

CALCUTTA HIGH COURT

Pyari Mohan Kundu

Vs

Kalu Khan

(N Chatterjea and Newbould, JJ.)

12.02.1917

JUDGMENT

N Chatterjea, J.

1. We are invited in this Rule to set aside an order passed by the Court below refusing to hear an application for review of a judgment presented to it by the petitioner, on the ground that an appeal had been preferred against the decree to this Court. The application for review, it appears, was filed on 26th June 1916 and the appeal to this Court was not preferred until the 4th of July. The application for review, therefore, was filed before any appeal was preferred to this Court. Section 114, Civil Procedure Code, lays down that Any person considering himself aggrieved by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, may apply for review of judgment." It is clear from that Section that an application for review can be made before any appeal has been preferred. That being so, the question is whether there is anything in the Civil Procedure Code to prevent the Court from proceeding with the application for review notwithstanding the pendency of the appeal. The question has been considered in several cases. One of the earliest cases in this Court is Bhurrit Chunder Mozoomdar v. Ram Gunga Sein (1) where, in delivering the judgment of the Full Bench, the learned Judges observed: "it is clear that, if a review be applied for in proper time, and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of appeal, and he has full power, and is bound to proceed under the application for review." That case was decided under Act VIII of 1859 : but, so far as this question is concerned, Section 376 of that Act has substantially been re-enacted in Section 114 of the present Code. See also Thacoor Prosad v. Baluck Ram (2); Sarat Chandra Dhal v. Damodar Manna(6) The same view has been taken in the Bombay and Madras High Courts. See Narayan Purshottam Gargate v. Laxmibai Datto Bhagwan (4) and Chenna Reddi v. Pedda Obi Reddi (3) the last one being a decision of the Full Bench. We agree with the observations made in that case and which run as follows: "The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by Statute in this way, it appears to me that they cannot be taken away or cut down except by express words or necessary implication. There are no express words and the question, therefore, is---is there any necessary implication? No such implication arises from the terms of Section 623 itself which provides by way of exception, that, in certain cases, an

application for review may be made even after an appeal I as been filed and if the Court can proceed to hear such an application, why not also an application made before the filing of an appeal?" Having regard to the terms of the Section and the cases referred to above, we are of opinion that the Court has power, and in fact is bound, to proceed with the application for review, notwithstanding the fact that an appeal has been subsequently filed in the case. But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded with. Whether it can be so proceeded with (after the appeal is heard) in cases coming under Order XLVII, Rule 1 (2), it is unnecessary for us to consider: On the other hand, if the application for review issuccessful, the appeal cannot proceed. See *Kanh iya Lal v. Baldeo Prasad* (5). The appeal in the present case has not yet been heard under Order XLI, Rule 11, Civil Procedure Code. The appellant undertakes to have the hearing of the appeal stayed until the decision of the application for review. We therefore, make the Rule absolute, set aside the order of the lower Court and direct that the application for review be taken up and disposed of without delay. The petitioner is entitled to his costs in this Rule from the opposite party. We assess the hearing fee at one gold mohur.

2. Let the record be sent down without delay.