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AZIMAN BIBI v. AMIR ALI.

Mr. *J. Simeon*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The Court (PETHERAM, C. J., and BRODHURST, J.) delivered the following judgment :—

PETHERAM, C. J.—The sole question in this case is, whether this deed of conditional sale included a transfer of an interest in the property, and reference need only be made to s. 58 of the Transfer of Property Act, which defines every mortgage as including a transfer of an interest in the property hypothecated for the purpose of a security. A deed of conditional sale of this kind is a mortgage, and some interest in the property is transferred. This is sufficient to let in the right of pre-emption, and it is not necessary that there should be a transfer of possession. On this point we hold that the recent decision of the Full Bench in *Sheoratan Kuar* v. *Mahipal Kuar* (1) is binding upon us, and the result is that this appeal must be allowed with costs.

Appeal allowed.

REVISIONAL CIVIL

1885
January 15.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HAR PRASAD AND ANOTHER (PETITIONERS) *v.* JAFAR ALI (OPPOSITE PARTY.)*

Civil Procedure Code, s. 622—High Court's powers of revision—"Jurisdiction"—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No. 164.

Where property had been attached in execution of a decree, *held* that the date on which the property was attached, and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under art. 164, sch. ii of Act XV of 1877. *Pachu* v. *Jaikishen* (2) referred to.

A Court which admits an application to set aside a decree *ex-parte* after the true period of limitation has expired, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision

* Application No. 197 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of G. J. Nicholls, Esq., Offg District Judge of Azamgarh, dated the 3rd May, 1884.

(1) *Ante*, p. 258. (2) Weekly Notes, 1884, p. 322.

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by the High Court under that section. *Amir Hasan Khan* v. *Sheo Baksh Singh* (1) and *Magni Ram* v. *Jiwa Lal* (2) commented on by MAHMOOD, J.

Per MAHMOOD, J.—The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hasan Khan* v. *Sheo Baksh Singh* (1) must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.

THIS was an application for revision under s. 622 of the Civil Procedure Code, made under the following circumstances:—On the 15th September, 1882, an *ex-parte* decree was passed by the Munsif of Azamgarh against Jafar Ali. In execution of that decree, the property of Jafar Ali was attached on the 19th June, 1883, and on the 15th September, 1883, a sale proclamation was made. On the 20th November, 1883, the sale in execution took place. On the 13th December the judgment-debtor presented an application under s. 108 of the Civil Procedure Code for setting aside the *ex-parte* decree, alleging that by the fraud of the decree-holders he had not had knowledge of the suit and the execution-proceedings. The Munsif allowed the application. The decree-holders appealed to the District Judge of Azamgarh, contending that the application of the 13th December should not have been allowed by the Munsif, on the ground that it was barred by limitation under art. 164, sch. ii of the Limitation Act, more than thirty days having passed since the 19th June, 1883, when the property was attached in execution.

The District Judge observed:—"The Court considers that the date of the sale (20th November, 1883) is the date of execution of process under art. 164 of sch. ii, Act XV of 1877." He held that the application was not barred by limitation, and that the judgment-debtor, Jafar Ali, had no notice of the original suit, but he did not try the questions whether the judgment-debtor had notice of the execution-proceedings, and whether the decree-holders had acted in the fraudulent manner alleged. He dismissed the appeal with costs.

The decree-holders applied to the High Court for the revision of this order under s. 622 of the Civil Procedure Code, on the ground that the lower Courts had exceeded their powers in entertaining the application to set aside an *ex-parte* decree after the

(1) I. L. R., 11 Calc. 6. (2) *Ante*, p. 336.

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time allowed by the Law of Limitation. On the other side it was objected that the High Court had no power of revision in the case under s. 622.

Munshi *Hanuman Prasad*, for the petitioners.

Munshi *Kashi Prasad*, for the opposite party.

OLDFIELD, J.—(After stating the facts, continued):—Art. 164 of the Limitation Act provides thirty days, as the period of limitation for an order to set aside a judgment *ex-parte*, from the date of executing any process for enforcing the judgment, and by s. 4 of the Act it is enacted that "subject to the provisions contained in ss. 5 to 25 inclusive, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule of the Act, shall be dismissed, although limitation has not been set up as a defence."

