

1907

THAMMAN  
PANDE  
v.  
THE  
MAHARAJA  
OF VIZIANAGRAM.

for a long term of years, and who therefore had nothing to put him on inquiry, might find at the expiration of the term of his lease that a considerable portion, it may be, of his property had passed out of his hands by a trespasser taking possession of it without his knowledge. We are quite unable to appreciate the reasoning of the learned Judges who decided the latest case in the Calcutta High Court, namely, *Gobinda Nath Shaha v. Surja Kantha* (1). We are of opinion that the decision of the Court below was right and we dismiss this appeal with costs.

*Appeal dismissed.*

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May 28.

*Before Mr. Justice Banerji.*

GHASITI BIBI AND OTHERS (JUDGMENT-DEBTORS) v. ABDUL SAMAD (DECREE-HOLDER) AND LIAQAT HUSAIN (AUCTION-PURCHASER).\*

*Civil Procedure Code, sections 103, 310 and 588 (8)—Appeal—Order refusing to restore an application under section 310 which had been dismissed for default of appearance.*

*Held* that no appeal lies from an order refusing to restore to the file of pending applications an application under section 310 of the Code of Civil Procedure which has been dismissed for default of appearance. The principle applied in *Jung Bahadur v. Mahadeo Prasad* (2), *Ningappa v. Gangawa* (3) and *Raja v. Strinivasa* (4), followed.

THE facts of this case are as follows:—

There was a decree against Musammat Ghasiti Bibi and others, in execution of which the property of the judgment-debtors was sold by auction on the 21st of July 1906 and was purchased by one Liaqat Husain. An application under section 310 of the Code of Civil Procedure was presented by one Kallu, who described himself as the agent of two of the judgment-debtors, praying to have the sale set aside. The auction-purchaser resisted this application, and the 15th of September 1906 was fixed for hearing. On that date the applicant did not appear, and consequently the application was rejected for default of appearance. On the 20th of September 1906 Ghasiti Bibi made an application to the Court asking for the restoration of the case. This application purported to have been made under section 103 of the Code of

\* First Appeal No. 343 of 1906, from a decree of Babu Prag Das, Subordinate Judge of Allahabad, dated the 26th of November 1906.

(1) (1899) I. L. R., 26 Calc., 460.

(3) (1885) I. L. R., 10 Bom., 433.

(2) (1903) I. L. R., 31 Calc., 207.

(4) (1888) I. L. R., 11 Mad., 819.

Civil Procedure. On the 26th of November it was rejected, and from this order the judgment-debtors appealed to the High Court.

*Dr. Tej Bahadur Sapru*, for the appellants.

*Mr. Karamat Husain*, for the respondents.

BANERJI, J.—A preliminary objection has been raised by the learned counsel for the respondents to the effect that no appeal lies in this case. For the purpose of determining this objection it is necessary to state the circumstances under which the appeal was filed. There was a decree against Musammat Ghasiti Bibi and others, in execution of which the property of the judgment-debtors was sold by auction on the 21st of July 1906 and was purchased by the respondent Liaqat Husain. An application under section 310 of the Code of Civil Procedure was presented by one Kallu, who described himself as the agent of two of the judgment-debtors, praying to have the sale set aside. The auction-purchaser resisted this application, and the 15th of September 1906 was fixed for hearing. On that date the applicant did not appear, and consequently the application was rejected for default of appearance. On the 20th of September 1906 Ghasiti Bibi made an application to the Court asking for the restoration of the case. This application purported to have been made under section 103 of the Code of Civil Procedure. On the 26th of November it was rejected, and from this order the present appeal has been preferred. It is contended that no appeal lies from an order dismissing an application under section 103 unless the order is one by which an application to set aside the dismissal of a suit has been rejected and the order in this case is not an order of that description. The objection seems to me to be well founded. It is not denied that unless the law gives a right of appeal against any particular order, no appeal lies against such order. The only case in which an appeal is allowed against an order passed under section 103 is that mentioned in clause (8), section 588 of the Code of Civil Procedure. Under that clause an appeal lies from orders rejecting applications under section 103 for an order to set aside the dismissal of a suit. It is true that under the explanation to section 647 of the Code and under the rulings of their Lordships of the Privy Council, proceedings in execution are proceedings in the suit. But it is not

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every order in a suit or execution proceeding dismissing an application under section 103 which is open to appeal under section 588. The only order under section 103 from which an appeal is allowed by section 588 is, as said above, an order rejecting an application to set aside the dismissal of a suit. The order complained of in this case is not an order rejecting an application to have the dismissal of a suit set aside. No appeal therefore lies from that order. In the case of an application under section 311 of the Code of Civil Procedure dismissed for default of appearance and sought to be restored by an application under section 103 it was held by the Calcutta High Court in *Jung Bahadur v. Mahadeo Prosad* (1), following *Ningappa v. Gangawa* (2) and *Raja v. Strinivasa* (3), that no appeal lies. The principle laid down in these cases applies equally to the present case, and I must hold that no appeal lies. I accordingly allow the preliminary objection and dismiss the appeal with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

1907  
May 29.

*Before Mr. Justice Dillon.*

EMPEROR v. BUDH LAL.\*

*Act No. XLV of 1860 (Indian Penal Code), section 411—Possession of stolen property—Joint Hindu family—Liability of head of the family or managing member.*

Stolen property consisting of a considerable quantity of cloth weighing about five maunds were discovered on search by the police in a locked room in a house belonging to and inhabited by a joint Hindu family composed of a father, son and grandson. The son was found to be the managing member of the family, and the key of the room in which the stolen property was found was produced by him. The circumstances were such that it was very improbable that the cloth could possibly have been placed where it was found without the connivance of some or all of the members of the family. *Held* that under the above circumstances the conviction of the managing member of the family under section 411 of the Indian Penal Code was a proper conviction. *Queen-Empress v. Sangam Lal* (4) referred to.

THE facts of this case are as follows:—

Three bales of cotton cloth had been consigned by a firm in Cawnpore to a shopkeeper at Jalaun, of which only two arrived

\* Criminal Revision No. 215 of 1907.

(1) (1903) I. L. R., 31 Cal., 207.

(2) (1885) I. L. R., 10 Bom., 433.

(3) (1888) I. L. R., 11 Mad., 319.

(4) (1893) I. L. R., 15 All., 129.