1930.

HIT NARAYAN SINGH v. BRIJ NANDAN SINGH.

KULWANT SAHAY, J.

that case it is open to a creditor to apply to the Insolvency Court for leave to proceed against the person of the insolvent.

Having regard to the express terms of sub-section (2) of section 28 of the Provincial Insolvency Act, I am of opinion that the decree-holder was under a disability from taking any step in execution of his decree until leave had been obtained and as the application for execution was made within the period of limitation from the order granting leave, the present application for execution is not barred by limitation.

The appeal is, therefore, allowed, and the order of the Court below is set aside. The execution will proceed in due course of law.

The appellant is entitled to his costs.

MACPHERSON, J.—I agree. The case of *Sheosaran Ram* v. *Basudeo Prasad Sahu*(1) is distinguishable on the facts. An application in execution by arrest of judgment-debtor is, in my opinion, the commencement of a legal proceeding under section 28(2) of the Provincial Insolvency Act and limitation began to run against the appellant from the date when the leave of the Insolvency Court for such commencement was granted.

Appeal allowed.

LETTERS PATENT.

Before Terrell, C. J. and Khaja Mohamad Noor, J.

1930.

Dec. 1.

RAGHUBANS LAL

v.

SOLANO.*

Letters Patent of the Patna High Court—clause 10 *as it stood before amendment in* 1929—*decision of a judge passed*

* Letters Patent Appeal no. 85 of 1928, from a decision of the Hon'ble Mr. Justice R. L. Ross, dated the 1st August, 1928, setting aside the order of M. Amir Hamza, Subordinate Judge of Gaya, dated the 23rd December, 1927.

(1) (1918) 47 Ind. Cas. 798.

in revisional jurisdiction—records called for on the application of one of the parties—appeal, whether lies to the Divisional Court.

Clause 10 of the old Letters Patent of the Patna High Court before its amendment in 1929 provided :

" And we do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being the order made in the exercise of revisional jurisdiction in a case which has been called for by the said court.....)."

Held, that the words " which has been called for by the said court " are general in their application and refer both to the case in which the High Court has *suo motu* called for the records and the case where the records have been called for on the application of one of the parties.

Held, therefore, that in all cases where the records have been called for *suo motu* or on the application of one of the parties no appeal lies to a Divisional Court under Clause 10 of the Letters Patent from a decision of a Judge passed in the exercise of revisional jurisdiction irrespective of whether the assumption of jurisdiction is justified or not and whether the order is right or not on its merits.

Byomkes Seth v. *Bhut Nath Pal*(1), followed.

Appeal by the opposite party.

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

Rai Gurusaran Prasad (with him *Chaudhuri Mathura Prasad*, *Dhyan Chandra* and *J. N. Sahai*), for the appellants.

S. M. Mullick and *D. N. Varma*, for the respondents.

COURTNEY TERRELL, C. J.—In my opinion this Letters Patent Appeal must be dismissed on a preliminary objection by the respondents that no appeal lies to a Divisional Court under section 10 of the Letters Patent from a decision of a Judge passed in the exercise of revisional jurisdiction. The only

(1) (1921) 34 Cal. L. J. 489.

1930.

RAGHUBANS LAL v. SOLANO.

COURTNEY TERRELL, C. J.

facts which are material to this decision are these. A final decree for partition as between the respondents and the appellants was passed on the 22nd of December, 1922, the suit for partition having been begun in the year 1917, and delivery of possession was granted to the parties of the respective takhtas allotted to them on the 28th of February, 1923. Now on the 18th January, 1927, the respondents applied to the Subordinate Judge under section 151 of the Civil Procedure Code praying him to set aside the final decree which had been passed. The merits of the application need not concern us at the moment. This application was rejected by the Subordinate Judge. Thereupon the respondents applied to the High Court in revision of the Subordinate Judge's decision. The matter came before a single Judge of this Court who set aside the order of the Subordinate Judge and directed that the partition should be re-opened. From the decision of the single Judge of this Court the appellants come before us on a Letters Patent Appeal, and the respondents object that the decision of a single Judge was a decision in the exercise of revisional jurisdiction.

