1904
APRIL 26.
MAY 5, 10.

APPELLATE CRIMINAL.

31 C. 715=8 C. W. N. 910=1 Cr. L. J. 408.

We are relieved of the necessity of referring the case to a Full Bench, because in our opinion the contention of the appellants must fail upon another ground.

The accused had a reasonable time for applying to this Court, before they were required to enter upon their defence, that is, before the 16th February. And as they abstained from doing so the proceedings of the Sessions Judge were not void. This was also the view taken by Stevens and Harington, JJ. in the case of *Dhone Kristo Samanta* v. *King-Emperor* (1). In that case it was further held that it was competent to the Magistrate before granting an adjournment to proceed with the case up to the point at which the accused would be called on for their defence. It would seem to follow that the trial is good and valid in every case at least up to the close of the case for the prosecution. And no doubt the terms of clause (8), section 526 admit of this construction, though it is perhaps not quite in accord with what was laid down by the same learned Judges in the two other cases, to which reference has been made. Having disposed of the question of law we now turn to a consideration of the merits.

That the mortgage deed is a forgery has been sufficiently proved in this case. The accused Elamudin, Meher, Kaltu and Jarip, whose names appear as attesting witnesses, gave evidence for the defence in the former trial and there admitted the part they took. Their depositions have been admitted in evidence and [721] rightly so on the authority of the case of *Moher Sheikh* v. *Queen-Empress* (2). Against Kutub Ali there is the evidence of the cartman, Who was relied on in the former case and against Joharuddin there is the same evidence, as also his thumb impression.

As regards the accused Phatu there is nothing but his statement to the Magistrate, and that is ambiguous and inconclusive. We therefore direct that Phatu be acquitted. The conviction and sentences of the other appellants are affirmed, and they must at once surrender to their bail.

---

31 C. 722 (=8 C. W. N. 572.)

[722] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Harington and Mr. Justice Brett.

BALKISHEN SAHU *v.* KHUGNU.*

[21st March, 1904.]

Appeal—Civil Procedure Code (Act XIV of 1882), s. 215A and s. 545—Preliminary order—Appellate Court, power of, to stay proceedings.

When an appeal is pending in the High Court against a preliminary order made by a Subordinate Court under s. 215A of the Civil Procedure Code, the High Court having seizin of the appeal can, apart from the question whether the case falls within s. 545 of the Code, make an order staying the carrying out of such order pending the hearing of the appeal.

[Foll. 38 Cal. 927=3 C. L. J. 67. Ref. 3 C. L. J. 29 ; 34 C. 1037 F.B.=11 C. W. N. 1030=6 C. L. J. 298 ; 31 Cal. 1031 : 43 All. 198 ; 60 I. C. 131 ; 48 All. 203 ; Dist. 34 Cal. 1081=9 C. W. N. 123.]

REFERENCE to a Full Bench by Harington and Brett, JJ.

---

*Reference to Full Bench in Civil Rule No. 1355 of 1903, in Regular Appeal No. 132 of 1903.

(1) (1902) 6 C. W. N. 717. (2) (1893) I. L. R. 21 Cal. 392.

1904
MARCH 21.

FULL BENCH.

31 C. 722=8 C. W. N. 572.

The Order of Reference was as follows :—

"In this case Balkishen Sahu, Hira Lal Sahu and Luchman Sahu are the appellants. Mussummat Khugnu and Luchman are the respondents.

In August 1888, Luchman Sahu, as the guardian of Mussummat Khugnu (who was then a minor) sued Balkishen Sahu, and the father of Hira Lal and Luchman Sahu claiming possession of certain property, for an account and various other reliefs.

The suit was decreed in September 1890 and the judgment was upheld by the High Court on appeal in May 1892.

In July 1892, the defendant appealed to Her Majesty in Council, but pending the hearing of the appeal a compromise was effected between the parties. In September 1892, the compromise was sanctioned by the District Judge under section 462 of the Civil Procedure Code as being for the benefit of the minor.

Mussummat Khugnu, having attained her majority, has now sued the appellants in the Court of the second Subordinate Judge of Patna alleging that the compromise was obtained by fraud and re-asserting the claim, which had been given up under the compromise, to have an account rendered from January 14th, 1882, to September 9th, 1892, and claiming various other reliefs.

[723] The learned Judge passed a preliminary decree under Section 215A, Civil Procedure Code, directing that an account should be taken and ordering that a Commissioner should be appointed for that purpose, and that the accounts should be produced within one month.

Against this preliminary decree, the defendants have appealed to this Court and the appeal is now pending.

On May 1st, 1903, a rule was issued calling upon the respondent to show cause why, pending the hearing of the appeal, further proceedings should not be stayed.