When therefore a Court has admitted an application to set aside an *ex-parte* judgment in contravention of the Law of Limitation, it must be held to have acted in the exercise of its jurisdiction illegally within the meaning of s. 622, and, there being no appeal to this Court in the case, this Court has, in my opinion, powers of revision under s, 622 of the Civil Procedure Code.

In the case before us the Judge erred in his application of the Law of Limitation. The period of limitation will run from the date of executing any process for enforcing the judgment; and in this case will run from the date of attachment of the property of the judgment-debtor in execution of the decree; and the application will be barred unless the judgment-debtor has been kept by means of fraud from the knowledge of his right to make the application. This is a question which the Judge must determine before he can properly entertain the application.

The order is set aside, and the case will go back to the Judge for disposal with reference to the above remarks. Costs to follow the result.

MAHMOOD, J.—The question whether the order of the District Judge can be revised by this Court, under s. 622 of the Civil Procedure Code, opens up a very important question of law, in discussing which it is not necessary to go further back than Act VIII of 1859, the old Code of Civil Procedure. That Act,

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as it originally stood, does not seem to have contained any provisions enabling the High Courts to interfere in revision, but s. 35 of Act XXIII of 1861 laid down the following rule:—"The Sudder Court may call for the record of any case decided on appeal by any subordinate Court in which no further appeal shall lie to the Sudder Court, if such subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law; and the Sudder Court may set aside the decision passed on appeal in such case by the subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right."

It is important to notice here that the only cases in which the High Court had power to interfere in revision were those "decided on appeal," and in which the subordinate appellate Court had "exercised a jurisdiction not vested in it by law." So the law stood until Act X of 1877 was passed. S. 622 of that Act was as follows:—"The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested; and may pass such orders in the case as the High Court thinks fit." The changes here made are two; *first*, that not only the judgments of the subordinate appellate Courts, but those of Courts of first instance, might be interfered with in revision; and *secondly*, that the cases in which such interference was justified were not only those in which there was *assumption* by the lower Court of a jurisdiction which it did not possess, but also cases in which there was *failure* to exercise a jurisdiction which it did possess. There was, therefore, a clear increase of the powers of revision, and it is important to see how legislation on this subject went further. S. 92 of Act XII of 1879 gave the High Court the power to interfere, not only in the two kinds of cases mentioned in s. 622 of the Code of 1877, but also in cases where the lower Court appeard "*to have acted in the exercise of its jurisdiction illegally or with material irregularity*," thus distinctly conferring a *third* power, distinct from those which the High Court previously possessed. Now s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879, has been reproduced *verbatim* in the present Code, and therefore all arguments and decisions which apply to

the former section apply equally to the present. The question then arises, how the present section is to be interpreted. Does it mean that in cases where "no appeal lies to the High Court," the revisional powers of the Court are co-extensive with those which it has in second appeal by virtue of s. 584 of the Code? I cannot think that it means this. Here I may refer to the Full Bench case, decided by this Court, of *Maulvi Muhammad* v. *Syed Husain* (1), in which the majority of the Judges held that when, under s. 622 of Act X of 1877, the High Court had called for the record of a case in which no appeal lay to it, it might, under that section, pass any order in such case which it might have passed if it had dealt with the case as a second appeal. The late Chief Justice even went further, and held that the High Court might, under that section, pass in such case any such order as it thought proper, whether in regard to fact or law. A similar view of s. 622 was taken by the Madras High Court in *Subbáji Rau Srinivasa Rau* (2), where it was held that where the lower Court had failed to do so, the High Court was competent to interfere in revision on the ground of fraud vitiating execution-sales.

