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QUEEN-EMPRESS v. BALWANT.

Proceeding to the second branch of the reference, we are asked what order can be made with reference to a person convicted by a Magistrate, but acquitted by the Court of Session in appeal, such order of acquittal being reversed by the High Court under s. 439 of the Criminal Procedure Code. Clearly, the order must be one directing the re-trial of the proceedings wherein the final order has been found to be bad, and has in consequence been reversed. And as to the Court to which our order of re-trial should be sent, the scope for selection is limited to three tribunals, that is to say, the High Court, the Sessions Court of appeal, or the Magistrate.

It cannot be the High Court, because the limitation imposed by the last clause of s. 439 would restrict the result to a re-affirmation of the finding of acquittal. Similarly, it would be idle, as well as unreasonable, to direct a re-trial by the Magistrate, whose proceedings, the order of the appellate Court having been reversed, so far stand good, and who would, presumably, as a matter of course, re-affirm the conviction.

The Sessions Court of appeal then is the proper tribunal for re-trial of the appeal, or such other Court of equal jurisdiction as we might entrust, under s. 526 of the Code, with the trial of the appeal. This is our answer to the second question.

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December 2.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MUHAMMAD ABDUL KADIR (DEFENDANT) *v.* KUTUB HUSAIN (PLAINTIFF).

KAMAL-UD-DIN AHMAD (DEFENDANT) *v.* KUTUB HUSAIN (PLAINTIFF).*

Sale in execution of decree—Sale of rights and interests in mauza consisting of two mahals—Submersion of mahal at time of sale—Sale certificate not specifically mentioning submerged mahal—Passing of rights in submerged mahal to purchaser.

The rights and interests of certain judgment-debtors in a mauza consisting of two separate mahals, respectively known as the *Uparwar Mahal* and the *Kachar Mahal*, were brought to sale in execution of the decree. At the time of the sale, the *Kachar Mahal* was submerged by the river Ganges, and in the sale-

* Second Appeals Nos. 154 and 155 of 1886 from decrees of F. E. Elliot, Esq., District Judge of Allahabad, dated the 24th September, 1885, confirming decrees of Pandit Indar Narain, Munsif of Allahabad, dated the 22nd December, 1883.

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notification the revenue assessed upon the *Uparwar Mahal* only was mentioned, and there was no specific attachment of the *Kachar* or submerged land, but the property was sold as that of the judgment-debtors in the mauza. Subsequently, the river having receded, the auction-purchaser attempted to obtain possession of the *Kachar* land, but was resisted by the judgment-debtors on the ground that their rights and interests in that land had not been conveyed by the auction-sale, but only their rights and interests in the *Uparwar Mahal*.

Held that either the whole rights of the judgment-debtors in both mahals were sold, or, if not, their rights in the *Uparwar Mahal*, with the necessary and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mahal; and the mere fact of the mention in the sale-notification of the revenue of the *Uparwar Mahal* did not affect what passed by the sale.

Held also that the attachment of the judgment-debtors' entire proprietary rights in the mauza included their interests in both mahals, and the sale certificate clearly showed that all their rights in the village were passed to the purchaser. *Mahadeo Dubey* v. *Bhola Nath Dichit* (1) and S. A. No. 818 of 1885 referred to. *Fida Husain* v. *Kutub Husain* (2) dissented from.

The facts of this case are stated in the judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondent.

STRAIGHT, J.—These two appeals, Nos. 154 and 155 of 1886, relate to two suits which were instituted by the respondent, plaintiff, against the two defendants-appellants on the 3rd August, 1883.

Both the Courts below have found in favour of the plaintiff, and two separate appeals are preferred by the two defendants to this Court, which may conveniently be disposed of in a single judgment. The case upon which the plaintiff came into Court is shortly this. He said that on the 20th September, 1877, one Salamat Ali purchased certain rights and interests at an auction-sale in mauza Mustafabad, pargana Chail, in the Allahabad District. These rights and interests were brought to sale by one Badri Nath, and they were sold as the property of Muhammad Abdul Kadir and Kamal-ud-din Ahmad, in mauza Mustafabad, pargana Chail, Allahabad District. Subsequently, in March, 1879, or 1286 Fasli, Salamat Ali transferred what he had purchased to Kutub Husain, the present plaintiff, who, therefore, is entitled to

(1) I. L. R., 5 All. 86. (2) I. L. R., 7 All. 38.

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have whatever was purchased by Salamat Ali at the sale of the 20th September, 1877.

Now, it appears that the village of Mustafabad is situated on the banks of the river Ganges, and that from time to time land has accreted, and does accrete, to that mauza owing to the receding of the river, which in the rainy reason gets covered with water and again temporarily disappears. Such land, thus from time to time covered with water, has been known as the *kachar* land of the village, and prior to 1875 it has so frequently made its re-appearance that the Revenue authorities in that year, for greater convenience in assessing it for revenue, treated it as a separate mahal. Accordingly, therefore, it may be taken that mauza Mustafabad contained two mahals, that is to say, two revenue-paying divisions, respectively known as the *Uparwar Mahal* and the *Kachar Mahal*. It also appears that in 1877, at the time of the auction-sale to Salamat Ali, the *Kachar Mahal* was submerged, and the contention which subsequently to that sale was made by the defendants before the Revenue authorities, whose decision led to the present suit, and is maintained here, is that these submerged lands, that is, the *Kachar Mahal*, could not and did not pass to the auction-purchaser under his purchase of the 20th September, 1877, but only the *Uparwar* land.

