1909

BHAWAN SINGH v. NAROTTAM SINGH.

BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff, who is a tenant of the defendants, zamindars, for demolition of certain constructions alleged to have been made on a public thoroughfare and for the widening of that thoroughfare for the passage of carts. The court of first instance decreed the claim but the lower appellate court has dismissed it. It was found by the court of first instance, and it is admitted by the learned Vakil for the appellant, that the pathway in question is a public thoroughfare. The alleged obstruction to it is therefore a public nuisance. It is a well-known rule that a private action cannot be maintained in respect of a public nuisance save by a person who suffers particular damage beyond what is suffered by him in common with all other persons affected by the nuisance (Pollock on Torts, VII Edn., p. 395). It is not alleged in this case that the plaintiff has suffered any particular damage. On the contrary, it has been found by the lower appellate court that there is a way across the waste land lying to the south of the defendant's house for the passage of the plaintiff's carts. So that it cannot be said that the plaintiff has sustained any particular damage. This being so the plaintiff is not entitled to have the alleged nuisance removed. On this ground the plaintiff's suit must fail and has been rightly dismissed. I dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1909
May 4.

Before Mr. Justice Richards and Mr. Justice Alston.

DAMBER SINGH, (PETITIONER) *v.* SRIKRISHN DASS, (OPPOSITE PARTY).*

Act (Local No. II) of 1901 *(Agra Tenancy Act), sections* 167, 177—*Execution of decree—Appeal—Revision—Jurisdiction.*

A suit was dismissed by the Revenue Court as not cognizable by it and the District Judge, upon appeal, having dealt with it under sections 196 and 197 of the Tenancy Act, made a decree, execution of which was applied for in the court of the Assistant Collector of the first class who rejected the application; *held* that no application in revision lay against the order of the Assistant Collector refusing execution.

* Civil Revision No. 55 of 1908, against an order of M. Habibullah, Assistant Collector of Aligarh.

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DAMBER SINGH v. SRI KRISHN DASS.

THE facts of this case are set forth in the judgment.

Mr. *M. L. Agarwala*, for the applicant.

The Hon'ble Pandit *Sundar Lal*, (for whom Pandit *Baldev Ram Dave*) for the opposite party.

RICHARDS and ALSTON, JJ.—The facts out of which this application in revision arises are shortly as follows :—The plaintiffs instituted a suit in the Revenue Court. That court was of opinion that the suit was not cognizable by it and accordingly dismissed the suit. The plaintiff appealed to the District Judge who seems to have been of opinion that the decision of the court of first instance was correct and that the suit was not a suit cognizable by a Revenue Court. However, under the provisions of sections 196 and 197 of the Agra Tenancy Act he made a decree in favour of the plaintiff. The plaintiff applied to the Assistant Collector of the first class for execution of the decree. The Assistant Collector refused the application. The present application in revision to us is against such refusal. The reason that the application is made by way of revision is because no appeal lies. Section 177 of the Agra Tenancy Act deals with appeals to the District Judge. That section certainly does not give an appeal against the order of an Assistant Collector of the first class refusing to execute a decree. It would appear as if there was an omission from the Act, for it is hardly conceivable that it could have been intended that no appeal should lie on the very important matters which often arise in the course of execution of decrees. The question came up before a Judge of this Court in S. A. No. 690 of 1903. In that case an order had been made by the Assistant Collector allowing execution of the decree. There was an appeal to the Civil Court which held that no appeal lay. The learned Judge of this Court held that an appeal did lie. He called to his aid the provisions of section 193 of the Agra Tenancy Act, which makes the provisions of the Code of Civil Procedure (Act No. XIV of 1882) applicable, and he then held that the order was an order coming under section 244 of the Code of Civil Procedure and that an appeal lay to the District Judge. This ruling was followed by a Bench of this Court in *Kharag Singh* v. *Pola Ram* (1). The same question

(1) (1904) I. L. R. 27 All., 31.

arose in the case of *Musammat Naraini* v. *Musammat Parsanni* (1) in which a Bench of this Court held that a Revenue Court had no power under section 185 of the Tenancy Act to set aside the order of an Assistant Collector refusing an application for execution, the ground of the decision being that an appeal lay to the District Judge. However the decisions above referred to may be criticised, their results at least provided a way out of the difficulty which arises by reason of the fact that no appeal is expressly premitted by section 177 of the Tenancy Act. It would certainly appear that there ought to be some means of testing an order of an Assistant Collector of the first class in such an important matter. Revision either to the Board of Revenue or to the High Court is certainly not a satisfactory remedy. The question again came up before this Court in the case of *Zohra* v. *Mangulal* (2). It was there held by a full Bench of this Court that no appeal lay, and the decisions which we have mentioned above must accordingly be taken to have been overruled. As the result of this decision it must now be taken as settled law that no appeal lies in a case like the present. The simple question remains—does an application in revision lie to this Court? (We have not in any way considered the merits of the case.) There is an express provision in section 167 of the Act that all suits and applications of the nature specified in the fourth schedule of the Act shall be heard and determined by the Revenue Courts; and *except in the way of appeal,* no other court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which a suit or application might be brought or made. This clearly shows that *prima facie* revision does not lie to the High Court from an order of the Revenue Court. The remedy in the Civil Court is by appeal only, in cases in which an appeal is given. The applicant however contends that the decree in the present case was a decree of a Civil Court and not of a Revenue Court. Possibly his remedy was to apply to the District Judge for execution of the decree. He did not do so. He applied to an Assistant Collector of the first class. Having gone to that court and got an order from that court, we must treat the order which is sought to be set aside as the order of a Revenue

(1) (1905) 2 A. L. J. R., 331. (2) (1906) I. L. R., 28 All., 753.

1909

DAMBER SINGH v. SRI KRISHN DAS.

Court and not of any other court. It may be that this works some hardship. We cannot help this; and after all if the applicant went to the wrong court in the first instance, and then appealed, he has to some extent at least only himself to blame in the matter. We reject the application with costs.

Application rejected.

APPELLATE CRIMINAL.

1909
May 8.

Before Mr. Justice Alston.

KING EMPEROR *v.* GANESH.*

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 361, 363—*Kidnapping*—*Motive*—*Punishment.*

For a conviction under section 363, Indian Penal Code, it was sufficient to prove that the minor was taken away from the custody of a lawful guardian without his consent. Motive had nothing to say to the offence of kidnapping though it might have much to say to the punishment. Consent given by the guardian after the commission of the offence would not cure it.

Mr. *G. W. Hornsby*, for the appellant as *amicus curiæ*.

Mr. *R. Malcomson*, Officating Assistant Government Advocate for the Crown.

ALSTON, J.—This is a jail appeal from a conviction under section 366 of the Indian Penal Code. I took time to consider this case, because I was not satisfied that the findings of fact at which the learned Sessions Judge arrived were correct. On those findings it seemed to me that the appellant, however improperly he may have acted, had committed no criminal offence; but having listened to the learned Government Advocate, who put the case for the Crown before me with great pains, I am convinced that the appellant did commit an offence, but not one under section 366 of the Indian Penal Code.

I find as a fact that there was no abduction. I believe, however, that the appellant took the girl, who was undoubtedly a minor, to his village without having previously obtained the consent of either her father or of her uncle Sunder in whose charge she was for the time. I can see nothing that justifies the finding of the learned Sessions Judge that Sunder consented to

* Criminal Appeal No. 231 of 1909 against the order of Muhammad Rafique, Sessions Judge of Azamgarh, dated the 17th of March 1909.