a person aggrieved by a decree of the trial Court by refusing to file an appeal to the lower appellate Court can stifle a Second Appeal to this Court and can confer jurisdiction on the High Court to revise the decree of the trial Court. I am of the opinion that this was not the intention of the legislature in enacting s. 115. It can never have been intended by the legislature that, where a person aggrieved by a decree of the trial Court has his remedy by way of appeal *to this Court* (if he will only first avail himself of that remedy by taking an appeal to the lower appellate Court), he can seek his remedy in this Court

(1) (1936) 63 C. L. J. 105.

1940

Naphar Chandra Sardar v. *Kali Pada Das.*

Nasim Ali J.

under s. 115. The object of s. 115 was to give relief to a person who cannot get relief in this Court under ss. 96, 100, 104, or O. XLIII or any other statute. The words "appeal lies thereto" indicate that where a relief can be given by this Court in the exercise of its appellate jurisdiction, its revisional jurisdiction under s. 115 cannot be invoked. These words, in my opinion, mean "appeal is allowed under the Code or "any other law". In the case of *Bani Madho Ram* v. *Mahadeo Pandey* (1) Sulaiman and Niamatulla JJ. observed :—

> It seems to us that no revision lies under s. 115, Civil Procedure Code. It was clearly a case of a decree which could have been appealed against to the District Judge from whose decree a Second Appeal could have been filed to this High Court. It is, therefore, not a case in which no appeal lies to the High Court at all although no appeal could have been filed from the original decree of the first Court direct. In our opinion there is no ground for restricting the scope of the words "in which no appeal lies thereto" to cases where no appeal lies from the order sought to be revised. So long as the party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision.

I respectfully agree with these observations.

The next contention of the judgment-debtors is that the jurisdiction of this Court to interfere under s. 115 of the Code in cases like this had never been questioned before and, therefore, we should interfere in this case. This argument, however, is irrelevant on the question of the interpretation of s. 115, though it may be a good ground for not allowing costs in this case, and though perhaps it may have some bearing on the question of an admission of an appeal under s. 5 of the Limitation Act, if such appeal be presented in future by the petitioners.

I, therefore, hold that this petition for revision is incompetent. In this view of the matter I express no opinion on the questions raised in this Rule.

The Rule is, accordingly, discharged. But there will be no order for costs.

(1) [1930] A. I. R. (All.) 604, 605.

Civil Revision Cases Nos. 1506 and 1650 of 1939.

The facts of these two cases are in all material particulars the same as in Revision Case No. 963 of 1939. For the reasons given in that case I discharge both these Rules also, without costs.

Civil Revision Case No. 963 of 1939.

RAU J. I agree that the question whether the execution of a decree is or is not barred, whether temporarily or permanently, by reason of some special law—in the case before us, by the Bengal Agricultural Debtors Act—is a question within s. 47 of the Code of Civil Procedure and its determination is, accordingly, a decree within the meaning of the definition in s. 2(2) of that Code. It follows that an order staying or refusing to stay execution upon the ground that execution is or is not barred by the special law in question is subject to appeal as a decree. The order which forms the subject-matter of this Rule is accordingly appealable as a decree.

The next question is whether we have jurisdiction to interfere with the order in revision under s. 115 of the Civil Procedure Code. The section, it will be remembered, runs :—

> The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—
>
> (*a*) to have exercised a jurisdiction not vested in it by law ; *etc.*,
>
> the High Court may make such order in the case as it thinks fit.

The words "in which no appeal lies thereto" present some difficulty. "Thereto" means of course to the High Court. The words "no appeal lies" are not so easy to interpret. Where, at the moment the record is called for, the case has reached a stage at which the next appeal, whether first or second, is to the High Court, it is easy enough to say whether an appeal actually lies to the High Court or not; and if it lies, revision is clearly barred. But where a case

1940

Naphar Chandra Sardar v. *Kali Pada Das.*

Rau J.

has not reached that stage and has, say, only reached the stage at which the next appeal is to some Court subordinate to the High Court, with a possibility of a Second Appeal to the High Court at some future date is revision barred? In other words, are we to interpret the expression "in which no appeal lies" as if it were equivalent to the expression "in which "no appeal lies or may in future lie"? I hesitate to place so wide a construction upon these words. According to the alternative interpretation, revision is barred only where an appeal, whether first or second, lies immediately to the High Court; where no such immediate appeal lies, the High Court has jurisdiction to intervene in revision, although whether it will exercise this jurisdiction or not will depend upon the urgency of the need for intervention.

In the case before us there is no urgent need for our intervention at the present stage, even if we have jurisdiction to intervene. Whatever, therefore, may be the precise interpretation of s. 115 of the Code of Civil Procedure, I agree that the present Rule should be discharged.

Rule discharged.

A. A.