Another case to which I wish to refer is *Shiva Nathaji* v. *Joma Kashinath* (3) in which West, J., in an elaborate judgment, with which, speaking generally, I agree, explained the scope of the revisional powers of the High Courts. All these rulings, however, with the exception of the principles of the last, must now be regarded as superseded by the recent decision of the Privy Council in *Amir Hasan Khan* v. *Sheo Baksh Singh* (4); but before I deal with the judgment in that case, I wish to refer to the recent Full Bench ruling of this Court in *Magni Ram* v. *Jiwa Lal* (5), in which the decision of their Lordships of the Privy Council was followed. That ruling was to the effect that the Privy Council had decided that only questions relating to jurisdiction can be entertained under s. 622.

I was a party to this ruling of the Full Bench, and I am anxious that its precise meaning (or at least my meaning in concurring in it, and effect should not be misunderstood. The ques-

(1) I. L. R., 3 All. 203.
(2) I. L. R., 2 Mad. 264.
(3) I. L. R., 7 Bom. 341.
(4) I. L. R., 11 Calc. 6.
(5) *Ante*. p. 336.

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tion is, what was decided by the Privy Council in the case referred to? The substance of the judgment is contained in the concluding words of the penultimate paragraph:—"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

The view of law here expressed is of course binding upon this Court, and I proceed to consider the exact meaning of the passage. And in doing so it seems to me that the word "*jurisdiction*," as used by their Lordships of the Privy Council, is the most important word.

The word in its ordinary meaning simply means the legal power or authority of hearing and determining disputes for the purposes of administering justice, and in its broad legal sense it may be taken to mean the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority. Such limitations may either be territorial or pecuniary with reference to the value of the subject-matter in litigation, or they may relate to the nature of the litigation, or the domicile and nationality of the parties, or the class or rank to which the tribunal belongs.

I am of opinion that the expression, as used by their Lordships, must be understood in its broad sense and not too narrowly, and this interpretation is supported by the fact that in the last paragraph of their judgment their Lordships say that "the Judicial Commissioner had no *jurisdiction* in the case" under s. 622 of the Civil Procedure Code. Considering that the Judicial Commissioner exercises in Oudh (to use their Lordships' own words) "the same *powers* as the High Court," the *dictum* cannot be understood to mean that he had no "*jurisdiction*," in the narrow sense of the word, to entertain an application for revision under s. 622 in the case. I understand the passage simply to mean that he had exceeded his powers, and that his order was therefore *ulta vires*.

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Understanding in this sense the word "*jurisdiction*" in the judgment of the Privy Council, I proceed with my views in regard to the revisional powers of this Court under s. 622 of the Civil Procedure Code. I have already said that the section contemplates three cases in which the revisional powers of the High Court may be exercised. The *first* is *assumption* by the lower Court of a jurisdiction which it does not possess. The *second* is its *failure* to exercise a jurisdiction which it does possess. The *third* is where there is neither of these two, but there is exercise of the jurisdiction which the Court possesses, and has exercised in a manner which is vitiated by illegality or material irregularity. The precise question before the Privy Council was, whether or not a particular suit was barred by s. 13 or s. 43 of the Civil Procedure Code. Now I think it can be shown by considering this question that there may be a decision which is made in the legal exercise of jurisdiction which is erroneous, but not illegal or materially irregular. I gather from the report in *Amir Husan Khan* v. *Sheo Baksh Singh* (1) that the lower Courts had found that the matter in issue was not *res-judicata* under s. 13, and that it could not have been included in the former litigation so as to be affected by s. 43. In that case no appeal lay from the decision of the lower appellate Court to the Judicial Commissioner, because s. 21 of the Oudh Civil Courts Act allows no second appeal from two concurrent judgments of lower Courts. In such a case I myself should not think it right to interfere in revision. The lower Courts had jurisdiction, and did not exercise it in any illegal or irregular manner. But suppose either of the Judges in that case had said:—"It is true that this same matter, which is now in dispute, was litigated before under the circumstances described in s. 13 of the Code; but although it was then tried and decided, the Judge trying the former suit appears to me to have decided erroneously, and I shall therefore try it myself, and determine it according to my own views." Or suppose the Court had said:—"This claim could, no doubt, have been made a part of the suit which was formerly tried, but the circumstances are such that I think it would be inequitable to apply the provisions of s. 43, and I therefore allow the plaintiff to sue." In these cases I think that there would be an exercise of

(1) I. L. R., 11 Calc. 6.

