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S.A.S. CHETTYAR FIRM v. S.V.A.R.A. FIRM AND OTHERS.

DAS, J.

the order which we have under consideration. This amounted to a failure to exercise jurisdiction which justifies interference under section 115, Civil Procedure Code. It is not for us to order him to exercise his jurisdiction in any direction but he is bound to direct his mind seriously to the materials which appear on the record and to form his conclusion on them. I agree with my brother Das that the learned Judge was not bound to hold an enquiry.

APPELLATE CIVIL.

Before Mr. Justice Baguley.

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June 12.

MA PYU
v.
K. C. MITRA.*

Civil Procedure Code (Act V of 1908), ss. 100, 101—Second appeal under the Code on an issue of law only—Findings of fact of the first Appellate Court cannot be questioned on second appeal.

Under the provisions of ss. 100, 101, second appeals lie only if the decision is contrary to law or if the decision fails to determine some material issue of law or if there is any substantial error or defect in the procedure. S. 100 says nothing about the findings of fact, concurrent or otherwise, and therefore the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence in support of the finding, however unsatisfactory it might be if examined.

Durga v. *Jewahir*, (P.C.) 18 Cal. 23; *Pertap* v. *Mohendranath*, (P.C.) 17 Cal. 291; *Ramgopal* v. *Shamskhaton*, (P.C.) 20 Cal. 93—*referred to.*

Doctor for the appellant.
Sen for the respondent.

BAGULEY, J.—One Po Mya was supposed to be the owner of two adjacent pieces of land, Holdings No. 77 and No. 78. Holding No. 77 was freehold.

* Civil Second Appeal No. 551 of 1927 against the judgment of the District Court of Henzada in Civil Appeal No. 68 of 1927.

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Holding No. 78 was leasehold. As a matter of fact the lease had lapsed ; but this does not have any bearing on the case. He sold Holding No. 78 and two small triangular pieces of Holding No. 77 to K. C. Mitra and placed him in possession of the land but no registered deed was executed. Afterwards he purported to sell the whole of Holdings Nos. 78 and 77 to the plaintiff, Ma Pyu. The defendant finding that the lease had lapsed got a fresh lease from Government of the entire original Holding No. 78 and the plaintiff appears to have abandoned any attempt to get that away from him, but she now sues him to recover the two small triangular portions of Holding No. 77 on which it would seem part of his building had been erected.

The trial Court decided the case really on the issue :—

"Is the defendant in possession of the suit land under the agreement of sale by U Po Mya ?" The learned Judge found that the defendant was in possession of the suit land under the agreement of sale and dismissed the case.

On appeal the learned District Judge agreed with this view but said quite rightly that it was necessary to see whether the plaintiff had notice of the agreement of sale by U Po Mya in favour of the defendant. After examining the evidence he came to the conclusion that the plaintiff had notice of the agreement to sell and of the occupation of the land by the defendant. He therefore dismissed the appeal and the plaintiff has come in second appeal to this Court.

The memorandum of appeal is based to a great extent on questions of fact. I pointed out to Mr. Doctor that in my opinion findings of fact in the lower Appellate Court must be regarded as final.

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Section 100 of the Civil Procedure Code is quite clear and section 100 does not mention the word "facts". Section 101 says that no second appeal shall lie except on the grounds mentioned in section 100. It was argued that there was no concurrent finding of facts with regard to the question of notice; but that seems to me to be quite immaterial. Section 100 says nothing about the findings of fact, concurrent or otherwise. It says that second appeals may be filed if a decision is contrary to law, if a decision fails to determine some material issue of law or if there is any substantial error or defect in the procedure, which may possibly have produced error or defect in the decision of the case. Reference may be given to a few authorities to hold that Courts of second appeal must not attempt to extend the scope of the section. They are all Privy Council cases.

The first is *Pertap Chunder Ghose* v. *Mohendranath Purkait* (1). In this ruling at page 298 I find a note "Their Lordships must observe that the limitations to the power of the Court by sections 584 and 585 (now sections 100 and 101) in a second appeal, ought to be attended to, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact." This was a case in which the trial Court and the 1st Appellate Court appear to have come to two different conclusions with regard to the facts.

The next ruling is *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (2). This is also a Privy Council case and at page 30 their Lordships remark: "Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section 584. No Court in India or elsewhere has power to add to or enlarge

(1) (1889) 17 Cal. 291. (2) (1890) 18 Cal. 23.

those grounds . . . . . It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding." In this case also the lower Appellate Court had reversed the decree of the trial Court on facts.

The third case is *Ramgopal and another* v. *Shamskhaton and others* (1). In this case also quoting yet another ruling their Lordships of the Privy Council say: "It has now been conclusively settled that the third court . . . . . cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final."

We are therefore in this case bound by the facts as found by the lower Appellate Court. The learned Judge has found as a fact that the building of the defendant was standing on the site on the 1st day of April 1925 and there is undoubtedly evidence which would warrant such a finding being reached.

P. C. Dey, the plaintiff's husband, who conducted this case for her states that the house stands on the site of the two triangular pieces of land now in dispute. The sale deed executed in favour of the plaintiff is dated the 5th July 1925 and the lower Appellate Court has found as a fact that three months

(1) (1892) 20 Cal. 93.

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before that date the defendant's house was standing on the site in question. This must be regarded as notice of the defendant's interest in the land to the plaintiff; for, the plaintiff's agent P. C. Dey, who is her husband, has a shop quite close to the land now in dispute. It is therefore not necessary to say anything further.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Carr.

1928

June 18.

MA NYUN
v.
MAUNG SAN MYA AND ANOTHER.*

Stamp Act (II of 1899), ss. 35 (a), 36—Promissory-note insufficiently stamped, admitted in evidence—Proviso (a) of s. 35—Whether such admission amounts to illegality—Appellate Court's power to question the admission.

Held, that where a trial Court admits an insufficiently stamped promissory-note in evidence on payment of the duty and penalty, overlooking the fact that proviso (a) of s. 35 of the Stamp Act does not apply to a promissory-note, the Court cannot be said to have acted illegally, and having regard to the provisions of s. 36 of the Act the Appellate Court has no power to question the admission of the document, and to reject it on the ground that it was not duly stamped.

Devachand v. *Hirachand*, 13 Bom. 449; *Khoob Lall* v. *Jungle Singh*, 3 Cal. 787; *Mi Ke* v. *Nga Kan Gyi*, II U.B.R. Stamp 36; *Panchanand* v. *Taramoni*, 12 Cal. 64—*followed.*

Maung Ba Kywan v. *Ma Kyi Kyee*, 2 L.B.R. 103—*dissented from.*

Paw Tun for the appellant.

Kin U for the respondents.

CARR, J.—This was a suit on a promissory-note. Both the Courts below have agreed that the plaintiff proved the execution of the note. The Township Court on that finding gave a decree for the plaintiff,

* Special Civil Second Appeal No. 52 of 1928 against the judgment of the District Court of Tharrawaddy in Civil Appeal No. 102 of 1927.