APPELLATE CIVIL.

1937.

August, 19.

Before Courtney Terrell, C.J. and Madan, J.

BARAIK RAM GOBIND SINGH

v.

CHOWRA URAON.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 190(*1*) *and* 213—*non-issue of notice under section* 190(*1*), *whether renders the sale void—section, whether applies to warrants issued against immoveable property—section* 213, *whether applies to cases where court had no jurisdiction to sell—remand for rehearing of issues not raised in the plaint, legality of—suit against minor—notice served on mother as guardian—absence of order of appointment and consent of guardian—decree, whether is a nullity.*

An appellate court may remand a suit for rehearing on issues not raised in the plaint, if the remand is on questions of jurisdiction such as can be raised at any time.

The failure to issue notice under section 190(*1*) of the Chota Nagpur Tenancy Act, 1908, is a matter of jurisdiction and renders the subsequent sale in execution void.

There is nothing in section 190(*1*) of the Act to limit its operation to warrants to be issued against the person or moveables of the judgment-debtor; it applies to all warrants issued in execution proceedings under the Act.

Raja Baldeo Das Birla v. *Lal Nilmani Nath Sahi Deo*(1), followed.

Section 213 of the Act applies to cases of irregularity or fraud in conducting the sale, and does not apply to cases where the court had no jurisdiction to sell.

Therefore, the dismissal of an application under section 213 does not bar a subsequent suit under section 214 to set aside the sale.

*Appeals from Appellate Decrees no. 877 to 882 of 1933, from a decision of Babu Kshetra Nath Singh, Special Subordinate Judge of Ranchi, dated the 15th March, 1933, confirming a decision of Babu Nirmal Chandra Ghosh, Munsif of Ranchi, dated the 16th February, 1932.

(1) (1928) I. L. R. 8 Pat. 122.

In the case of minor defendants the court must see not merely that a guardian is appointed, but that the guardian has consented to act.

Rani Chhattra Kumari Debi v. *Panda Radha Mohan Singari*(1), followed.

Where, therefore in a suit the defendants were minors and notices were served on them through their mothers as guardians, but no appearance was made on their behalf, and there was no order of the court appointing the mothers as their guardians or showing that the guardian consented to act on their behalf,

Held, that the decree passed in the suit was a nullity.

Appeal by the defendants.

The appeals were in the first instance heard by Dhavle, J. who referred them to a Division Bench by the following judgment:

DHAVLE, J.—These are appeals by the defendants in suits for having the sales of 6 holdings in *mauza Kaimbo* in the district of Ranchi in execution of rent decrees declared illegal, null and void and for recovery of possession. According to the plaintiffs the rent decrees were without a foundation of arrears of rent and were fraudulently obtained by suppression of processes; and the execution proceedings were also vitiated by a fraudulent suppression of processes. The trial Court found that there were no arrears of rent due and that there had been no supression of processes. The suits brought by the plaintiffs, now respondents, were accordingly dismissed. There were appeals which were heard by Babu Narendra Nath Banerji, Additional Subordinate Judge. This officer allowed the appeals without reversing the findings of the trial Court; he remanded the suits for re-hearing on two grounds which are not to be found in the plaints but which were urged before him. One ground was that in 4 of the rent suits, which had been decreed in May, 1919 (the dates are not always accurately stated; in Rent Suit no. 723 of 1918-19 for instance, Ex. J1, an execution petition gives the date of the decree as the 8th of January, 1919, while Ex. 1(2) a copy of the decree, gives the date as the 12th of June, 1919, and Ex. G2, the order-sheet, shows that the suit was decreed on the 8th of May, 1919) the sales were without jurisdiction as notices under section 190 of the Chota Nagpur Tenancy Act were not shown to have been issued. The second ground was that in the other two rent suits which were decreed in January, 1921, the sales were without jurisdiction because it did not appear that any guardians *ad litem* had been

(1) (1922) 3 Pat. L. T. 451.

1937.

BARAIK RAM GOBIND SINGH v. CHOWRA URAON.

DHAVLE, J.

appointed for the minor defendants or had appeared in the suit. An issue had been raised in the trial Court regarding the jurisdiction of the Civil Court to try the suits in view of the fact (which was not disputed) that the plaintiffs had applied under section 213 of the Chota Nagpur Tenancy Act for getting the sales set aside and had failed. The learned Munsif had held that the suits were accordingly barred under section 258 of the Act. The Additional Subordinate Judge held that section 258 was no bar because the Revenue Court had not treated the applications made by the plaintiffs as applications under section 213 but as applications under section 212—as if both the sections were not mentioned in section 214; and he further held that under section 214 a suit would lie to set aside a sale on the ground of want of jurisdiction.

