

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

1939.

MAHARAJA PRATAP UDAI NATH SHAH DEO

May, 2.

v.

SUKHDEO PRASAD BHAGAT.*

Chota Nagpur Tenancy Act, 1908 (Beng. Act VI of 1908), section 215(3)—orders made on applications for setting aside sale, whether appealable—practice—phrase “strike off”, inappropriate use of—appellate Court, whether entitled to call for a private report from lower Court—procedure, whether irregular.

The terms of section 215(3) of the Chota Nagpur Tenancy Act, 1908, make it clear that orders passed on applications to set aside sales are within the section and are, therefore, appealable.

Nilmani Nath Sahi Deo v. Maharaja Sri Pratap Udai Nath Sahi Deo(1), followed.

If an executing Court wants to dispose of an application finally, it should use clear and unambiguous language, such as “the application is dismissed”. The phrase “strike off” which is really meaningless and is at any rate capable of a number of meanings, should not be used.

An appellate Court is not entitled to call for a private report from the lower Court for its information; it must decide an appeal upon the materials before it and if it cannot do so, it can only act in the manner provided by the Code of Civil Procedure, 1908.

Appeal by the decree-holder.

The appeal was in the first instance heard by Manohar Lall, J. who referred it to a Division Bench.

*Appeal from Appellate Order no. 325 of 1938, from an order of T. Luby, Esq., Judicial Commissioner of Chota Nagpur, dated the 20th June, 1938, affirming an order of Maulavi A. Hussain, Rent Suit Deputy Collector, dated the 2nd February, 1938.

(1) (1918) 49 Ind. Cas. 389.

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The facts of the case material to this report are set out in the judgment of Harries, C.J.

S. M. Mullick and *B. C. De*, for the appellant.

N. N. Sen, for the respondents.

HARRIES, C.J.—This is a miscellaneous second appeal from an order of the learned Judicial Commissioner of Chota Nagpur dismissing an appeal from an order of the Rent Suit Deputy Collector.

The facts of the case can be shortly stated as follows. The appellant obtained a decree for rent against a tenure-holder and in execution of that decree the property was sold and purchased by Gangadhar, respondent no. 3. The purchaser, however, did not have his name recorded in the landlord's sarishta. Further arrears of rent accumulated, and the plaintiff brought another suit against his original tenure-holder and obtained a decree. In execution of that decree he again put the property up for sale, and on the 16th of November, 1937, he purchased it himself. On the 18th of December, 1937, the respondent Gangadhar presented a petition praying that the sale should be set aside on the ground that he had purchased it at an earlier sale and that the property could not be resold. The learned Rent Suit Deputy Collector upon this petition passed the following order :

" Put up on 22nd December 1937, with execution record referred to ".

The matter was adjourned and finally came for decision before the Rent Suit Deputy Collector on the 2nd of February, 1938, when he passed the following order :

" This holding has already been sold and the man to whom it has been sold is not a party in any of the proceedings taken since. Strike off."

It is to be observed that in the type-written paper-book before us the words "Strike off" have been incorrectly typed as "Struck off".

From this order the present appellant preferred an appeal to the court of the Judicial Commissioner who dismissed it. The judgment reads as follows:—

"Parties heard and record perused. On the facts as recounted in the Deputy Collector's report (and the accuracy of his report is not disputed) the landlord appellant has no case. At his instance the holding was sold at Court auction and purchased by the objector-respondent who got a sale certificate and delivery of possession. The holding cannot be sold again in execution of another decree against the original tenant (obtained) without making the auction-purchaser a party. I dismiss this appeal with costs and pleader's fee Rs. 10 to the contesting respondent."

In this judgment the learned Judicial Commissioner refers to some report made by the Deputy Collector. What this report was is not clear, and it would appear as if the Judicial Commissioner had called upon the Deputy Collector to make a report to supplement the orders appearing on the order-sheet. This seems to me to be a most unusual proceeding, and an appellate Court is not entitled to call for a private report from the lower Court for its information. An appellate Court must decide an appeal upon the materials before it and if it cannot do so, it can only act in the manner provided by the Code of Civil Procedure. I presume this report was shown to the parties; but if it was not, then the procedure was highly irregular.