Now two points were urged by the appellants. The first point was that it being conceded that an order truly made in exercise of revisional jurisdiction is not subject to appeal it is nevertheless clear according to the wording of clause 10 of the Letters Patent that if in fact and in law the order made was against the jurisdiction of the High Court to act in revision, then the matter is open to appeal; that is to say, a single Judge who purports to exercise the jurisdiction may exercise the jurisdiction, if he acts judicially, in any way he pleases without his decision being subject to appeal but he is not the final Judge so far as the High Court is concerned as to whether he did or did not possess any jurisdiction to pass the order. To this the answer has, I think, rightly been made that a decision purporting to be in the exercise

of revisional jurisdiction, whether the assumption of jurisdiction is justified or not and whether the order is right or not on its merits, is not subject to appeal. The single Judge is the final authority subject to appeal only to the Privy Council, first of all, as to whether he had or had not jurisdiction; secondly, on the merits of the particular case itself, and that view of the matter was taken by the Calcutta High Court in the case of *Byomkes Seth* v. *Bhut Nath Pal*(1) and has not since been doubted by any High Court. The second point taken by the appellants is based upon the difference between the old Letters Patent of this Court and the Letters Patent as now amended. It is said and it is conceded for the purposes of this argument that the old Letters Patent applies to this case, and the old Letters Patent in clause 10 thereof is thus, so far as the material part is concerned, worded:

> "And we do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being the order made in the exercise of revisional jurisdiction in a case which has been called for by the said Court.....)".

The new Letters Patent omits the words "which has been called for by the said Court" and with that omission the words of the Letters Patent as amended are the same as the words of the Calcutta Letters Patent upon which the decision above referred to was based. Now it is said that if those words "in a case which has been called for by the High Court" are taken into consideration they limit the case where no appeal lies to a Divisional Court to one in which the records have been called for by the High Court *suo motu* and, therefore, in a case like the present where the records were called for on the application of one of the parties is not within the terms used by the Letters Patent and hence an appeal lies. It was conceded that no authority could be produced in which such a construction has been given to these words and moreover, in my opinion, the words do not bear that

(1) (1921) 34 Cal. L. J. 489.

1930.

RAGHUBANS LAL v. SOLANO.

COURTNEY TERRELL, C. J.

construction. The words "which has been called for by the said Court" are general in their application and refer both to the case in which the High Court has *suo motu* called for records and the case where the records have been called for on the application of one of the parties. Therefore, even if the old Letters Patent applied to this case, no appeal against the order lies and if the distinction created by those words in the old Letters Patent is left out of consideration, then the old Letters Patent must be construed in exactly the same way as the Calcutta High Court construed the amended Calcutta Letters Patent and the reasoning of the Calcutta High Court applies.

I would, therefore, dismiss this appeal on the preliminary point with costs to the respondents: hearing fee five gold mohurs.

KHAJA MOHAMAD NOOR, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Khaja Mohamad Noor, JJ.

1930.

Nov. 20, 21. Dec. 3.

KAMLA PRASAD

v.

JAGARNATH PRASAD.*

Court-fees Act, 1870, (*Act VII of* 1870), *section* 7(IV) (*c*) *and Article* 17—*reversionary heir, suit by, for declaration that deed of gift executed by last male holder was null and void—prayer in substance for cancellation of deed—suit, whether one for declaration and consequential relief—ad valorem court-fee payable.*

The plaintiffs as the reversionary heirs of *M* brought a suit for a declaration that a deed of gift executed by *M* was illegal, null and void and ultra vires for reasons given in

* Appeal from Original Decree no. 20 of 1930, from a decision of Babu Saudagar Singh, Subordinate Judge, Shahabad, dated the 6th September, 1929.