

1905

EMPEROR  
v.  
DENI.

which it is not in the breast of any subsequent judge to alter according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws of the land—not delegated to pronounce a new law but to maintain the old—*jus dicere et non jus dare*” (Broom’s Legal Maxims, 7th Edition, p. 118). This rule is accepted by every Court of Justice in England or Ireland and is loyally followed even by judges of co-ordinate jurisdiction. *A fortiori* is the rule binding upon subordinate Courts. The Judge of a subordinate Court, however brilliant and well trained a lawyer he may be, is not entitled to assume the powers of an appellate court or refuse to follow the decisions of the High Court to which his court is subordinate. It is the duty of every subordinate Judge loyally to accept the rulings of such High Court unless or until they have been overruled by a higher tribunal. We regret that the learned Sessions Judge should have seen fit in this case to deviate from a well recognised rule. We direct that a copy of this judgment be sent to him for his guidance in future.

We dismiss this appeal and direct that the accused Deni and Amiri be forthwith released from custody.

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## REVISIONAL CIVIL.

1905  
May 30, and  
June 14.

*Before Mr. Justice Know.*

DEBI DAS (DECREE-HOLDER) v. EJAZ HUSAIN (JUDGMENT-DEBTOR).\*

*Civil Procedure Code, sections 244, 622—Execution of decree—Question not relating to the execution of the decree—Appeal—Revision—Practice—Exercise of High Court’s revisional jurisdiction.*

The plaintiff in a suit for an injunction obtained a decree prohibiting the defendant from obstructing him in building within a certain area, and also giving costs. This decree was executed for the costs awarded. Subsequently, the judgment-debtor applied to the executing Court, asking that the decree-holder should be ordered to demolish certain structures which he had erected beyond the limits prescribed by the decree, and obtained an order as prayed. *Held* that no appeal would lie from such an order.

*Held* also that the High Court is competent, of its own motion, to call for the record of a civil case and pass such orders as it thinks fit, and the exercise of its powers of revision on the civil side will not invariably (though

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\* Civil Revision No. 29 of 1905.

such is ordinarily the case) be confined to matters in respect of which no other remedy is open to the party aggrieved. *Mahomed Foyez Chowdhry v. Goluck Dass* (1) distinguished. *The Secretary of State for India in Council v. Jillo* (2), and *Guise v. Jaisraj* (3) referred to.

THE facts of this case sufficiently appear from the following judgment of the Court in Second Appeal No. 1283 of 1904:—

Dr. *Satish Chandra Banerji*, for the appellant.

*Maulvi Ghulam Muftaba* for the respondent.

KNOX, J.—The contention of the appellant is to the effect that the Courts below have acted without jurisdiction in passing the order which they did. The respondent concedes this, but argues that in that case no appeal lay to the Court below and no appeal lies to this Court. The Court of first instance professed to act under section 244 of the Code of Civil Procedure. The circumstances briefly are as follows:—The decree-holder had got a decree granting him an order permanently restraining the respondent from making certain constructions upon a parcel of land, and from obstructing the decree-holder in certain works that he was erecting upon the land. The decree-holder had executed his decree and recovered costs. After he had done this, the judgment-debtor, being of opinion that the decree-holder was making constructions over a larger area of land than that which was set out in the decree, came to the execution Court and asked that Court to order demolition of the buildings erected beyond the lands specified in the decree, and give back possession. Both the Courts, finding that the decree-holder under colour of the decree had taken possession of land in excess of what was decreed to him, gave the judgment-debtor the relief he prayed for. I have no doubt whatever that these proceedings, commencing with the judgment-debtor's objection of the 11th March 1904 (though they purported to be made under section 244), could not have been taken under that section. The Courts below had no jurisdiction: the question raised by the judgment-debtor was not a question relating to the execution, discharge or satisfaction of the decree. The decree had been satisfied. The appeal then must fail, and I dismiss it with costs.

