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As the Judge failed to exercise a jurisdiction vested in him by law in the matter of the appeal, we set aside the order and direct the memorandum of appeal to be transmitted to him for disposal on the merits according to law.

In the course of considering this matter we have had occasion to examine two decisions, passed by us on the 11th of February last, in Appeal from Order No. 138 of 1879 (1) and Revision Case No. 38B of 1879 (1).

We think it right to take this opportunity to say, as regards the first of these, that it was determined under an erroneous conception of s. 102 of Act XII of 1879. It was incorrect to say, that that section was "inapplicable" to that appeal. The order thereby appealed was one "*confirming a sale*," and it was appealable both under s. 588 of Act X of 1877 and the amendment of that section contained in Act XII of 1879. Moreover, that appeal was pending, when the last-mentioned Act came into force, and should, therefore, have been heard and determined as provided by the amendment to s. 589, namely, by this Court. Accordingly our order sending it back to the Judge for disposal was incorrect.

In Revision Case No. 38B. we were in error in using the expression "had the provisions of Act XII of 1879 been applicable, the appeal from the Munsif's order *setting aside the sale* would lie, not to the Judge but the High Court"; for s. 588, as amended, enacts, by omission, that appeals from orders setting aside sales can no longer be had. We have thought it right to correct this inaccuracy of expression, though our order in the case was perfectly regular.

APPELLATE CIVIL.

188
March

Before Mr. Justice Pearson and Mr. Justice Oldfield.

GANPATJI AND ANOTHER (PLAINTIFFS) *v.* SAADAT ALI AND OTHERS (DEFENDANTS.)*

Mortgage—Sale in execution of decree—Vendor and Purchaser.

The proprietors of a taluka and mahál called *B*, assessed with revenue at Rs. 6,800-4-7, to which certain lands which had been gained by alluvion apper-

(1) Unreported, decided the 11th February, 1880.

* First Appeal, No 50 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 28th February, 1879.

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tained, which lands had been formed into a separate mahál and assessed with revenue at Rs. 88, mortgaged it in these terms: "We agree mutually to mortgage the said taluka *B*, and accordingly after mortgaging and hypothecating the whole of the mauzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, &c., &c., and all and every portion of our proprietary, possessory, and demandable rights, without excepting any right or interest obtained or obtainable, &c." Subsequently, the mahál taluka *B*, "together with original and attached mahál and all the zamindari rights appertaining thereto" was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire taluka *B*, *jama* Rs. 6,800-4-7" but afterwards refused to perform the contract and was sued for its specific performance. The plaint in this suit stated that the subject-matter of the contract was the "entire taluka *B*, *jama* Rs. 6,800-4-7," and the decree which the purchasers obtained for the specific performance of the contract referred to its subject-matter in similar terms.

Held, in a suit by the purchasers for the possession of the alluvial mahál, that the terms of the mortgage were sufficiently comprehensive to include that mahál, and it was not intended by the entry of the *jama* of mahál *B*, exclusive of the *jama* of the alluvial mahál, to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. Also that the alluvial mahál passed to the auction-purchaser at the auction-sale, under the words "attached mahál." Also that the sale to the plaintiffs passed the alluvial mahál, the words "the entire taluka *B*" being sufficient to include it, the entry of the *jama* of mahál *B* in the sale-contract, plaint, and decree being merely descriptive.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Messrs. *Conlan* and *Colvin*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellants.

Pandit *Ajudhia Nath*, Lala *Lalta Prasad*, and Munshi *Kashi Prasad*, for the respondents.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—The case of the plaintiffs is that taluka Birpur with all the villages appertaining to it and all existent and contingent rights connected with it had been hypothecated to Nawab Jafar Ali Mirza, for money lent to Husaini Khanam and Bakya Bibi the proprietors, and the Nawab instituted a suit and obtained a decree against them, and in execution caused the taluka with

all rights and interests to be sold, and himself purchased it on 20th November, 1872. After the purchase, the auction-purchaser agreed to sell the property to Jiwan Lal now represented by Ganpatji, who admitted the plaintiff Hari Das to an interest in the transfer, and after a suit instituted against the auction-purchaser they obtained a decree compelling the auction-purchaser to execute a sale-deed in their favour in accordance with the agreement. The plaintiffs have been obstructed by the heir of the judgment-debtors, the former owners of taluka Birpur, and by lessees put in by him, in obtaining possession of some alluvial land comprising 110 bighas, 12 biswas, 13 dhurs, which accreted to some of the villages comprising the taluka in 1860 and 1861, and was formed into a mahál and assessed with a revenue of Rs. 88 in 1863 and settled with the proprietors of taluka Birpur, and which the plaintiffs allege was sold at the auction-sale on 20th November, 1872, and passed by that sale to their vendor and to which they are in consequence entitled.

The defendants, one of whom is the heir of the former owners of the taluka, and the other two are lessees on his part, aver that this alluvial land was not hypothecated to Nawab Jafar Ali Mirza, nor included in the property sold at auction; that the property hypothecated and sold was the original mahál of taluka Birpur, excluding this land which was formed into a separate mahál recorded under the name of *Gang-bárár*; and they further aver that the plaintiffs' vendor, the auction-purchaser, never considered himself the purchaser of this land nor agreed to sell this land, and it was improperly included in the sale-deed which the plaintiffs obtained by a decree of Court; and they further plead that the suit is not maintainable with reference to s. 241, Act XIX of 1873, and is barred by limitation.