On the rule coming on for hearing it was argued that the Court had no jurisdiction to stay the proceedings consequent on the preliminary decree, when no final decree had been made in the suit. The case of *Basanta Kumar Sircar* v. *Bhut Nath Sircar* (1) is an authority for the proposition that, when a preliminary decree for partition has been passed and an order has been made appointing a Commissioner for the puspose of carrying out that decree, the Court has no jurisdiction to stay the proceedings, the proceedings not being in execution of a decree within Section 545 of the Civil Procedure Code.

On the other hand *Mussummat Brij Coomari* v. *Ramrick Das* (2) lays down that, where there remains something substantial to be done under a decree, before it can become thoroughly effectual, the decree has to be executed within the meaning of Section 545, Civil Procedure Code. The Court therefore has jurisdiction to stay the proceedings.

In our opinion there is no distinction in principle between the carrying out by a Commissioner appointed by the Court of a preliminary decree for partition, and of a preliminary order for the taking of accounts.

If therefore the law is correctly laid down in the case of *Basanta Kumar Sircar* v. *Bhut Nath Sircar* (1) we have no jurisdiction to stay the proceedings. On the other hand the order made under Section 215A is a decree and appealable as such and there remains something to be done to make it thoroughly effectual. If therefore the proposition enunciated in *Brij Coomari* v. *Ramrick Das* (2) is correct, the Court has jurisdiction to stay the proceedings consequent on the order under Section 215A.

There being this conflict of authority we refer to the Full Bench this question.

When an appeal is pending to the High Court against a preliminary order made in a Subordinate Court under Section 215A of the Civil Procedure Code, has the High Court jurisdiction to stay the carrying out of such order pending the hearing of the appeal?"

Babu *Umakali Mukerji* and Moulavi *Mahomad Mustafa Khan* for the petitioner.

Babu *Ram Charan Mitra* and Babu *Kritanta Kumar Bose* for the opposite party.

(1) (1897) 1 C. W. N. 264.

(2) (1901) 5 C. W. N. 781.

1904 MARCH 21. FULL BENCH.

[724] MACLEAN, C. J. The question submitted to us is this :— " When an appeal is pending to the High Court against a preliminary order made in a Subordinate Court under section 215A of the Civil procedure Code, has the High Court jurisdiction to stay the carrying out of such order pending the hearing of the appeal?" I have no hesitation in answering the question in the affirmative. Apart from the question whether the case falls within section 545 of the Code of Civil Procedure the Court, which has *seizin* of the appeal, can make an order staying proceedings pending its hearing. 31 C. 722=8 C. W. N. 572.

With this expression of opinion, the rule must go back to the referring Court. The costs of this reference are made costs in the rule.

PRINSEP, J. I am of the same opinion.

GHOSE, J. I agree.

HARINGTON, J. I agree.

BRETT, J. I agree.

31 C. 725=(8 C. W. N. 605.)

[725] APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Mitra.

SARAT CHANDRA ROY CHOWDHRY *v.* ASIMAN BIBI. *

[9th May, 1904.]

Revenue Sale—Revenue Sale Law (Act XI of 1859) s. 37.—The words " under the law in force" in the proviso to that section meaning of—Ejectment suit—Lands—Rent Act (X of 1859)—Occupancy raiyat—Bengal Tenancy Act (VIII of 1885) ss. 20, 21 and 195, cl. (c).

The words " under the laws in force " in the proviso to section 37 of Act XI of 1859, have reference to assessment or enhancement of rent, and not to the rules as to the mode of acquisition of occupancy rights, and mean " under the laws for the time being in force."

A purchaser of an entire estate sold for arrears of revenue, sued the cultivating raiyats in ejectment. The defendants contended that their interests were protected by the proviso to section 37 of Act XI of 1859.

It was found that the holdings of the defendants consisted of land held by them partly for more than twelve years and partly for less than twelve years, at the date of the sale, and that the two classes of lands were undistinguishable.

Upon an objection that the defendants " under the law in force," *i.e.*, Act X of 1859 could not acquire rights of occupancy to all the lands held by them and as such they were not protected by the proviso to section 37 of Act XI of 1859 :

Held, that the defendants were protected by the proviso to section 37 of Act XI of 1859, inasmuch as they were settled raiyats under s. 20 of the Bengal Tenancy Act (VIII of 1885), the law for the time being in force, and had under s. 21 of the said Act occupancy rights in all lands for the time being held by them.

[Fol : 42 C. 745.]

SECOND APPEAL by the plaintiff Sarat Chandra Roy Chowdhry. The minor defendant, Asiman Bibi, as respondent, was represented by her father and guardian Saniruddi Mondal.

This appeal arose out of an action brought by the plaintiff for ejectment and in the alternative for assessment of rent against [726] the

* Appeal from Appellate Decree No. 2317 of 1900, against the decree of Alfred F. Steinberg, District Judge of Rajshahye, dated the 2nd of January 1900, reversing the decree of Raj Narain Mukherjee, Munsiff of Nawabgunge, dated the 10th of October 1898.