(1) (1880) 7 C. L. R., 191. (2) (1898) I. L. R., 21 All., 133.

(3) (1898) I. L. R., 15 All., 405.

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The Court subsequently directed that the case should be laid before it in revision, and this being done, the following order was passed :—

KNOX, J.—This revision case is an outcome of execution Second Appeal No. 1283 of 1904 decided on the 30th May 1905. For the facts of this case the judgment of that case may be consulted and considered part and portion of this judgment. Syed Ejaz Husain through his learned pleader raises the objection that this Court should not interfere in revision. The case of *Mohamed Foyez Chowdhry v. Gobuck Dass* (1) is cited as an authority for the contention that it is only on the application of a party interested that the High Court can act as a Court of revision. Rule 15 of the Rules of 18th January 1898 is also put forward as an authority for the same contention. Both the case and the rule cited refer to the procedure which a petitioner should adopt, or must adopt if he wishes this Court to exercise its powers of revision. Neither precedent nor rule cited limit the authority of this Court to call for the record of a case and pass such order as the Court thinks fit. On the contrary, a Full Bench of this Court in *The Secretary of State for India in Council v. Jillo* (2) adopted the procedure which has been followed in this case.

It is next urged that this Court cannot interfere, inasmuch as there is another remedy which the opposite party can avail themselves of, and I am referred to the case of *Guise v. Jaisraj* (3). The head-note is somewhat misleading. What was laid down in that case was that this Court should not grant the extraordinary remedy by way of revision when a remedy by way of suit lies open. Ordinarily, I am prepared to subscribe to that, but in this matter each case must be judged upon the circumstances peculiar to it. The subject-matter is valued at Rs. 40. The decree-holder is purporting to act under a decree which he obtained on 17th November 1902. The application for execution, which has in no way been traversed, shows that his path in execution has been a very thorny one. I have held that the order complained of was an order entirely without

(1) (1880) 7 C. L. R., 191.

(2) (1898) 1. L. R., 21 All., 133.

(3) (1893) 1. L. R., 15 All., 405.

jurisdiction, and therefore it appears to me most consonant with equity to place the parties as far as possible in the position they occupied before the judgment-debtor moved the Court to pass the order which it had no jurisdiction to pass. On that date, if in fact a trespass had been committed by the decree-holder, it is the judgment-debtor who would have to bring a suit for redress. In no case that I can conceive would the decree-holder have had recourse to the Court. I accordingly pass this order, namely, that the orders of the Courts below be set aside with costs.

*Application allowed.*

## APPELLATE CIVIL.

1905

DEBI DAS  
v.  
EJAZ  
HUSAIN.

1905

June 19.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burdett.*

JANKI PRASAD (DEFENDANT) v. GAURI SAHAI (PLAINTIFF) AND OTHERS  
(DEFENDANTS).\*

*Civil Procedure Code, section 396—Suit for partition of immovable property  
—Commissioner appointed to make partition—Court not competent to  
modify commissioner's report.*

Where in a suit for partition of immovable property a commissioner has been appointed under section 396 of the Code of Civil Procedure to ascertain the shares of the parties, the Court when passing its final decree must either accept or reject the report of the commissioner *in toto*, and is not competent to modify it. *Shah Muhammad Khan v. Hanwant Singh* (1) referred to.

THIS was for suit for partition amongst several co-sharers of certain house property. The Court of first instance (Subordinate Judge of Moradabad), after passing a preliminary decree for partition, appointed the amin a commissioner under section 396 of the Code of Civil Procedure for the purpose of fixing the specific shares of the parties. The amin made a report, to which various objections were taken by the parties. On the 3rd of September 1903 the Subordinate Judge passed his final decree in the suit. He did not, however, accept in its entirety the commissioner's report, but modified it by directing that a

\* First appeal No. 278 of 1903 from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 3rd of September 1903.

(1) Weekly Notes, 1898, p. 45.