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[921] APPELLATE CIVIL.

Before Mr. Justice Henderson and Mr. Justice Geidt.

NOBIN KALI DEBI *v.* BANALATA DEBI.*

[2nd May, 1905.]

Land Acquisition Act (I of 1894) ss. 32, 33, 54—Appeal—Order—Order directing refund of compensation money paid—Civil Procedure Code (Act XIV of 1882) s. 588—Execution, mode of—Order directing payment of money—Civil Procedure Code (Act XIV of 1882) ss. 254, 649.

An order made by a Court in a proceeding under the Land Acquisition Act, directing a party, to whom a sum of money awarded as compensation under the Act had been paid under a previous order, to refund the money, is not an award or a portion of an award within the meaning of s. 54 of the Act, nor does it come under any of the orders mentioned in s. 588 of the Civil Procedure Code.

No appeal therefore lies from such an order.

Sheo Rattan Roy v. *Mohri* (1); *Mahammad Ali Raja Avargal* v. *Ahamed Ali Raja Avergal* (2) distinguished.

The order directing a refund may be enforced by the imprisonment of the party against whom it is made or by the attachment and sale of his property under ss. 254 and 649 of the Civil Procedure Code.

[Ref. 33 Cal. 927=3 C. L. J. 67; 21 C. L. J. 624=30 I. C. 49; 64 I. C. 864; 69 I. C. 1.]

APPEAL by the opposite party Nobin Kali Debi.

One Tarini Charan Banerjee died in the year 1880 possessed of considerable property including a house in the town of Calcutta. He left a will by which he bequeathed a certain share of his immoveable properties to his widow, the appellant Nobin Kali, for her life with remainder to his daughter Kumudini Debi absolutely. The widow Nobin Kali and one Ambica Charan were appointed executrix and executor, and they obtained probate of the will. Kumudini Debi died in the year 1886 leaving three children, a son Nandalal Mukerjee and two unmarried and unbetrothed daughters, Pannalata Debi and the respondent Banalata Debi. By an order dated the 6th of January 1890 made in [922] certain suits to which the aforesaid three children of Kumudini Debi were parties, Nobin Kali and Ambica Charan were discharged from acting further as the executrix and executor of the estate of the said Tarini Charan, and by a subsequent order a portion of the aforesaid house was allotted to Nobin Kali as part of the share of the estate taken by her under the will of Tarini Charan.

Subsequent to this allotment the said house was acquired under the Land Acquisition Act, and the money awarded as compensation was forwarded to the District Judge by the Collector under the Act to be deposited under s. 32 (2). Subsequently the appellant Nobin Kali Debi and the aforesaid Nandalal Mukerjee made a joint application to the Judge stating that the former was the executrix of the will of Tarini Charan, and the latter was the sole reversionary heir and prayed that the amount in deposit might be paid to Nobin Kali. Thereupon the Judge acting on these representations directed that the money be paid under protest to Nobin Kali, who in accordance with the order withdrew the money. Shortly afterwards

* Appeal from Order No. 215 of 1904 and Rules Nos. 2097 and 3060 of 1904 against the decree of C. P. Caspersz, District Judge of 24-Pergannahs, dated the 12th May 1904.

(1) (1899) I. L. R. 21 All. 354. (2) (1902) I. L. R. 26 Mad. 287.

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the respondent Banalata Debi presented a petition to the Judge praying that Nobin Kali and Nandalal Mukerjee might be directed forthwith to refund and deposit in Court the sum of money withdrawn by the former, and that the money might be invested in Government securities on the ground that the previous order had been obtained by suppression of material facts. The Judge by his order, dated the 6th of January 1904, held that the previous order allowing Nobin Kali to withdraw the money had been obtained by misrepresentation of facts, and he recalled the said order, but he made no order for refund apparently on the ground that he had no power to do so. Banalata Debi moved the High Court against this order, and the Court by its order, dated the 15th of March 1904, held that the Judge had the power to order a refund, and sent the record back to the Judge so that he might apply his mind to the question whether, having regard to all the circumstances of the case, an order for refund of the money should be made. On receipt of the record the Judge on the 12th of May ordered Nobin Kali to refund the money within two weeks, reserving to the petitioner Banalata Debi liberty to apply in case of non-compliance. Nobin Kali having failed to comply [923] with the order, the Judge on the application of Banalata Debi made an order on the 28th of November 1904 attaching certain properties belonging to the former.

Nobin Kali Debi appealed to the High Court against the order of the 12th of May. She also obtained two rules, ordered to be heard along with the appeal, one directed against the order of the 12th of May and the other against the order of attachment dated the 28th of November.

The Advocate-General (Mr. *O'Kinealy*) (Babu *Umakali Mukerjee* and Babu *Sorashi Charan Mitter* with him) for the appellant.

Babu *Ram Churn Mitter* (Babu *Mohendra Kumar Mitter*, Babu *Dwarka Nath Mitter*, Babu *Narendra Kumar Bose*, Babu *Haraprasad Chatterjee* and Babu *Chandra Sekhar Banerjee* with him) for the respondent.

Babu *Ram Churn Mitter* took a preliminary objection that no appeal lay from the order of the Judge, as it did not come under any of the orders mentioned in s. 588 of the Civil Procedure Code.

