

FULL BENCH.

Before Sir Richard Gurth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Mitter.

1880
April 6.

IN THE MATTER OF THE PETITION OF BHEKRAJ KOERI.
BHEKRAJ KOERI v. GENDH LAL TEWARI.

Jurisdiction—Power of High Court to set aside, an Order of a Judicial Commissioner—Superintendence of High Court under the Charter Act (24 & 25 Vict., c. 105), s. 15—Civil Procedure Code (Act X of 1877), ss. 290 and 622—Act XII of 1879, s. 97.

Certain immoveable property was, on the 15th day of February 1879, notified for sale under a decree of a Civil Court on the 15th of March following, so that only 29, instead of 30, days elapsed between the day of sale and the notification. The sale having taken place, the execution-debtor applied to the Deputy Commissioner to set it aside, upon the ground that the sale was illegal, the requirements of s. 290 of the Civil Procedure Code being essential to its validity. Upon that ground the sale was set aside as illegal by the Deputy Commissioner. On appeal, the Judicial Commissioner reversed this decision, on the ground that the fact of the sale having taken place 29 instead of 30 days after the notification was merely an irregularity, and that, as the execution-debtor had not shown that he had suffered any damage from the irregularity, the sale ought to be confirmed. An application was then made to a Division Bench of the High Court to set aside the order of the Judicial Commissioner confirming the sale, upon the ground that it was manifestly erroneous, and the Division Bench referred the question to a Full Bench: Whether, assuming the requirements of s. 290 to be essential to the validity of a sale, the High Court had any power, either under s. 15 of the Charter Act or s. 622 of the Civil Procedure Code, as amended, to set aside the Judicial Commissioner's order.

The Full Bench, without answering the question referred, *held*, that, assuming the requirements of s. 290 to be essential, the High Court had a right, under its summary powers, to set aside the sale itself, notwithstanding (and apart from the question whether it would set aside) the order of the Judicial Commissioner.

THIS was an application made alternatively under s. 622 of the Civil Procedure Code as amended by Act XII of 1879, or

* Reference to a Full Bench in Rule No. 1310 of 1879, made by the Chief Justice and Mr. Justice Mitter, dated the 8th March 1880.

under s. 15 of the Charter Act, to set aside an order made on appeal by the Judicial Commissioner of Chota Nagpore. The application was heard before Garth, C. J., and Mitter, J., and a question arising as to the jurisdiction of the High Court, the matter was referred to a Full Bench in the following terms:—

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“The question which we desire to refer to a Full Bench is, whether, under the special powers conferred upon the Court by either s. 622 of the Civil Procedure Code as amended, or under s. 15 of the Charter Act, we have any right to set aside the order upon the following ground:—

“Certain property of the judgment-debtor was notified for sale in execution of the decree so long ago as the 15th August 1878. The sale was then postponed several times for various reasons, until, on the 15th of February 1879, it was finally fixed for the 15th March 1879. On that day neither the execution-creditor nor the execution-debtor appeared. There were few persons present, and the property was purchased for Rs. 2,000. There is, undoubtedly, good reason for supposing that this price was a very inadequate one, and it appears that the judgment-creditor is willing now to give some Rs. 9,000 for the property.

“An application was then made to the lower Court by the judgment-debtor to set aside the sale, upon certain grounds which are immaterial to our present purpose, and which the Deputy Commissioner considered to be frivolous; but at the hearing, the applicant’s vakeel took another point for the first time, viz., that the sale was illegal, and must be set aside (under s. 290 of the Civil Procedure Code), inasmuch as the notification of the sale took place on the 15th March, so that only 29 days, instead of 30, elapsed between the sale and the notification. The Deputy Commissioner considered this circumstance fatal to the validity of the sale, and accordingly set it aside.

“The purchaser, who was a party to the proceedings, then appealed to the Judicial Commissioner, who, after hearing the matter argued, decided that the error was merely an irregularity, and that as the judgment-debtor had failed to show that the inadequacy of the price obtained at the sale was owing in any way to that irregularity, the order of the Deputy Commissioner ought to be set aside, and the sale consequently confirmed.

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“An application was then made to this Court by the judgment-debtor to set aside the order of the Judicial Commissioner, upon the ground that he had no right to make it; that the requirements of s. 290 were essential to the validity of the sale; and that the Judicial Commissioner had consequently exercised his jurisdiction illegally in setting aside the Deputy Commissioner's order, and confirming an invalid sale.

“We entertain considerable doubt whether, assuming the applicant to be right in his view of the meaning of s. 290, we have any power to interfere under either s. 15 of the Charter Act, or s. 622 of the Code; but as different Judges of this Court apparently entertain different views as to the powers of the High Court in that respect, and as it is of great importance that the Court should be guided by some uniform rule in the exercise of its powers, we think it right to refer the question to a Full Bench.

