LETTERS PATENT.

Before Dawson Miller, C. J. and Coutts, J.

1921

Dec., 21.

MUNSHI LAL

v.

MAHANTH RAMASIS PURI.*

Letters Patent of the High Court of Judicature at Patna ——Clause (10), "judgment", whether includes decision of single Judge setting aside a decree——Decree set aside by single Judge and case remanded——appeal from order passed on remand, whether order of remand and order passed thereon can be ignored.

Where a decree is set aside by a Judge of the High Court sitting alone and the case is remanded another Judge of the High Court cannot, on appeal from the order passed on remand, treat the order of remand and the order passed thereon as nullities and restore the original decree.

The decision of a Judge of the High Court sitting alone setting aside a decree is a judgment within the meaning of clause (*10*) of the Letters Patent whether a rehearing is ordered or not.

Bara Estate Ltd. v. *Anup Chandra* (1), distinguished.

Appeal by the defendants Nos. 1 and 2.

The facts of the case material to this report are stated in the judgment of Sir Dawson Miller, C. J.

Abani Bhusan Mukherji, for the appellants.

Kulwant Sahay, for the respondents.

DAWSON MILLER, C. J.—This is an appeal under the Letters Patent by Munshi Lal and Parbhu Narain, the principal defendants in the suit, from a decision of Jwala Prasad, J., dated the 17th August, 1920.

The plaintiffs, who are proprietors of an 8-annas 3-pies share in Mauza Medhiganj Birwachak, instituted the suit before the Munsif of Patna claiming possession of 11 *kattahs* of land together with mesne

* Lerters Patent Appeal No. 120 of 1920.

(1) (1917) 2 Pat. L. J. 668.

profits against the appellants who claimed it as included in their holding. The plaintiffs also claimed in the alternative assessment of rent.

The case for the appellants was that the land originally formed part of the holding of Gobind Mahto which was mortgage to them, and that they obtained a mortgage decree against Gobind and purchased his holding at a sale in execution of their decree in May, 1913, and had been in possession ever since that date. The case of the respondents on the other hand was that the land in suit never belonged to Gobind but was part of a holding in occupation of Tilak Koeri, and that Tilak having disposed of all his holding, except the 11 *kattahs* in dispute, had abandoned that portion, so that the respondents as landlords were entitled to possession. The respondents have recognised the appellants as tenants of Gobind's holding and the main issues between the parties were, first, whether the land originally formed part of Gobind's holding or the holding of Tilak, and, in the latter case, whether Tilak had abandoned it so as to entitled the plaintiffs to possession.

The Munsif before whom the trial originally came found in favour of the plaintiffs and his decision, dated the 5th December, 1916, was confirmed on appeal by Mr. Ross, District Judge of Patna, on the 20th July, 1917.

The defendants appealed to the High Court from the decision of the District Judge. The appeal was heard by Das, J. The learned Judge considered that the lower appellate court had misdirected itself in finding that there was no evidence on the record, apart from the mortgage decree, that Gobind had ever had any title to the 11 *kattahs* in dispute and on relying on the Record-of-Rights which was not in evidence in the case. He further considered that the judgment was defective as it contained no finding that Tilak had ever abandoned the land. He accordingly was of opinion that the whole case should be reconsidered by the lower appellate court, with special reference to two rent decrees obtained by the respondents against Gobind in 1883 and 1884, which, in

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addition to the mortgage proceedings, went to show that Gobind had been in possession of the disputed land. He therefore remanded the case to the lower appellate court for decision on the 14th May, 1919. The rehearing came before Mr. Ashutosh Chatterjee, then District Judge of Patna, on the 28th June, 1919. He found that Tilak had ceased to have any concern with his holding before the suit was instituted, and, if the land belonged to him, he must be taken to have abandoned it. He found however that the land was not in Tilak's holding but in that of Gobind and passed by the mortgage sale to the appellants. He further found that the evidence produced by the appellants was sufficient to rebut the presumption arising from the entry in the Record-of-Rights. He accordingly allowed the appeal, set aside the decree of the trial court and dismissed the suit with costs.

From this decision the respondents appealed to the High Court. The appeal was heard by Jwala Prasad, J. The learned Judge found that the decision of Das, J., remanding the whole case for rehearing was based upon a misapprehension because the rent decrees had in fact been considered by Mr. Ross, in his judgment, and, secondly, because although the Record-of-Rights was not on the record in the suit it was the case of both parties that the land in suit was recorded in Tilak's name. He accordingly held that the judgment of Das, J., remanding the case was invalid and, consequently, that the judgment come to by Mr. Ashutosh Chatterjee on remand was also invalid and could not displace the former judgment of the same court. He then held that Mr. Ross's judgment not having been legally set aside must be restored. With great respect to the learned judge I am unable to accept his view that it was open to him to call in question the earlier judgment remanding the case for a rehearing. The effect of that judgment was to set aside the judgment and decree come to by the lower appellate court in the plaintiffs' favour. It was in my opinion open to the plaintiffs to appeal from the judgment of Das, J., under