The remand order of the Additional Subordinate Judge was challenged by appeal to this Court. Macpherson, J. held that no appeal lay as the remand did not come within Order XLI, rule 23.

The suits were re-heard by the Court of first instance in accordance with the remand order, with the result that they were decreed. The learned Munsif inferred that in the four suits of 1918-19 it was more likely than not that more than a year had elapsed between the passing of the rent decrees and the institution of the first execution cases which were dismissed in November, 1921: and as the records of those execution cases had been destroyed under the rules and the decree-holders had failed to produce extracts from the rent suit and execution registers to show when the first execution cases were instituted, and there was no evidence to show that notices under section 190 had been served, he held that the sales were without jurisdiction. I have stated this finding at length because the lower appellate Court has expressly dissented from it and yet upheld the order of the lower Court on another ground. The sales in these four rent suits were held in the course of the second execution cases which were started in November, 1922, and the learned Munsif held that as the interval between the end of the first execution cases and the beginning of the second execution cases was less than a year, no notices under section 190 were necessary in connection with the second set of executions. This the learned Subordinate Judge dissented from in view of the fact that section 190 makes notices necessary when a period of more than a year has elapsed " from the date of the last previous application for execution " and not, as we have in Order XXI, rule 22, of the Civil Procedure Code " from the date of the last order against the party against whom execution is applied for ". As regards the other two rent suits the learned Munsif held that the rent decrees were invalid and inoperative (and therefore the sales also) because it did not appear that the guardians proposed by the plaintiffs in the rent suits for the minor defendants had expressed their willingness to act as guardians or had been appointed to act as such by order of the Court. This view was accepted by the lower appellate Court also.

The first question that arises before me is the effect of the remand order of Babu Narendra Nath Banerji. That order on the face of it was entirely unjustified by anything that appears in the plaints of the

title suits and converted suits based on fraud into suits for want of jurisdiction. There has been a difference of opinion among the High Courts of Allahabad, Calcutta and Madras as to the effect of such improper orders of remand. As the remand order was not appealable, though the defendants did endeavour to get it set aside, clause (2) of section 105 of the Civil Procedure Code does not apply and operate to prevent them from disputing its correctness. Clause (1) of the section entitles appellants to take their stand upon "any error, defect or irregularity in any order affecting the decision of the case". But the powers of the Court in second appeal are limited, while the findings about notices depend less on positive evidence than on inferences and there is the further difficulty caused by the fact that the cases that have now come to me are cases based on want of jurisdiction while the cases that had gone up to the Additional Subordinate Judge were cases grounded on fraud.

Assuming that the remand order of the Additional Subordinate Judge is not (as it possibly might) ignored in second appeal, the question would arise how far a notice under section 190 of the Chota Nagpur Tenancy Act was really essential in these cases. The point is not *res integra* for it was held in *Raja Baldeo Das Birla* v. *Lal Nilmaninath Sahi Deo*(1) that though section 190 provides for a notice before issue of "a warrant of execution" section 185 does not limit such warrants to warrants against the person or against the movable property of a judgment-debtor, and that, therefore, a notice under section 190 is necessary to give the Court jurisdiction to sell the holding or tenure under section 208 of the Code. This raises several questions including one that has been referred to by the lower appellate Court, as I have already indicated, viz. whether the interval of one year is to be counted "from the date of the last previous application for execution" as the section says, or "from the date of the last order against the party against whom execution is applied for" as we have in the analogous provision in Order XXI, rule 22, which was referred to by Ross, J. in the case of *Raja Baldeo Das Birla* v. *Lal Nilmaninath Sahi Deo*(1). The proposition that such a notice goes to jurisdiction is itself open to some doubt as will be seen from my discussion of it in *Chrestien* v. *Jaideo Prasad Rai*(2). I referred on that occasion, among other cases, to *Fakhrul Islam* v. *Rani Bhubaneswari Kuer*(3) in which Kulwant Sahay, J. said that there is no sense in insisting on the issue of a fresh notice under Order XXI, rule 22, to give the executing Court jurisdiction where the judgment-debtor has appeared in the execution proceedings without such notice. In *Chandra Nath Bagchi* v. *Nabadwip Chandra Dutt*(4) Rankin, C.J. said that it would be piling unreason upon technicality to do so. But if this is accepted, how can it be said that the notice goes to jurisdiction? What the Privy Council seem to have decided in *Raghunath Das* v. *Sundar Das*

(1) (1928) I. L. R. 8 Pat. 122.