My difficulty in this case is to know what precisely was the order of the Deputy Collector which was upheld on appeal by the learned Judicial Commissioner. It must be remembered that Gangadhar had presented a petition praying that the second sale should be set aside on the ground that he had purchased the property in the earlier sale and that it could not be resold. The learned Deputy Collector's order is "Strike off", but strike off what? Did he

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mean to strike off the petition to set aside the sale or the application for execution? I think it is clear that what he must have intended was to strike off the whole execution case.

It has been argued that he could not do that on the application to set aside the sale. He should have dealt with that application and either allowed it or dismissed it. Quite obviously the learned Deputy Collector was of opinion that the sale should be set aside; but, as I have stated, he merely passed an order striking off something.

I should like to make it clear that the phrase "strike off" is really meaningless and has led to endless litigation in these Courts. In other Courts it has been held time and again that the phrase "strike off" does not mean "dismissed" and in a decision of their Lordships of the Privy Council an order striking off was construed as an order staying execution rather than dismissing it. If an executing Court wants to dispose finally of an application, it should use clear and unambiguous language such as "the application is dismissed". "Striking off an application" is a phrase which is capable of a number of meanings. In the present case, however, it appears that the Deputy Collector desired to put an end to something, and it may be that that something was the whole execution case.

It is also tolerably clear from the judgment of the learned Judicial Commissioner that he regarded the order striking off as something passed in connection with a petition to set aside the sale. However, it is clear that if any meaning can be given to the phrase "strike off", it must mean that the execution application or the execution case in its entirety was dismissed. The Courts have not considered whether or not such an order could be made.

In my judgment the order made by the learned Judicial Commissioner must be set aside and the case remanded to him to be heard and determined according to law.

Before ending this judgment, I must refer to a point raised by the learned Advocate for the respondents that no second appeal lay to this Court. It was contended that this was an order which was not appealable to the learned Judicial Commissioner and consequently that no appeal lay from that judgment to this Court. In my judgment this case falls within section 215(3) of the Chota Nagpur Tenancy Act, which provides that orders after decree and relating to the execution thereof with certain exceptions are appealable to the Court to which an appeal from the decree itself would lie. It has been strenuously argued that as the property here had been sold this is not a decree relating to execution, because the execution came to an end when the property was purchased by Gangadhar. Reliance has been placed on cases dealing with the construction given to a similar phrase in section 47 of the Code of Civil Procedure. In my view, however, the terms of section 215(3) of the Chota Nagpur Tenancy Act make it clear that orders passed on applications to set aside sales are within the section, because certain of those orders are by the terms of the section excluded from its ambit, for example orders passed under section 212(2) of the Act are not to be treated as orders relating to execution. A perusal of section 212(2) of the Act makes it clear that such an order is an order setting aside a sale. Had that order not been expressly excluded, it would have been within the ambit of the section. In my view the language of section 215(3) is wide enough to permit an appeal in this case.

In any event if the order is an order striking off the execution application, then clearly it is an order

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relating to execution and is, therefore, appealable under section 215(3) of the Chota Nagpur Tenancy Act.

For the reasons which I have given, I would allow this appeal, set aside the decree of the learned Judicial Commissioner and remand the case to him to be heard and determined according to law. In the circumstances of this case, I would make no order as to costs.

MANOHAR LALL, J.—I agree. In my opinion the language of section 215(3) of the Chota Nagpur Tenancy Act is wide enough to make an appeal competent in a case like the present. This was the view expressed by Mr. Justice Mullick in the case of *Nilmani Nath Sahi Deo v. Maharaja Sri Pratap Uday Nath Sahi Deo*(1) although his remarks are in the nature of obiter. For the reasons which have just been given by my Lord the Chief Justice, there cannot be any doubt that the legislature in enacting section 215 intended to depart from the interpretation put upon similar words in section 47 of the Code of Civil Procedure.

S. A. K.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

Before Harries, C.J. and Manohar Lall, J.

DEBI PRASAD AGARWALA

v.

HAJI SYED MEHDI HASAN.*

Limitation Act, 1908 (Act IX of 1908), Schedule I, Articles 97 and 116—lessee taking possession under a registered

*Appeal from Appellate Decree no. 333 of 1937, from a decision of Babu Sachindra Nath Ganguli, Subordinate Judge at Arrah, dated the 4th January, 1937, reversing a decision of Babu Shiva Nandan Prasad, Munsif at Sasaram, dated the 25th January, 1935.

(1) (1918) 49 Ind. Cas. 389.

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