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that it was not. So also as to the notice. Having regard to the provisions of the second clause, it is the original petition and the original notice, which ought to be stuck up, for section 10 of the Regulation says that, at the time of the sale, "the notice previously stuck up in the cutcherry shall be taken down"—apparently meaning the notice stuck up in some conspicuous part of the cutcherry as provided in clause 2 of section 8, which, I think, means the notice itself, and not a copy of it. This, then, was a material irregularity.

There was another irregularity. The notice was stuck up only until the 14th May, although the sale did not, in fact, take place until the 15th. This was in contravention of section 10.

Again, if we look at section 10, we find it provided that when the notice previously stuck up shall be taken down, "the lots shall be called up successively in the order in which they may be found in that notice." The notice, apparently, contained no such order as to the lots and was consequently not in the proper form.

[956] Further, the evidence in case shows that the petition and the notice were stuck up every day at 10 A.M. and taken down at 5 P.M., and that they were not stuck up at all on Sundays. There is nothing in the Regulation to justify this procedure: on the contrary section 10 would seem to imply that the notice is to remain stuck up, until it should be taken down at the time of the sale.

It is unnecessary, in the view we hold, to go into the question whether there was sufficient publication at the cutcherry of the zemindar, or upon the land of the defaulter, though this is very doubtful upon the evidence. The irregularities to which we have referred are sufficient to vitiate the sale; for the provisions of the Regulation appear to have been seriously disregarded.

A preliminary objection was taken by the respondent to the effect that, as the auction-purchaser and the other co-sharers were not made parties to this appeal, the appeal could not proceed. It is unnecessary to go into that question as we have dealt with the case on the merits.

The appeal must be dismissed with costs.

MITRA, J. I am of the same opinion.

Appeal dismissed.

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32 C. 957 (=9 C. W. N. 721=1 C. L. J. 476.)

[957] FULL BENCH.

Before Sir Francis W. Maclean, Kt., K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Sale and Mr. Justice Geidt.

KALI MANDAL *v.* RAMSARBASWA CHAKRAVARTI.*

[20th May, 1905.]

Appeal—Acts—Bengal Tenancy Act (VIII of 1885) s. 153—Appeal from order.

Held by the Full Bench, Rampini, J., dissenting:—

An order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, falls within the proviso to s. 153 of the Bengal Tenancy Act, and is appealable, although there could be no appeal from the decree in the suit on account of the prohibition contained in that section.

[Fol. 15 I. C. 436=16 C. L. J. 542=17 C. W. N. 84; Ref. 18 C. W. N. 1266=20 C. L. J. 341=27 I. C. 294; 19 C. W. N. 953=22 C. L. J. 244=29 I. C. 308; 49 I. C. 465.]

* Reference to Full Bench in Civil Rule No. 3626 of 1904.

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REFERENCE to Full Bench.

The facts relevant to this report were as follows: The landlord in execution of an *ex parte* decree for rent obtained by him caused the holding to be sold, purchased it himself and obtained possession through the Court on the 6th of August 1903.

The judgment-debtor applied to have the sale set aside on the ground of fraud.

The Munsif by his order dated the 23rd of February 1904 set aside the sale. The suit was valued at less than Rs. 50 and the Munsif was an officer specially empowered under s. 153 (*b*) of the Bengal Tenancy Act. On appeal by the decree-holder purchaser the Subordinate Judge confirmed the sale. Thereupon the judgment-debtor moved the High Court and obtained a rule calling upon the opposite party to show cause, why the order of the Subordinate Judge should not be set aside on the ground that no appeal lay to him.

The Rule came on for hearing before MACLEAN C.J. and MITRA J.

[958] Their Lordships being unable to agree with the decision in the case of *Monmohini Dasi* v. *Lakhi Narain Chandra* (1) made the following order of reference to a Full Bench:—

"The holding of the defendants, the petitioners in this Court, was sold in execution of a decree for rent obtained by the opposite party. The suit was laid at a sum below Rs. 50; it was undefended, and the decree was passed by a Munsif, who was empowered to exercise final jurisdiction under clause (*b*) of section 153 of the Bengal Tenancy Act.

The petitioners applied under section 244 of the Civil Procedure Code to have the sale set aside on the ground of fraud. The Munsif acceded to their prayer and the sale was set aside. The decree-holder, who was himself the purchaser, appealed against the order. The appeal came on for hearing before the Subordinate Judge, who on a preliminary objection under section 153 held, for reasons contained in his judgment, that he was competent to entertain the appeal. On the merits the Subordinate Judge decreed the appeal and confirmed the sale.

The present application raises the question of the jurisdiction as to appeal to the Lower Appellate Court. It is conceded that the Subordinate Judge was in error in holding that the Munsif was not vested with the power contemplated by clause (*b*) of section 153.

The decree in the suit did not decide any question relating to title to land or any interest in land as between parties having conflicting claims thereto or any other question referred to in the proviso to section 153, but it seems to us that a proceeding to set aside a sale distinctly raises a question as to an interest in land, and the order of a Munsif adjudicating on that question is an order excepted from the prohibition as to appeals.