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jurisdiction, but "illegally" and "with material irregularity." Or to take a case which actually came before my brother Oldfield and myself a few days ago. Suppose that a Judge, professing to act under s. 206 of the Civil Procedure Code, which empowers him in certain cases to amend his decree, chooses to say that "dismissed" means "decreed," and proceeds practically to alter the whole nature of the decree. There again we have jurisdiction, in its narrow sense, existing in the Judge, but exercised by him "illegally" and "with material irregularity." Or, again, take s. 624 of the Civil Procedure Code, which provides that (except in certain cases) "no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it." And suppose that a Judge, disregarding this provision, reviews the judgment of his predecessor. I think that here, too, we have an example of jurisdiction being exercised illegally and with material irregularity. Once more, take the case of the Judge of a Small Cause Court (from whose decision there is no appeal), before whom a claim for Rs. 50 is brought, and witnesses produced, but who dismisses the claim without having heard the witnesses, on the ground that the plaintiff's story is obviously untrue. This is another instance of an illegal or materially irregular exercise of jurisdiction.

And so in the present case. Upon the findings recorded by the Judge, it is clear that he, though professing to apply the law of limitation, has in fact contravened the provisions of that law as contained in s. 4 of the Limitation Act. To allow an application of the kind referred to in art. 164 of sch. ii to be made after the true period of limitation has expired is to act, not indeed without jurisdiction in its narrow sense, but "in the exercise of jurisdiction illegally or with material irregularity," in other words, to act *ultra vires*.

This is all that I desire to say in this case regarding the scope of the revisional powers of the High Court as explained by their Lordships of the Privy Council. The Full Bench ruling of this Court in *Mgni Ram* v. *Jiwa Lal* (1) does not appear to me to go beyond the views which I have expressed, and if I had thought otherwise I should not have assented to it.

The reason why I hold the District Judge to have decided wrongly on the question of limitation is this. Art 164 of sch ii of

(1) *Ante*, p. 336.

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the Limitation Act makes the period of limitation for an application by a defendant for an order to set aside a judgment *ex-parte* to run from "the date of executing any process for enforcing the judgment." In the case of *Pachu v. Jaikishen* (1) it was held that "any" process must be taken to mean "first" process, and for obvious reasons I agree with that decision. Here the first process for enforcing the judgment of the 15th September, 1882, was the attachment of the property on the 19th June, 1883. The application to set aside the judgment was not made till the 13th December, 1883, and was therefore obviously barred by limitation. The Munsif, however, held on the evidence before him that the decree-holder was guilty of fraud in concealing the proceedings both of the suit and of the execution from the judgment-debtor Jafar Ali, and that the judgment-debtor is therefore entitled to claim the benefit of s. 18 of the Limitation Act. The Judge, in consequence of his mistake as to the period of limitation, did not go into the merits of the question, namely, into the question of fraud, and whether the execution-proceedings were within the knowledge of the defendant. I therefore concur in my brother Oldfield's order allowing the application, setting aside the Judge's order, and remanding the case to him for disposal on the question of fraud.

APPELLATE CIVIL.

1885
January 22.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

AZIZULLAH KHAN AND OTHERS (DEFENDANTS) *v.* AHMAD ALI KHAN AND OTHERS (PLAINTIFFS).*

Muhammadan Law—Muhammadan widow—Dower—Widow's heirs—Determination of amount of dower—Admission by co-defendant.

A Muhammadan widow lawfully in possession of her husband's estate occupies a position analogous to that of a mortgagee, and her possession cannot be disturbed until her dower-debt has been satisfied, and after her death her heirs are entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery.

Held that the ruling of the Court in *Balund Khan v. Janee* (2) that where a defendant is found to be in possession of landed property in lieu of dower, and it

* Second Appeal No. 3 of 1884, from a decree H. D. Willcock, Esq., District Judge of Azamgarh, dated the 25th July, 1883, affirming a decree of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 24th April, 1883.

(1) Weekly Notes, 1884, p. 322. (2) N.-W. P. H. C. Rep., 1870, p. 319.