that s. 293 applies to all of them. It is only necessary to notice the position of s. 293 amongst the general rules, and the 2nd schedule under the heading chap. xix, to understand that the provision for making a defaulting purchaser at a sale liable for deficiency on resale, now extends to all sales, whether of moveable or immoveable property, and also to resales held under ss. 297, 306 or 308. It had been held under the old Code that this liability did not extend to purchasers defaulting to make the deposit under s. 353, Act VIII of 1859—*Ajoodhya Persad* v. *Gopal Dutt Misser* (1)—and we have no doubt the law has been advisedly made wider in its scope.

Whether the case comes under s. 244, Act X of 1877, or not, is a point which is perhaps open to doubt. We leave it open for the present.

We dismiss the appeal with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

MANLY (DEFENDANT) *v.* PATTERSON (PLAINTIFF).*

1881 *May* 27.

Appeal to Privy Council—Application for Leave to Appeal—Judgment of one Judge—Ministerial and Judicial Acts—Letters Patent, cl. 15.

The plaintiff obtained a decree in the Court of first instance. On appeal to the High Court, the decision of the lower Court was uphold, but the decree was varied in respect of some matters relating to the mode in which the relief to which the plaintiff was declared entitled should be granted. The defendant applied for leave to appeal to the Privy Council, but the application was refused, on the ground that the judgment in the High Court and the Court of first instance were in effect concurrent judgments, and that no substantial point of law was involved in the case. The defendant appealed under cl. 15 of the Letters Patent.

Held, that no appeal would lie.

Mussamut Amirunnesa v. *Baboo Behary Lall* (2) followed.

IN this case an application was made by the defendant in the Privy Council Department for leave to appeal against a decree

* Appeal under s. 15 of the Letters Patent, against the order of Mr. Justice Pontifex, dated the 29th April 1881, in the matter of Privy Council Appeal No. 15 of 1881 (in Appeal from Original Decree No. 120 of 1880).

(1) 17 W. R., 271. (2) 25 W. R., 529.

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of the High Court (PONTIFEX and McDONELL, JJ.), affirming a decision of the Subordinate Judge of the 24-Pargannas. The application was refused by Mr. Justice Pontifex, who held, that the decisions in the Court of first instance and in the High Court were in effect concurrent, and that no substantial point of law was involved in the case. It appeared that the High Court had modified the decree of the lower Court on the question of costs and on some other matters relating to the manner in which the relief to which the plaintiff was declared should be worked out under the decree. The applicant appealed.

Mr. *H. Bell* for the appellant.

Mr. *Bonnerjee*, for the respondent, objected that no appeal would lie.

Mr. *Bell*, for the appellant, contended, that there was an appeal, because the learned Judge had not followed the provisions of s. 596 of the Code of Civil Procedure. He had not confined himself to his ministerial duties, but had gone out of his way to give a judicial decision. In such a case an appeal would lie on the authority of *Kally Soondery Dabia's* case (1). The learned Judge says, the judgments are in effect concurrent; that is a judicial decision from which there is an appeal. Even if they were in effect concurrent, that would not be sufficient. Section 596 requires that the decree appealed from should affirm the decree of the lower Court, and that is not the case here. *Mussamut Amirunnesa* v. *Baboo Behary Lall* (2) is not in point here.

Mr. *Bonnerjee* was not called upon.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

GARTH, C. J.—This is an appeal from a decision of Mr. Justice Pontifex in the Privy Council Department, refusing leave to appeal to the Privy Council, upon the ground that

(1) I. L. R., 6 Calc., 594. (2) 25 W. R., 529.

there was no point of law, and that, on the facts, the High Court had agreed with the judgment of the Court below.

A preliminary objection has been taken by the Standing Counsel that no appeal lies under such circumstances; and there is no doubt that this is an attempt to reopen a question which was decided by this Court in the year 1876. See *Mussamut Amirunnesa* v. *Baboo Behary Lall* (1),

The sections in the Civil Procedure Code, under which Mr. Bell says he has a right to appeal, are contained in chap. xlv; but these sections present no new phase of the law upon this subject since the above case was decided, because at that time the Privy Council Act, VI of 1874, was in force, and the sections in that Act upon the subject are identically the same as those in chap. xlv of the Civil Procedure Code of 1877.

At the time when the above case was decided by Mr. Justice Ainslie and myself, we thought it right to consult most of our brother Judges before we delivered our judgment, because it was most important, (having regard to what had been the practice of this Court), that some definite rule should be laid down.