(2) (1934) I. L. R. 13 Pat. 467, 474.

(3) (1928) I. L. R. 7 Pat. 790.

(4) (1931) A. I. R. (Cal.) 476.

1937.

BARAIK RAM GOBIND SINGH v. CHOWRA URAON.

DHAVLE, J.

Khetri(1) seems to be that the notice is necessary in order to obtain jurisdiction to sell property by way of execution as against an official assignee or other legal representative who has to be brought on the record. This distinction, however, did not commend itself to the Full Bench of the Madras High Court in *Rajagopala Ayyar* v. *Ramanuja-chariar*(2) but the learned Judges did not, if I may say so with the greatest respect, consider the question of jurisdiction with reference to the facts of such cases as *Fakhrul Islam* v. *Rani Bhubaneshwari Kuer*(3) and *Chandra Nath Bagchi* v. *Nabadwip Chandra Dutt*(4). And would a notice be essential for jurisdiction to sell in execution of a mortgage decree if it has not become necessary to replace the mortgagor on the record by his legal representative? *See Kaniz Mehdi Begum* v. *Rasul Beg*(5). This aspect of the matter is important because we are dealing with rent decrees and rent is a first charge on the holding. Apart from this it is noticeable that the only warrants of execution that are spoken of in Chapter XVI of the Chota Nagpur Tenancy Act—the Chapter in which section 190 occurs—seem to be warrants issued against the person of judgment-debtor (section 191) and warrants against the movable property of a judgment-debtor (section 199). I can find no reference to warrants of execution in respect of tenures or holdings dealt with in section 208, and though section 202 speaks of " warrants for the sale of property under this chapter ", it would appear from the sections 199 to 201 and sections 203 to 207 that section 202 was intended to deal with sale of movable property only. It is also not altogether impossible to see some reason for limiting the warrants of execution in section 190 to warrants of arrest and warrants for the sale of movable property; for in these cases the officer charged with the execution of the warrant has to take immediate action unlike the officer concerned in processes connected with execution against immovable property. Sales under section 208 are effected in accordance with the Bengal Rent Recovery Act, 1865 and apparently require no preliminary but notices to be hung up in various places. At the same time I find that Form no. 27 in Appendix E of the Civil Procedure Code is headed " *Warrant* of sale of property in execution of a decree for money (Order XXI, rule 66)". A still more important considera-tion is the fact that section 190 speaks of more than one year " from the date of the last previous application for execution ". Warrants of arrest and warrants for the sale of movable property presumably do not take as long as a year for execution; but execution against immovable property often takes much longer than that period, and it is difficult to imagine that it was the intention of the Legislature to provide that when execution is going on against immovable property, there could be no further execution even if the prior execution should for some reason or other fail unless the decree-holder safeguarded himself by taking out a notice under section 190 within one year of his application though not yet disposed of.

(1) (1914) I. L. R. 42 Cal. 72, P. C.

(2) (1923) I. L. R. 47 Mad. 288, F. B.

(3) (1928) I. L. R. 7 Pat. 790.

(4) (1931) A. I. R. (Cal.) 476.

(5) (1918) 48 Ind. Cas. 39.

About the guardians ad litem for the minors there is a great deal of conflict of opinion regarding the effect of absence of proof that the guardian had consented to his appointment. The question was elaborately considered by Das, J. in *Pande Satdeo Narain* v. *Ramayan Tewari*(1). The learned Judge's views, however, have provoked comment in other quarters—*see* the decision of Rankin, C.J. in *Satish Chandra Banarji* v. *Hasemali Kazi*(2) and is not consistent with the views expressed in several reported decisions of this Court *Lala Rampirit Prasad* v. *Babu Thakur Saran*(3), *Rani Chhattra Kumari Devi* v. *Panda Radha Mohan Singari*(4) and *Shaikh Sajjad Husain* v. *Sakal Rai*(5) (a decision to which Das, J. was a party).

In comparison with these matters, the question whether section 258 does not bar the present suits presents little difficulty. The applications made by the plaintiffs under section 213 cannot be brushed aside in the way adopted by the Additional Subordinate Judge. The Deputy Collector may have been and probably was wrong in the way he disposed of them without looking into the question of fraud, but section 214 cannot be so read as to make it possible for the Civil Court to interfere with the order of the Deputy Collector, right or wrong, even on the ground of want of jurisdiction as understood by the Additional Sub-Judge, in view of the bar imposed by section 258. As I read section 258, now that the case of fraud has disappeared, plaintiffs can only succeed, in spite of the dismissal of their applications under section 213, by showing not that the order of the Deputy Collector was wrong but that the Deputy Collector had no jurisdiction at all to entertain those applications. If any relief had been permissible to them on the ground of fraud it has been definitely held under section 258 that the fraud that will have to be established would be fraud in the other party obtaining those orders under section 213—*see Gossain Das* v. *Gopal Singh*(6).

