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falls under both section 182 and section 211, Indian Penal Code, prosecution under section 182 is quite improper. To permit such a prosecution, it will, in my opinion, be contrary to the general principle that a prosecution for a lesser offence should not be launched when the facts constitute a graver offence.

For the reasons stated above, I allow the application, and the proceedings before the Township Magistrate, Sagaing, are quashed.

APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Doyle.

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June 12.

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

Civil Procedure Code (Act V of 1908), s. 73—Order for rateable distribution not a ministerial act—Order revisable by High Court under s. 115 of the Code—No inquiry as to ownership of property necessary when ordering rateable distribution.

An order made under s. 73 of the Civil Procedure Code is not a ministerial and non-judicial act of a Judge. The High Court can therefore interfere with such an order on revision.

In passing an order for a rateable distribution, a Court is not bound to inquire as to whom the property belongs.

Shankar Saruf v. *Mejo Mal*, (P.C.) 23 All. 313—*referred to.*

Bibi Uma v. *Rasoolan*, 5 Pat. 445 ; S. *Pillai* v. *Arunachalam*, 40 Mad. 841—*dissented from.*

Leach, Ganguli, Chowdhury, Doctor for the appellants.

Foucar, Shaffee, Basu, Venketram for the respondents.

* Civil Revision Nos. 321, 327 and 328 of 1927 against the order of the District Court of Pyinmana in Civil Execution Nos. 30, 31 and 32 of 1925.

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

DAS, J.—These are applications against the order of the District Judge of Pyinmana passed under section 73 of the Civil Procedure Code.

The first question for consideration is whether this Court can interfere with an order passed under section 73 of the Civil Procedure Code.

It is argued on the authority of a decision of their Lordships of the Privy Council in the case of *Shankar Sarup and others* v. *Mejo Mal and others* (1) that they held that the action of the Judge under section 73 was merely ministerial and non-judicial and that therefore this Court cannot interfere with the same in revision. At page 372 of the report their Lordships say as follows :—

"The scheme of section 295 (present section 73) is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu Bhikaji Phadke* v. *Achut Jagannath Ghate* (2), and they concur in the further observation made by the learned Judge in that case that the application of the 13th article is also precluded by the fact that the order for distribution was a step in an execution proceeding and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit."

It is quite clear from those observations that what their Lordships were considering in that case was whether the 13th article of the Limitation Act applied to an order passed under section 295 and that they never stated that the order under section 295 was a

(1) (1901) 23 All. 313. (2) (1884) 15 Bom. 438.

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ministerial and non-judicial order. On the other hand they clearly stated that the order in question was an order in a suit. That being so, it cannot be stated that their Lordships held that the order under section 295 was a ministerial order. All that they stated was that the scheme of section 295 was to enable the Judge to distribute the price as a matter of administration.

In this connection reference was made to a decision in the case of *Bibi Uma Habiba* v. *Mussammat Rasoolan* (1), where Foster, J., states as follows :—

"It was urged that the matter really was under section 47, but it seems to me that the Privy Council decision must be deferred to, and this matter must be regarded as a purely ministerial act which has no element of a judicial decision."

I do not agree with the learned Judge in these observations. I do not think that their Lordships of the Privy Council had ever stated or meant to infer that a decision under section 73 was a purely ministerial act which had no element of a judicial decision. I may also mention the case of *Saravana Pillai* v. *Arunachalam Chettiar* (2), where the learned Judges seem to think that their Lordships of the Privy Council had held that an order under section 73 was a non-judicial order which could not be interfered with in revision by the High Court. I do not agree with the observations of the learned Judges in that case. I am of opinion that their Lordships of the Privy Council did not hold that an order under section 73 of the Civil Procedure Code was a ministerial and non-judicial act of a Judge which could not be interfered with by the High Court in revision. I think that the High Court can interfere with an order passed under section 73 of the Civil Procedure Code under section 115 of the Civil Procedure Code. But

(1) (1926) 5 Pat. 445. (2) (1917) 40 Mad. 841.

section 73 of the Civil Procedure Code does not provide for any enquiry being made by the Court when passing an order for a rateable distribution and I do not think that the Judge is bound to make any enquiry as to whom the property belongs before making the rateable distribution.

In this case the properties were sold as belonging to the three judgment-debtors. It must be assumed in this case the properties belonged to them in equal proportion. The learned Judge was certainly wrong in ordering the same rateable distribution to the decree-holders against one or two judgment-debtors. I think the proper procedure would be first of all to pay off the mortgage decree obtained against Maung An and Maung Tha Hlaing out of two-thirds of the assets in the hands of the Court: and after that the decree-holders against all three are entitled to a rateable distribution out of the assets left in the hands of the Court and, if there is any balance left after paying off the decree-holders against all three, then the balance will be distributed proportionately to the decree-holders against one or two of the judgment-debtors taking each judgment-debtor's share to be one-third in the assets.

DOYLE, J.—Their Lordships of the Privy Council appear to have considered that a Court acting under section 73, Civil Procedure Code, was acting somewhat after the fashion of a Court executing a decree, such a Court having no power to go into the matter whether such a decree has been obtained by fraud or not, but to say that they were administering the order does not amount to saying that they were acting in immaterial capacity. As regards our power of revision it is clear that the learned District Judge did not adopt any principle other than that of convenience in passing

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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.

1928

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.