The Subordinate Judge rightly held that there was no bar to the institution of this suit on the ground taken; and he proceeded to find that the land in dispute was not included in the hypothecation made by the owners of Birpur to plaintiffs' vendor, nor in the auction-sale, nor in the subsequent contract of sale by the plaintiffs' vendor to plaintiffs; and he bases this finding mainly on the following grounds: That the alluvial land formed a separate mahál

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bearing a separate number in the *tauzi* from that of Birpur, with separate revenue assessed, *viz.*, Rs. 6,800-4-7 on mahál Birpur, and Rs. 88 on mahál *Gang-barár*, and had no connection with taluka Birpur; that all that was entered in the mortgage-deed as subject of mortgage was taluka Birpur proper, assessed with revenue of Rs. 6,800, and that the sale notification and application for sale made no separate reference to this mahál, and that it was not expressly included in the plaint (dated 19th March, 1874,) in the suit instituted by plaintiffs against the auction-purchaser, nor in the decree of 21st July, 1874, nor in the sale-contract by plaintiffs' vendor; and the Subordinate Judge argues that, being a separate mahál and not expressly included in the above documents, it cannot be held to have formed part of the property mortgaged and sold.

We are unable to take the same view as the Subordinate Judge. Taluka Birpur is shown to comprise a number of villages forming a mahál, and in 1860 the land in dispute was thrown up and accreted in front of five of these villages, Birpur, Barmara, Ami, Soharpur, and Narainpur, and in 1863 it was formed into a mahál and assessed with the proprietors of the taluka Birpur, and entered as "*Arazi gang-barár*, mauzas Birpur, Barmara, Ami, Soharpur, and Narainpur appertaining to taluka Birpur." Thus, although formed into a separate mahál for fiscal purposes, the land would appear to have been attached to the mauzas to which it was an accretion, and at all events it is clear the new mahál after its formation appertained to taluka Birpur. The Subordinate Judge is therefore wrong in considering it had no connection with the taluka; on the contrary it appertained to it as a dependent mahál. By the terms of the mortgage-deed the owners of the taluka "agree mutually to mortgage the said taluka Birpur, and accordingly after mortgaging and hypothecating the whole of the mauzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated land, inhabited, waste, and saline tracts, stone and wooden presses, *kacha* and *pucca* wells, reservoirs, and tanks, small tanks, and ponds, sir, *baghs*, scattered trees, trees bearing fruits and barren trees,

chaunî houses and dwelling-houses, &c., and all and every portion of our proprietary, possessory, and demandable rights without excepting any right or interest obtained or obtainable."

Now it seems to us, considering the fact that the alluvial mahál appertained to the taluka, that the above terms are comprehensive enough to include it in the property mortgaged ; and if the sum entered as the *jama* was that of the taluka exclusive of the *jama* of the alluvial mahál, there was no intention by that entry to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive But the material point is not what was mortgaged but what was sold at auction. Unfortunately no sale-certificate is forthcoming, and it is alleged, and not disputed, that although the sale was confirmed no sale-certificate was obtained by the auction-purchaser, probably owing to the dispute between him and the plaintiffs. But we have in evidence the application for sale and the sale-notification, and in the former the decree-holder applies for the sale of "mahál taluka Birpur, together with original and attached mahál and all zamindari rights belonging thereto", and the sale-notification directs the sale of the "mahál Birpur, together with original and attached mahál and all the zamindari rights appertaining thereto." The attached mahál alluded to can be no other than this alluvial land, and we are at a loss to understand the Subordinate Judge's remark that the sale-notification and application for sale made no separate reference to this mahál.

We can come to no other conclusion than that this alluvial tract, formed into a separate mahál, remained attached to the taluka, and was included in the property sold at auction.

Nor do we agree with the Subordinate Judge that it was excluded from the sale to the plaintiffs, the enforcement of which they obtained under a decree of Court. The Subordinate Judge rests his finding on this point on the fact which he asserts that this land was not included in the sale-contract to plaintiffs, nor in their plaint in their suit to enforce that contract, nor in the decree which they obtained. But the whole force of the Subordinate Judge's opinion rests on an argument formed upon the amount of the *jama* which is entered in those documents as the *jama* of taluka

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Birpur, and which is said not to include the *jama* of the alluvial mahál. But the entry of *jama* is merely descriptive, while the essential part of the document is the entry in respect of the subject of sale, and this is the "entire taluka Birpur", a term sufficiently comprehensive to include the alluvial mahál appertaining to the taluka, and we may observe that the draft sale-deed, dated 21st January, 1874, expressly includes alluvial lands, and what is more to the purpose the sale-deed executed by order of the Court which gave the plaintiffs their decree expressly includes the disputed lands as conveyed to them by the auction-purchaser.

We reverse the decree of the lower Court and decree the claim with all costs.

Appeal allowed.

PRIVY COUNCIL.

P. C.
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March 9.

HIRA LAL (DECREE-HOLDER) *v.* BADRI DAS AND OTHERS (JUDGMENT-DEBTORS).

[On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.]

Limitation—Proceeding to enforce decree—Act XIV. of 1859, *s.* 20.

It was the object of the Legislature in Act XIV. of 1859, s. 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bonâ fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding, taken *bonâ fide* and with due diligence, before a Judge whom the judgment-creditor believed, *bonâ fide*, though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of s. 20.

APPEAL from a judgment of the High Court of the North-Western Provinces (25th May, 1877,) affirming a judgment of the Judge of Agra (31st May, 1876,) allowing the objection of the respondents to the execution in 1874 of a decree obtained in 1867.

In 1867 the decree of which execution was refused in the Indian Courts was obtained by the appellant and one Makhan

Present:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.