I consider it desirable that the various questions raised in these appeals should be decided by a larger Bench. In coming to this conclusion I took into account the means and wishes of the parties. The case will, as already ordered, be referred to a larger Bench under proviso (*a*) to rule 1 in chapter 2 of part 1 of the Rules of the High Court.

On this reference.

Ray Gurusaran Prasad and *Ray Paras Nath*, for the appellants.

M. N. Pal, for the minor respondents in appeal no. 877 only.

(1) (1923) I. L. R. 2 Pat. 335.
(2) (1927) I. L. R. 54 Cal. 450.
(3) (1921) 2 Pat. L. T. 617.
(4) (1922) 3 Pat. L. T. 451.
(5) (1922) I. L. R. 2 Pat. 7.
(6) (1925) 8 Pat. L. T. 688.

1937.

BARAIK RAM GOBIND SINGH v. CHOWRA URAON.

MADAN, J.—These six appeals by the defendants have been referred to us by a single Judge. The unfortunate history of this litigation begins from the year 1918 when rent suits nos. 693 and 723 were filed under the Chota Nagpur Tenancy Act by the landlords of village Kaimbo in the Ranchi district. The suits were for recovery of three years' rent due in respect of four holdings of Uraon tenants of the village. The order-sheets record that the suits were contested, and in the year 1919 they were decreed for very trifling amounts, ranging from 4 annas 3 pies to 4 rupees 3 annas 6 pies, found to be due after crediting various part payments. Two years later in the year 1921 executions were taken out, but were allowed to be dismissed for default. As a result of further *ex parte* execution proceedings the holdings were sold in June, 1922, and purchased by the landlords. Meanwhile in the year 1920 rent suit no. 330 had been filed in respect of two further holdings of Uraons in the village. *Ex parte* decrees were obtained in the year 1924, and the holdings were purchased in execution by the landlords in the same year. In all six cases the landlords took out delivery of possession through the court in the year 1925. Thus in four of these cases, as appears from the facts stated above, the landlord waited till the sixth year before seizing through the court the entire holdings of the tenants for insignificant decretal amounts, which in three of the cases were actually less than one rupee. Meanwhile the landlords had obtained and realised other rent decrees from the tenants. I cannot but conclude that in the circumstances there might have been good reason for the rent court to set aside the sales, but unfortunately applications filed by the tenants under section 213 of the Chota Nagpur Tenancy Act before that court were rejected as having been filed more than thirty days after the sales, although the tenants pleaded that they had filed them within thirty days of their knowledge of the sales.

The tenants then filed title suits nos. 94 to 99 of 1926 against the landlords, the present appellants for setting aside the decrees and the consequent sales on the ground of fraud. Title suits nos. 94, 95, 98 and 99 were in respect of the rent decrees of the year 1918, and title suits nos. 96 and 97 were in respect of those of the year 1920. The plaintiffs claimed that no rents were due, and that they were ignorant of both the decrees and the execution proceedings until a peon came to the village to deliver possession to the landlords. They asked to be restored to possession of their holdings as they had been found to be out of possession in proceedings under section 145 of the Criminal Procedure Code. These suits were dismissed by the Munsif in the year 1927 on the ground that no fraud had been established. This decision was upheld by the Subordinate Judge in the year 1928, but the suits were remanded for rehearing on a wholly different ground, namely that, as contended for the first time in the appeal, all six sales were without jurisdiction and void for non-issue of notice under section 190(*1*) of the Chota Nagpur Tenancy Act, while in suits nos. 96 and 97 the decrees were void because the tenants were minors and were unrepresented. An appeal to this Court against the order of remand was dismissed in the year 1932 on the ground that that order was not subject to appeal.

On remand the trial court held that in suits nos. 84, 85, 88 and 89 the sales were void for non-issue of notice under section 190(*1*) in the first execution cases. The court held that in the second executions no such notices were required. In suits nos. 86 and 87 it was found that notices under section 190(*1*) had been issued, but that the decrees were a nullity as having been passed against minors who were not properly represented by a guardian. An

1937.