For several years past, the Judge in the Privy Council Department, (selected from amongst the most experienced Judges of the Court), has always sat alone to determine points relating to Privy Council Appeals, and especially as to whether leave to appeal should be granted or refused. For a long time no attempt was made to appeal against his orders; but for the first time in the year 1873 some appeals were preferred against orders refusing an appeal, which were heard by Division Benches without the question of jurisdiction being raised, though in four out of those cases the Judges expressed a doubt as to whether they had any power to hear the appeal.

After consulting other Judges, Mr. Justice Ainslie and myself decided in the above case that the appeal would not lie; and one of our principal reasons for so deciding was this, that the Judge in the Privy Council Department when dealing with such questions had always been considered as acting under the Privy Council orders, rather than as a Judge of the High Court.

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I observe we said in that case, "we have been unable to find a single instance, previously to the 23rd of August 1873, of any attempt to appeal against an order or certificate made by a Judge of this Department; and, indeed, it is very difficult to understand how an order or certificate under rule 2 of the Privy Council orders could properly be considered as a judgment of the High Court. It was in aid of the Privy Council that the rule was established; it has its origin in an Act of Parliament passed expressly for the better administration of justice in Her Majesty's Privy Council, and the certificate given under it would seem rather to form a part of the Privy Council proceedings, than to come within the legitimate province of this Court."

Now the appeal which is now before us is precisely similar to that which in the above case we held would not lie; and therefore we are bound by that authority. If we had any doubt about the correctness of it, all we could do would be to refer the present appeal to a Full Bench. But we do not entertain any such doubt.

Mr. Bell has argued, that the late case of *Kally Soondery Dabia* v. *Hurrish Chunder Chowdhry* (1), in which I had the misfortune to differ from two of my learned brothers, is opposed to the case of *Mussamut Amirunnesa* v. *Behary Lall* (2), but we think it is not so. If Mr. Justice Mitter and myself, before whom that appeal was heard, had been of opinion that the question in that case was the same as had been decided in the former one, we should have felt ourselves bound by the decision. But we considered, rightly or wrongly, that the question was a different one; that it arose under a different section of the Code, and depended on different considerations. It is a great satisfaction to me that *Kally Soondery's* case (1) is now under appeal to the Privy Council; because I trust that their Lordships may see their way to laying down some definite rule as to what orders made by a single Judge of the High Court in the Privy Council Department are, or are not, appealable to a Division Bench.

If those orders are appealable to a Division Bench, it would of course be useless that a single Judge should continue any

(1) I. L. R., 6 Calc., 594. (2) 25 W. R., 529.

longer to sit alone in the Privy Council Department, because all, or nearly all, his orders would be appealed, and thus a double expense would be entailed upon suitors, as well as a double labour upon the Court. For our present purpose it is sufficient to say, that we consider ourselves bound by the former decision in 1876. Mr. Bell's client in the present case is of course not without remedy, because he may always appeal to the Privy Council; and we know that their Lordships have frequently thought it right to admit appeals, when leave to appeal has been refused in this Court. The appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

SHAH AHMED SUJAD AND ANOTHER (PLAINTIFFS) *v.* TAREE RAI AND OTHERS (DEFENDANTS).*

1881
April 12.

Cause of Action—Declaratory Decree—Specific Relief Act (I of 1877), s. 42—Civil Procedure Code (Act X of 1877), s. 53.

In a suit for confirmation of possession and declaration of title in respect of land, where the plaint did not disclose any facts from which it could be said that the defendants denied the plaintiffs' title, but from the proceedings in the original cause it was established, that, before the suit was brought, there was a dispute existing between the parties as regards the title, and that a decree in favor of the plaintiffs had been passed by the original Court on the merits of the case,—

Held, that though the plaint might have been rejected in the first instance under s. 53 of the Civil Procedure Code, on the ground that it did not disclose any cause of action, it was too late for an Appellate Court to reverse the decree solely on that ground, without being satisfied that no such cause of action was established on the evidence.

THIS was a suit brought by the plaintiffs for confirmation of possession and declaration of title in respect of a plot of land,

* Appeal from Appellate Decree, No. 1704 of 1879, against the decree of Baboo Aubinash Chunder Mitter, Additional Subordinate Judge of Patna, dated the 22nd May 1879, reversing the decree of Moulvi Abdool Aziz, Munsif of Behar, dated the 30th November 1878.