This was the view taken in *Ganga Charan Bhattacharya* v. *Sashi Bhusan Roy* (2) and in an unreported case decided by this Bench (Appeal from Order No. 311 of 1904 decided on the 31st March 1905), though a different view was taken in *Monmohini Dasi* v. *Lakhi Narain Chandra* (1). In the last case the attention of the learned Judges was not drawn to the distinction between a decree in a suit and an order passed in execution of it and the different nature of the questions that might be raised in them.

Ganga Charan Bhattacharya v. *Sashi Bhusan Roy* (2) was distinguishable from *Monmohini Dasi* v. *Lakhi Narain Chandra* (1). Our order in appeal No. 311 of 1904 was based on a different point, and it was unnecessary for us to refer the question raised under section 153 to a Full Bench, but the present case cannot be distinguished.

We accordingly refer the following question to a Full Bench—

Does an appeal lie from an order setting aside a sale or declining to set aside a sale in execution of a decree for rent when there could be no appeal from the decree in the suit on account of the prohibition contained in section 153 of the Bengal Tenancy Act?"

(1) (1900) I. L. R. 28 Cal. 116. (2) (1905) 1 C. L. J. 255.

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[959] Babu *Samatul Chunder Dutt* for the petitioners. An order setting aside, refusing to set aside or confirming a sale is an order in execution proceedings and is therefore an order in the suit, which includes execution proceedings: s. 647 of the Civil Procedure Code, *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (1). Section 153 of the Bengal Tenancy Act, which controls the provisions of the Code of Civil Procedure in rent suits, forbids an appeal in the present case, unless it can be shown that the order decided a question relating to title to land, etc., arising between the parties, that is between parties to the suit: "parties" in s. 153 cannot mean merely parties in the execution proceedings. Orders under ss. 173 (3), 174 of the Bengal Tenancy Act and ss. 310A, 311 and 244 of the Civil Procedure Code, setting aside sales, cannot be questioned by way of appeal by the auction purchaser, if he be a third party. *Hara Bandhu Adhikari* v. *Harish Chandra Dey* (2). The proviso to s. 153 of the Bengal Tenancy Act refers to four questions, decisions on which are subject to appeal: the last three evidently cannot arise after the decree; the first question, namely, the question of title must also have reference to the same period of time, that is, the date of institution of the suit; the proviso to s. 153 does not contemplate any title coming into existence after the decree. An order setting aside a sale under ss. 311 and 244 of the Civil Procedure Code, does not decide any question of title; it merely decides whether there was any irregularity or fraud in course of the sale. There can be no conflict of claims—the landlord purchaser cannot at any stage of the case deny the tenancy. As to conflicting claims, see *Sita Nath Pal* v. *Kartick Gharmi* (3), *Donzelli* v. *Tekan Nodaf* (4). Under Act VIII (B.C.) of 1869, s. 102, which corresponded to s. 153 of the present Act, there was no appeal from any order in execution proceedings in cases where no appeal lay against the decree. *Deb Coomaree Dossee* v. *Gunga Dhur Dutt* (5); *Krishto Coomar Chuckerbutty* v. *Anund Coomar Dutt* (6); *Kedarnath Biswas* v. *Huro Pershad Roy* (7) [960] *Parbutty Churn Sen* v. *Shaik Mondari* (8). The same principle has been applied to appeals from orders in execution of decrees in suits of a Small Cause Court nature: *Lala Khandha Pershad* v. *Lala Lal Behary Lal* (9).

Babu *Mahendra Nath Roy*, for the opposite party, referred to an unreported case—Second Appeal No. 438 of 1901—decided by Ghose and Geidt JJ., and submitted that the case of *Manmohini Dasi* v. *Lakhi Narain Chandra* (10) overlooked the distinction between *decree* and *order* as indicated in s. 153 of the Bengal Tenancy Act. The decree was no doubt *ex parte*, but that fact does not affect the present question. We have to look to the nature of the *order* appealed from in the Lower Appellate Court. That order by setting aside the sale, decided a question of title to land as between parties, *viz.*, the judgment-debtor and the decree-holder auction-purchaser having conflicting claims thereto. The Lower Appellate Court had therefore jurisdiction to hear the appeal. The case of *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (1) does not militate against this view.

MACLEAN C. J. I think that, upon the present occasion, I cannot usefully add anything to what I said in the case referred to in the reference

(1) (1900) I. L. R. 27 Cal. 484.
(2) (1898) 3 C. W. N. 184.
(3) (1900) 8 C. W. N. 484.
(4) (1878) 2 C. L. R. 558.
(5) (1872) 17 W. R. 189.
(6) (1873) 19 W. R. 307.
(7) (1875) 23 W. R. 207.
(8) (1879) I. L. R. 5 Cal. 594.
(9) (1898) I. L. R. 25 Cal. 872.
(10) (1900) I. L. R. 28 Cal. 116.

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to this Bench—the case of *Ganga Charan Bhattacharya* v. *Sashi Bhushan Roy* (1). In that case, I dealt with the precise point, which is now before us, somewhat fully, and nothing additional now occurs to me. It was suggested in the course of the argument here that the word "parties" in the section must mean parties to the suit. We are relieved from any difficulty upon that head as in the present case both parties were parties to the suit. The decree-holder was the purchaser.