“Whether, assuming the applicant's view of s. 290 to be well founded, this Court has any power to set aside the Judicial Commissioner's order. *Shoovankurry Debi v. Dwarakanath Moorjee* (1), Special Appeals in suits Nos. 1609 and 1733 of 1879, unreported; *In re Da Costa* (2); *Ram Lall Singh v. Tanki Mahton* (3); and *Karim Sheikh v. Mukhoda Sunduri Dasi* (4).”

Mr. *H. Bell* (with him *Baboo Jogesh Chunder Dey*) for the appellant.—The question here is, whether, when the Judicial Commissioner has decided a question upon the construction of s. 290, —*viz.*, whether the non-observance of the requirements of the section amounted to an illegality or an irregularity, —the High Court can, under the special powers conferred by s. 15 of the Charter Act, or by s. 622 of Act X of 1877, set aside such order.

When Act VIII of 1859 was passed, it contained no revisional power, but such a power was given first by Act XXIII of 1861, s. 35, and was limited to cases in which a lower Court had exceeded its jurisdiction. Then 24 and 25 Vict. c. 104, passed in 1862, gave the High Court an additional power, *viz.*, the power of superintendence. The question as to what that

(1) 25 W. R., 345.

(*) 4 C. L. R., 14.

(2) B. L. R., Sup. Vol., 432; S. C., 5

(4) 15 B. L. R., 111.

W. R., Mis., 26; 1 Wym., 165.

power of superintendence included was settled by the case of *In re DaCosta* (1), which decided that it was not the intention of the Charter to give a special appeal where such an appeal had been taken away by law. This decision was carried one step further by the case of *In the matter of the petition of Gobind Koomar Chowdry* (2), in which it was decided that the Court had the power of revision where a lower Court had declined jurisdiction. These cases are now embodied in s. 622 of Act X of 1877; this section was amended by Act XII of 1879, by providing in addition that the High Court may call for the record of a case when the lower Court appears "to have acted in the exercise of its jurisdiction illegally or with material irregularity." The powers of revision are, therefore, now different from what they were under the Charter Act. The High Court has now power to interfere whenever a Court has acted illegally, and to interfere where it has exceeded its jurisdiction or acted with material irregularity. A material error has been committed by the Judicial Commissioner in setting aside the order of the lower Court, under which the notice under s. 290 of the Code was held to be insufficient. [GARTH, C. J.—If it was an irregularity, the Commissioner's construction of s. 290 was, that the person complaining of the irregularity must show that he was injured by it.] The words of s. 622 are imperative, and that being so, there has been "a capital error" in the judgment of the lower Court, and on the authority of the case of *Shoovankurry Debi v. Dwarkanath Mookerjee* (3), the High Court has power to interfere. [GARTH, C. J.—It is doubtful whether we have a right to touch the order of the Court, because it seems that the Judicial Commissioner has put a construction on the statute which he deemed to be right; and you must remember that your application is not to set aside the sale, but to set aside the order confirming the sale.] The amending words "acted illegally or with material irregularity" give the High Court power to interfere. In *Roghonundun Lall*

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(1) B. L. R. Sup. Vol. 432; S. C.; (2) B. L. R., Sup. Vol., 714; S. C.,
 6 W. R., Mis. 25; 1 Wym., 165. 7 W. R., 520.

(3) 25 W. R., 346.

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v. Mohesh Lall (1) there was no irregularity; and yet the High Court interfered, as the judgment-debtor had misled the lower Court.

Baboo *Madhub Chunder Ghose* for the respondent.—The Full Bench, in *Tej Ram v. Harsukh* (2), held, that the High Court has, under s. 15 of the Charter Act, administrative, but not judicial powers. And in the case of *In the matter of the petition of Jankee Bullub Sein* (3), the order made was most arbitrary, but the High Court held they had no power to interfere.

The Full Bench did not decide the question referred to them, but gave a short opinion for guidance of the Division Bench in the following form:—

GARTH, C. J.—Upon the assumption contained in the question referred, we are of opinion that the Court has power, under proper circumstances, to set aside the sale, notwithstanding the Judicial Commissioner's order.

Upon this opinion being pronounced by the Full Bench, the case was sent back to the Division Bench to determine, *1st*, whether the requirements of s. 290 were, or were not, essential to the validity of the sale; and, *2ndly*, assuming this to be so, whether, under the circumstances of the case, the sale ought to be set aside; but upon the matter coming on again before the Division Bench, the case was, at the suggestion of the Court, compromised by the parties.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

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April 8.

MOHINDROBHOOSUN BISWAS *v.* SHOSHEEBHOOSUN BISWAS.

Practice—Suit for Partition—Adding Parties—Mortgagee of Interest of Co-owner—Civil Procedure Code (Act X of 1877), s. 32.

In a suit for the partition of joint family property, the mortgagees of the right, title, and interest of the plaintiff applied under s. 32 of the Civil Procedure Code to be added as parties.

(1) 3 C. L. R., 137.

(3) B. L. R., Sup. Vol.; 716; S. C.

(2) 1 L. R., 1 All., 101.

7 W. R., 519.