

APPELLATE CIVIL.

Before Mr. Justice Best.

TIMMANNA BANTA (COUNTER-PETITIONER), PETITIONER,

v.

MAHABALA BHATTA (PETITIONER), RESPONDENT.*

1895.
August 19,
20, 27.*Civil Procedure Code, ss. 311, 588, clauses 16, 28 and n. 622.*

Land having been sold in execution of decree, one claiming that it had been held by the judgment-debtor benami for him applied that the sale be cancelled under section 311. He was not a party to the decree, and on that ground his petition was dismissed. The Appellate Court was of opinion that it had been wrongly dismissed and remanded the case to be disposed of on the merit :

Held, on revision, (1) that the order remanding the case was not appealable, and consequently that the petition for revision was maintainable ;

(2) that the fact of the petitioner being a stranger to the decree did not preclude him from obtaining the relief sought under section 311.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of O. Chandu Menon, Subordinate Judge of South Canara, on miscellaneous appeal No. 25 of 1894, setting aside the order of the District Munsif of Kasargode on miscellaneous petition No. 27 of 1894. By the proceedings sought to be revised the Subordinate Judge directed the District Munsif to restore to his file and dispose of on the merits a petition under section 311 of the Civil Procedure Code, which prayed that the auction sale of certain land should be cancelled. The petitioner was not a party to the decree, in execution of which the land in question was attached and sold, and his case was that the land was his property and that the execution proceedings had been carried on by the decree-holder and judgment-debtor in collusion. The District Munsif dismissed the petition on the ground that the petitioner being a stranger to the decree was not entitled to relief under section 311. This Subordinate Judge held that this view was wrong and made the order now sought to be revised.

The present petition was preferred by the purchaser at the auction sale.

Narayana Rau for petitioner.

Sankaran Nayar for respondent.

* Civil Revision Petition No. 604 of 1894.

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JUDGMENT.—The preliminary objection is taken that, as the order sought to be revised is one remanding the case and therefore appealable under clause 28 of section 588 of the Code of Civil Procedure, this petition for revision under section 622 is not maintainable. On the other hand, it is contended for the petitioner that the order in question being one passed under section 588 (article 16), any further appeal is barred by the last paragraph of the same section, which says that “orders passed in appeals under this section shall be final.”

Clause 28 must, I think, be read with the final paragraph, and so read, it must, I think, be held not to apply to orders of remand made in appeals under the same section.

The preliminary objection is therefore disallowed. Then the question is whether the Subordinate Judge is wrong in holding that the counter-petitioner has a *locus standi* under section 311 of the Code. The case in *Abdul Huq Mozoomdar v. Mohini Mohun Shaha*(1), on which the Subordinate Judge rests his order, has no doubt been overruled by a subsequent decision of a full bench of the Calcutta High Court, which is to be found in *Asmutunmissa Begum v. Ashruff Ali* (2), and this latter decision was followed by this Court in *Subbarayadu v. Pedda Subbarazu*(3). But as is pointed out by Petheram, C.J., in the recent case of *Abdul Gani v. Dunne*(4), the Full Bench decision in *Asmutunmissa Begum v. Ashruff Ali*(2) does not exclude the right to come in under section 311 of any person whose interest would pass by the sale. As remarked by Ghose, J., in the same case, the test is “whether the petitioner “would be entitled to bring a suit to contest the sale or to recover “the property,” and it has been held that the beneficial owner is bound by a decree passed against the benamidar.

The case of the counter-petitioner is, that the first defendant in the suit against whom the decree was obtained was merely a benamidar of the village, and that lands therein which belong to the petitioner have been sold without proper proclamation, &c.

The decision in *Asmutunmissa Begum v. Ashruff Ali*(2) and *Abdul Gani v. Dunne* (4) are both authorities for upholding the Subordinate Judge’s order.

This petition is dismissed with costs.

(1) I.L.R., 14 Calc., 240.

(3) I.L.R., 16 Mad., 476.

(2) I.L.R., 15 Calc., 488.

(4) I.L.R., 20 Calc., 418.