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his doing so is in conformity with the provisions of the Civil Procedure Code, we think the first objection mentioned in the order of reference had no force and should be disallowed. As to the second, that has been disposed of in another case (1).

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

MUHAMMAD MASBUK ALI KHAN AND OTHERS (PLAINTIFFS) v. KHUDA BAKHSH, (DEFENDANT). *

Declaratory decree—Act 1 of 1877 (Specific Relief Act), s. 42—Civil Procedure Code, s. 578.

An improper or irregular exercise of the discretionary power conferred by s. 42 of the Specific Relief Act (1 of 1877) does not in itself constitute sufficient ground for the reversal of a decree which is not open to objection on the ground of jurisdiction or of the merits of the case, being covered by s. 578 of the Civil Procedure Code. *Sant Kumar v. Deo Suran* (2) referred to.

THE plaintiffs in this case sued Khuda Bakhsh and others, co-sharers and the lambardár in a village Landhaur, for a declaration of their right to have the profits of the village divided on the principle that there were three *thokes*, one of $\frac{2}{3}$ rd and two of $\frac{1}{6}$ th each, and not three equal *thokes*. It appeared that a suit had previously been brought by Khuda Bakhsh against the lambardár for a share of certain trees, and that the Munsif had decided in decreeing that suit that the three *thokes* were equal.

This decision was alleged to be the cause of action for the present suit. The defendants pleaded, *inter alia*, that the plaintiffs had no cause of action. The Court of first instance (Subordinate Judge of Saháranpur) decreed the claim after taking evidence and investigating the case on the merits. On appeal the District Judge of Saháranpur reversed the Subordinate Judge's decree on grounds which he stated as follows:—

“It is clear that no cause of action accrued to the plaintiffs against Khuda Bakhsh or any one by the Munsif's decree in his

* Second appeal No. 856 of 1886, from a decree of J. W. Muir, Esq., District Judge of Saháranpur, dated the 22nd January, 1886, reversing a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saháranpur, dated the 28th June, 1883.

(1) *Maladin v. Ganga Bai*, ante, p. 613. (2) I. L. R., 8 All. 365.

favour. That decree could only bind him and the lambardár he impleaded, and could not be set up by the latter as a defence to any suit brought by the co-sharers. The respondents' vakil admits almost that all they want is a declaration that the decree is not binding on them. S. 42 of the Specific Relief Act does not apply. The lambardár impleaded in the former suit did not deny the plaintiffs' title, but affirmed it, though unsuccessfully; and it is not Khūda Bakhsh's mere denial of this title, but the decree in his favour, which they really seek to declare null and void. The merits of the case, then, need not have been discussed by the lower Court, and I need not discuss them here. The appeal is decreed, and the appellants will get their costs both here and in the lower Court."

From this decree the plaintiffs appealed to the High Court.

Shah *Asad Ali*, for the appellants.

The Hon. *T. Conlan* and *Munshi Kashi Prasad*, for the respondent.

BRODHURST and MAHMOOD, JJ.—In our opinion this case cannot be finally disposed of here, because the learned Judge of the lower appellate Court has not disposed of it upon the merits. The original suit was of a declaratory character, falling under the purview of s. 42 of the Specific Relief Act (I of 1887), and the Court of first instance, having admitted the suit and heard the pleadings of the parties upon the merits of the issues raised in the cause, decreed the claim, holding that the plaintiffs were entitled to the relief for which they prayed. The case then came up in first appeal to this Court upon a question of jurisdiction, and this Court, by its order of the 11th May, 1885, directed the learned Judge of the lower appellate Court to restore the appeal to his file and to dispose of it. In dealing with the case the learned Judge has simply held that the suit in its declaratory form was not maintainable under s. 42 of the Specific Relief Act, and upon that ground alone has decreed the appeal before him and dismissed the suit.

From that decree this second appeal has been preferred, and we are of opinion that the view adopted by the learned Judge in this case was erroneous, and that the litigation should have been tried upon

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the merits. In the case of *Sant Kumar v. Deo Saran* (1) it was held by one of us in a judgment which referred to older cases that an improper exercise of the discretionary power conferred by s. 42 of the Specific Relief Act by a Court of first instance does not in itself constitute a sufficient ground for the reversal of a decree which is not open to any objection upon the ground of jurisdiction or of the merits of the rights of the parties. In that ruling no rule was laid down as to cases which might fall under the proviso of s. 42 of Act I of 1877. This is not one of those cases which fall under the proviso to that section, and, indeed, Mr. *Kashi Prasad*, in arguing the case on behalf of the respondent, has conceded that the case is not governed by that proviso, no further relief being capable of being claimed by the plaintiffs within the meaning of that proviso. The ruling, therefore, fully applies to this case; and even if the Court of first instance exercised its discretion irregularly in entertaining the suit and trying it upon the merits, we think that it was the duty of the lower appellate Court not to have set aside the decree upon that ground alone, but to have decided it upon the merits, there being no question as to the want of jurisdiction: the error of the first Court, if indeed there was any error, being covered by s. 578 of the Civil Procedure Code, as stated in the ruling to which we have referred.

We, therefore, decree the appeal and set aside the decree of the lower appellate Court, and remand the case to that Court for disposal upon the merits, with reference to the observations we have made. The costs to abide the result.

Cause remanded.