BARAIK RAM GOBIND SINGH v. CHOWRA URAON.

MADAN, J.

appeal against this decision was dismissed by the Subordinate Judge, who upheld the findings of the Munsif except that in suits nos. 84, 85, 88 and 89 he found that there was no proof of non-issue of notices in the first execution cases, the records of which had been destroyed; but that the second executions were void for non-issue of notices as more than one year had elapsed between the dates of filing of the two sets of executions. Against this decision the landlords have appealed to this Court.

The first question that has been raised is whether the Subordinate Judge in the year 1928 was entitled to remand the suits for rehearing on issues not raised in the plaint. The remands were on questions of jurisdiction such as can be raised at any time, and it is immaterial that the tenants, as it appears, were not advised by their lawyers to raise those objections in their plaint. I hold therefore that the order of remand was legal. The next question that arises is the effect of non-issue of notice under section 190(*1*) in relation to suits nos. 84, 85, 88 and 89. The section runs as follows :—

> " A warrant of execution shall not be issued upon any decree or order without previous notice to the party against whom execution is applied for, if, when application for the issue of the warrant is made, a period of more than one year has elapsed from the date of the decree or order, or from the date of the last previous application for execution."

The section corresponds to Order XXI, rule 22, of the Civil Procedure Code, except that in the latter case notices are required only if a year has elapsed between the date of the last order in the previous execution and the date of filing the next execution. It has been found by the learned Subordinate Judge in connection with the four suits mentioned above that notice under section 190(*1*) was required to be issued, and that it was not issued. A similar case arose in *Raja Baldeo Das Birla* v. *Lal Nilmani Nath*

Sahi Deo(1), where it was held that failure to issue notice under section 190(*1*) is a matter of jurisdiction, and that the subsequent sale in execution is void. It was contended for the appellants that notice under section 190(*1*) is only necessary where warrant is to be issued against the person or moveables of the judgment-debtor, and that it is not required in the case of immoveable property. The section, however, contains nothing to suggest that it was not intended to apply to all warrants issued in execution proceedings under the Act. It is true that in the same chapter there are sections which refer only to warrants against the person and moveable properties, but I do not see that this is any reason for importing the same limitation into section 190. The same point arose in the case cited above where it was held that the section applies to all warrants, and following this authority I find that the sales in execution in these four cases were void. It was suggested that the plaintiffs were debarred from raising this objection owing to the dismissal of their applications under section 213. That section applies to irregularity or fraud in conducting the sale, and does not apply to cases where the court had no jurisdiction to sell. In such a case the plaintiffs were entitled to file a suit under section 214 of the Act, and I find that in suits nos. 84, 85, 88 and 89 the sales in execution have rightly been held to have been void.

In suits nos. 86 and 87 the decrees themselves have been found to be a nullity. In *Rani Chattra Kumari Debi* v. *Panda Radha Mohan Singhari*(2) it has been held that in the case of minor defendants the court must see not merely that a guardian is appointed, but that the guardian has consented to act. In this case the defendants were minors, and notices were served on them through their mothers as

(1) (1928) I. L. R. 8 Pat. 122.

(2) (1922) 3 Pat. L. T. 451.

1937.

BABAIK RAM GOBIND SINGH v. CHOWRA URAON.

MADAN, J.

guardian. No appearance was made on their behalf, and there is no order of the court appointing the mothers as their guardians or showing that the guardians consented to act on their behalf. In the circumstances the decrees were rightly found to be a nullity. The result is that I find no reason to interfere with the decision of the learned Subordinate Judge in regard to any of the suits, and I would therefore dismiss these appeals. The plaintiffs are entitled to be restored forthwith to possession of their holdings.

There remains the question of costs. It has been found that in four of these cases the landlords seized the entire holdings of their aboriginal tenants after long delays and for non-payment of ridiculously small amounts. Meanwhile they obtained and realised other rent decrees against the tenants, who no doubt fully believed that all their dues had been satisfied. This conduct of the landlords is such as to admit of no excuse. In the other two cases it has been found that *ex parte* decrees were obtained against minors who were unrepresented with the result that the landlords again got possession of the holdings. It is true that the plaintiffs were held to have been late in filing their applications under section 213 of the Tenancy Act, and were late in putting forward their objections regarding jurisdiction on which they were ultimately successful, but I do not think that they should be made to suffer for these delays. I would direct that the appellants should pay to the plaintiffs the entire costs of this litigation.

COURTNEY TERRELL, C.J.—I agree.

Appeals dismissed.

S. A. K.