The learned counsel for the appellant here has vigorously maintained that position, and in support of it has referred to a ruling of Mahmood and Duthoit, JJ., in *Fida Husain* v. *Kutub Husain* (1); and he further contends that as, in the sale-notification, only the revenue assessed upon the *Uparwar* land was notified, and as there was no distinct or specific attachment of the *Kachar* land, the sale, as regards the first point, did not carry these lands; and next, that the sale as regards them was a void sale, because there having been no attachment, the sale was void *ab initio*; and we are referred to a Full Bench ruling as to the last contention—*Mahadeo Dubey* v. *Bhola Nath Dichit* (2). With regard to the ruling in *Fida Husain* v. *Kutub Husain* referred to above, I must say it appears to be directly applicable to the present case, and I confess that I fail to see the distinction sought to be drawn by the learned pleader for the respondent.

(1) I. L. R., 7 All. 38. (2) I. L. R., 5 All. 86.

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I need scarcely say that for any decision written by Mr. Justice Mahmood I naturally have a high respect, and I should not, except for strong reasons, refrain from following it; but I regret to say that in the present instance I cannot adopt the views expressed by that learned Judge therein, and, with every deference, they do not commend themselves to my better judgment.

I think when the rights and interests of a judgment-debtor as proprietor in a village are put up and sold, without any restriction of any kind, and the sale-certificate, which is granted to the purchaser, transfers, or purports to transfer, those rights and interests, without any limitation or reservation, that the entire rights of the judgment-debtor pass to the purchaser as they exist in the whole mauza at the date of the sale taking place. In the present case, the proprietary rights of the judgment-debtors in mauza Mustafabad were sold without limitation or restriction of any kind, and the mere fact of the mention in the sale-notification of the revenue of one of the mahals, namely, the *Uparwar Mahal*, did not, in my opinion, affect what passed by the sale, more especially as, at the time, this was the only mahal from which revenue was recoverable by Government, the other being submerged. Whichever way the matter is looked at, it seems to me that either the whole rights of the judgment-debtors in both mahals were sold, or, if not, their rights in the *Uparwar Mahal*, with the accessory and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mahal.

As regards the point about the attachment, it seems to me beyond doubt that the entire proprietary rights of the judgment-debtors were attached, which included their interests in both mahals, and the sale-certificate clearly shows that all the judgment-debtors' rights in the village Mustafabad were passed to the purchaser.

For these reasons I regret I cannot follow the ruling of Mahmood and Duthoit, JJ., already referred to. I may add that in a similar case decided by the late Chief Justice, Sir Comer Petheram, and Tyrrell, J., on the 16th March, (S. A. No. 818 of 1885), those learned Judges have held, as I hold, in a case of lands called *Uparwar* and *Kachar* subject to similar incidents as the village

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lands in the present dispute, that a sale of the proprietary rig in a village covers both.

This being the view I take, both these appeals Nos. 154 and 155 must be dismissed with costs.

BRODHURST, J.—I entirely concur in dismissing both these appeals with costs.

Appeals dismissed.

REVISIONAL CIVIL.

1886
December 6.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

DURGA PRASAD (PLAINTIFF) *v.* RACHLA KUAR AND OTHERS (DEFENDANTS).*

Suit for declaration that property is liable to sale in execution of decree—Valuation of suit—Jurisdiction.

In a suit to have it declared that certain property valued at Rs. 400 was liable to sale in execution of the plaintiff's decree for Rs 1,500,—*held* that in this case the value of the property determined the jurisdiction, that it was immaterial that the amount of the decree was higher than the limit of the Munsif's jurisdiction, and that the case was therefore triable by the Munsif. *Gulzari Lal* v. *Jadaun Rai* (1) distinguished.

THE plaintiff stated in his plaint that on the 4th April, 1877, one Sheo Dat Rai who owned a 5½ gandas share in a certain village, gave a simple mortgage of 2 gandas to Mahipat Rai, his first cousin, and that this mortgage was a collusive transaction. He then, on the 13th July, 1877, gave a simple mortgage of the 5½ gandas to Hira Rai and Ram Charan Rai. Subsequently he caused a suit to be instituted against himself in respect of the mortgage of the 4th April, 1877, and this resulted in Mahipat Rai obtaining, on the 20th September, 1877, a decree against him for Rs. 121-15. On the 15th December, 1883, Hira Rai sold to the plaintiff two-thirds of the rights and interests of the mortgagees under the mortgage of the 13th July, 1877, and the plaintiff subsequently sued to enforce that mortgage, and obtained a decree for Rs. 1,505-7-9, and for the sale of two-thirds of the 5½ gandas share in satisfaction of the decretal amount. On the 1st September, 1885, the plaintiff learnt that Rachla Kuar, widow of

* Application No. 193 of 1886, for revision of an order of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 31st July, 1886, affirming an order of Maulvi Muhammad Amin-ud-din, Munsif of Muhamdabad, dated the 10th May, 1886.

(1) I. L. R., 2 All. 799.