section 15 of the Letters Patent. They did not avail themselves of that remedy and the decision cannot be called in question in a subsequent appeal against the decree made on remand. The learned Judge whose decision is now under appeal considered that the decision of this court in *Bara Estate Ltd.* v. *Anup Chandra* (1), applied to the facts of the present case. In the case cited it was held that an order, made by the High Court in second appeal, directing the trial of a certain issue without setting aside the decree of the lower court, was not a judgment from which an appeal lay under the Letters Patent, and, therefore, the propriety of the order could be called in question when the case came back again to the High Court for final determination of the appeal. With that decision I entirely agree, but where the appellate court sets aside the decree appealed from, whether it orders a rehearing or not, the decision in my opinion is a judgment within the meaning of the Letters Patent, whereas an order merely referring an issue for trial by the lower court before the final determination of the appeal has not been so regarded. It was no doubt this distinction which induced the legislature to differentiate between rules 23 and 25 of Order XLI of the Civil Procedure Code. In the former case, where the decree is reversed on appeal, the decision is appealable under Order XLIII, rule 1, where an appeal would lie from the decree of the appellate court, in the latter case no appeal is allowed under the Code as an order under rule 25 is in no way final and can be called in question when the appeal is finally determined after the issue has been decided by the lower court. I think it was not competent to the learned judge to question the propriety of the order of remand made by Das, J.

That, however, does not determine the questions for consideration in this appeal. The learned judge held that the finding of the lower appellate court on remand that the land in suit was part of Gobind's holding was not based upon legal evidence. It seems to me, with respect to the learned judge, that in

(1) (1917) 2 Pat. L. J. 663.

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dealing with this part of the case he was in error in failing to distinguish between a document which creates title and a transaction which may be regarded as evidence in support of a title created long ago. He held that because the mortgage of the land in suit given by Govind to the appellants in 1906 did not necessarily give them a title to the 11 *kattahs* in dispute it could therefore be disregarded as evidence of the fact in issue, namely, whether the land was included in Gobind's holding. The questions of possession and assertion of title by Gobind some years before the dispute arose were in my opinion relevant facts upon the issue and cannot be entirely disregarded. I agree that the evidence on either side was of a very meagre kind, but it must not be supposed that the learned District Judge was unmindful of the fact that there was oral evidence adduced by the appellants in support of Gobind's possession, whilst there was similar evidence in support of Tilak's possession given on behalf of the respondents. Little if any value could be attached to the oral evidence but it was for the court to say which story was best supported by the admitted circumstances and probabilities. The case set up by the respondents that Gobind's holding was originally less than 6 *bighas*, 2 *kattahs*, 4 *dhurs*, according to the *zamindari* measurement, was conclusively proved to be false in face of the rent decrees of 1883 and 1884, and the learned District Judge rejected the village papers produced by the respondents in support of that part of their case as fabrications, and found that all along Gobind's holding consisted of 6 *bighas*, 2 *kattahs*, 4 *dhurs*. This alone he thought was not sufficient to establish the appellants' case but it was a material factor in determining the probabilities and on which he was entitled to rely, and there was a further fact found by the learned judge, namely, that Tilak made no claim to the 11 *dhurs* in question. The learned judge did not expressly rely upon this as a ground for his decision, but it was a fact which he found and which he must have had in mind. He considered, however, that he was entitled to rely upon the mortgage and the fact

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that the respondents took possession under the mortgage decree in 1913 without opposition from any one as sufficient evidence to enable him to decide in the appellants' favour. The question for this court to determine is not whether the weight of evidence was in favour of the appellants or the respondents but whether there was any evidence to justify the finding. The appellants' title to Gobind's holding is not in dispute and their recognition as tenants of that holding is admitted. The only question for decision was whether the particular plot in dispute was in Gobind's holding or in that of Tilak. This was a question of fact upon which evidence of assertion of title and of acts of possession over the property was material. I think the decree appealed from should be set aside and the judgment of the District Judge, dated the 28th June, 1919, restored. The appellants will have their costs of this appeal and of the appeal to Jwala Prasad, J.

COUTTS, J.—I agree.

Appeal allowed.

CRIMINAL REFERENCE

Before Jwala Prasad and Adami, JJ.

MAHESH SHAH

v.

DARBARI HUSSAIN.*

1921

Nov. 11 and 1922

January 3.

Bengal Local Self-Government Act, 1885 (Ben. Act III of 1885) sections 78, 139 and 140—By-law prohibiting encroachment on any road and imposing penalty, validity of.

A bye-law framed by a District Board under section 139 of the Bengal Local Self-Government Act, 1885, prohibiting encroachment on any road and imposing a penalty for such encroachment is not *ultra vires*.

Ramanath Ghosh v. *Emperor* (1), dissented from.

*Criminal Reference No. 45 of 1921 made by H. W. Williams, Esq., Sessions Judge of Shahabad, dated the 12th August, 1921, under section 438 of the Code of Criminal Procedure, 1898.

(1) (1906-07) 11 Cal. W. N. Clxxv (*n*).