Since the case was before us and since the reference was made we have been referred to an unreported case, of which I was previously unaware—Appeal No. 438 of 1901—in which the decision was given on the 21st May 1902, a decision of my brothers Ghose and Geidt JJ., in which I find that they took **[961]** the same view of the question as I now take. The result, therefore, will be that the Rule will be discharged with costs.

GHOSE, J. I agree with the learned Chief Justice in the decision that he has arrived at. No doubt, it may be said that the precise question which was raised before the Court of first instance upon the application of the tenant, the judgment-debtor, was not a question relating to title to land, or to some interest in land, as between the parties to the suit—the question raised being whether the sale at which the landlord purchased was a good sale; but, as explained by a Divisional Bench of this Court in the case to which my Lord has referred, and to which I was a party, the order of the Court did, in effect, hold that the landlord acquired no title to the property in question under his purchase. That would be a decision of a question relating to title to land or to some interest therein, and as such would be appealable under the proviso to section 153 of the Bengal Tenancy Act. In this view of the matter, I think that this Rule must be discharged.

RAMPINI J. The question propounded for our consideration is, "does an appeal lie from an order setting aside a sale or declining to set aside a sale in execution of a decree for rent when there could be no appeal from the decree in the suit on account of the prohibition contained in section 153 of the Bengal Tenancy Act.

I am of opinion that no appeal lies, because I consider that no such question as is referred to in the proviso to section 153 of the Bengal Tenancy Act is decided, when an order is passed either setting aside or refusing to set aside a sale held in execution of a rent decree passed by a Munsif especially empowered by the Local Government under section 153 (*b*) of the Bengal Tenancy Act. It has been said that an order of such a nature decides a question relating to some interest in land as between parties having conflicting claims thereto. I am of opinion that this is not the case. Such an order may decide a question relating to an interest in land, but not an interest in land as between parties **[962]** having conflicting claims thereto in the sense which is properly to be attached to these words in the proviso to section 153. Such a case will arise when one of the parties to a suit or proceeding says: "This land is mine. I hold it by such and such a title," and the other party replies—"No, the land is mine by another title." In an application for the setting aside of a sale, no such question of conflicting interests arises. The plea of the judgment-debtor in such a case is:—"The land is no longer mine: my title to it has passed to the purchasers: but I maintain that the proceedings, in the course of which it passed to the other party, were irregular, and so I am entitled to have them set aside, and my land restored to me." The plea of the purchaser, on the other hand, is—"The

(1) (1905) 1 C. L. J. 225.

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land was yours—I have bought it at a Court sale regularly held and you cannot get it back." The question in such a case then is not a question as between parties having conflicting claims thereto in the sense in which these words are used in the proviso to the section above referred to.

I therefore would answer the question propounded to us in the negative.

32 C. 257=9 C. W. N. 721 =1 C. L. J. 476.

SALE J. I agree in the judgment that has been given by my Lord the Chief Justice.

GEIDT J. So do I.

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32 C. 963 (=9 C. W. N. 566.)

[963] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

GURU PROSUNNO LAHIRI *v.* JOTINDRA MOHUN LAHIRI.*

[22nd March, 1905.]

Appeal to Privy Council—Letters Patent, cl. 39—Division Court—Civil Procedure Code (Act XIV of 1882) ss. 595 and 596.

Where on an appeal to His Majesty in Council the case was sent back to the High Court with a direction that certain accounts might be taken on a certain footing and a Division Bench of the High Court took those accounts and made a final decree.

***Held*, that an appeal would lie to His Majesty in Council from such decree under cl. 39 of the Letters Patent, the amount in dispute being over Rs. 10,000.**

The expression "Division Court" in that section is not restricted to a Division Court sitting on the Original Side.

Ss. 595 and 596 of the Civil Procedure Code do not apparently apply to such a case.

APPLICATION for leave to appeal to His Majesty in Council by the defendants, Guru Prosunno Lahiri and others.

The plaintiff and defendants were the heirs of Rama Nath Lahiri.

Two ladies, Gunamani Debi and Baroda Sundari Debi, had obtained a decree for mesne profits against them and in execution of the decree attached some property belonging to the plaintiff. To save his property from sale, the plaintiff paid off the decree and brought the present suit against his co-judgment-debtors, the defendants, for contribution.

The original Court decreed a portion of the plaintiff's claim, but on appeal by the defendants the High Court dismissed the suit.

[964] The plaintiff appealed to His Majesty in Council (1).

By the order in Council the decrees of the High Court and of the Subordinate Judge were all discharged and the case was remitted to the High Court with a direction to retake the account between the parties on certain principles. The order further provided that if on the taking of the accounts anything should be found due to the plaintiff by either defendant a decree should be made against the latter, and if nothing should be found due from either the suit would be dismissed as against him with costs in all the Courts in India.

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*Application for leave to appeal to His Majesty in Council, No. 7 of 1905.

(1) *Jotindra Mohan Lahiri* v. *Guru Prosunno Lahiri*. (1904) I. L. R. 31 Cal. 597.