The Advocate-General (Mr. *O'Kinealy*). The order complained of is an award or a portion of an award within the meaning of s. 54 of the Land Acquisition Act. The word *award* is used in the Act very loosely, *Ezra* v. *Secretary of State for India* (1); it means simply decision; an order under s. 33 of the Act is an award; the order is a judicial order, which can only be made on notice and after hearing the parties interested, and it materially affects the rights of parties. The matters dealt with under ss. 31-33 of the Act are important matters deciding the rights of parties to possession and are portions of an award within the meaning of s. 54 of the Act. The order of the Judge with regard to apportionment is a decree and is appealable; what the Judge has said in the present case is this, namely, that he decided that so much was the proper sum to be awarded and that with regard to the persons before him he decided that such and such a person is not entitled to possession and therefore the money should not be paid to him; that is the order in this case, [924] and it would be extraordinary if no appeal were allowed; it would be taking away the right of appeal from the most important part of the order. The proceedings under Chapter V are proceedings under the Act, and any decision of the Judge under that part is an award within the

(1) (1905) I. L. R. 32 Cal. 605; 9 C. W. N. 154.

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meaning of s. 54 and is appealable. Reference was made to *Sheorattan Rai* v. *Mohri* (1).

Babu *Ram Churn Mitter*. The order complained of cannot be an award. The word *award* is used in ss. 11, 18 and 26 of the Act; the word *award* is used only when the amount of the compensation or the area of the land or any question of apportionment is determined.

The Court having held that no appeal lay.

The Advocate-General (Mr. *O'Kinealy*) (Babu *Umakali Mukerjee* and Babu *Sorashi Charan Mitter* with him) in support of the Rules. The Judge has failed to do what the High Court by the remand order directed him to do; that is a material irregularity of procedure. Section 260 of the Code under which the Judge proposed to act in making the order for attachment has no application to this case.

Babu *Ram Churn Mitter*. The Judge has acted within his jurisdiction, and no case for interference under s. 622 of the Code has been made out. The order of the 12th of May was an order for the payment of money within the meaning of s. 254 of the Civil Procedure Code and may be enforced by attachment: s. 649.

The Advocate-General (Mr. *O'Kinealy*) in reply. The remand order of this Court directed the Judge to take all the circumstances of the case into consideration before making any order as to a refund, but the Judge did not take into consideration a material circumstance of the case, namely, the right which Nobin Kali had to this money; the question of the rights of the different parties was not gone into: this is a material irregularity. *Sheorattan Rai* v. *Mohri* (1). Section 649 of the Code cannot make s. 260 applicable to this case; this order for refund of money is not an [925] order for payment of money in a proper judicial proceeding; s. 649 contemplates an order for payment in a judicial proceeding between one party and another. At best the order may be executed as a money decree, but the order under s. 260 is wholly wrong.

HENDERSON AND GEIDT, JJ. This is an appeal against an order dated the 12th of May 1904, directing the appellant to refund a sum of Rs. 14,000 odd, which had been paid to her under a previous order of the District Judge of the 24-Pergannahs. The order appealed against was made in a proceeding under the Land Acquisition Act, which was before the District Judge.

A preliminary objection has been taken that no appeal lies. Section 54 of the Land Acquisition Act directs that subject to the provisions of the Code of Civil Procedure, applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under the Act. The question, therefore, is whether the order amounts to an award or may be treated as part of an award of the Court in a proceeding under the Act.

The circumstances, so far as it is necessary to state them, under which the order came to be made, are these:—

A certain house in Calcutta was acquired under the Land Acquisition Act, and the Collector having awarded Rs. 14,000 odd as compensation deposited the money in the Court of the District Judge, and made a reference under section 31. That was on the 14th of September, and, on the same day, the appellant, with the consent of one Nanda Lal Mookerjee, who claimed to be the sole reversioner on the death of the appellant, applied for the payment to her of the money in deposit. She

(1) (1899) I. L. R. 21 All. 354.

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claimed to be entitled under the will of Tarini Charan Banerjee and under a partition made in the administration suit, which appears to have been instituted with regard to her husband's estate, to a life interest in the house. The money was deposited by the Collector upon the ground that in his opinion she was not a person competent to alienate the property, which had been the subject of the Land Acquisition proceedings. On the following day, the 15th [926] of September, an order was made directing the money to be paid out to the appellant, and it appears that the money was subsequently withdrawn. Thereupon on the 8th of December the respondent, one of the granddaughters of the appellant, claiming to be entitled to the money as having been the absolute property of her deceased mother subject to the life-interest of the appellant, applied to the District Judge for an order calling upon the appellant to refund the money so that it might be invested or otherwise dealt with under section 32 of the Act. On the 6th of January 1904, the District Judge cancelled the order of the 15th of September, but he refused to order restitution of the money. The respondent then applied, under section 622 of the Code of Civil Procedure to this Court and obtained a Rule; and upon the hearing of that Rule an order was made remanding the case to the District Judge for a further consideration of all the circumstances of the case, and upon such further consideration for a decision as to whether or not an order should be made for the refund of the money. On the matter being reheard the District Judge on the 12th of May last made the order appealed against.

In our opinion the order is not an award, nor can it be treated as a portion of an award within the meaning of the Land Acquisition Act. It may be that the appellant was entitled, as she claims to have been, to a life-interest in the house which was acquired, and to have had exclusive possession of that house during her life-time, and further that she is now entitled to a like interest in the fund by which the house in question is now represented. It may also be that, if the money be refunded and the District Judge proceeds to make an order under section 32, such order would amount to an award and would be appealable as was held by the Allahabad High Court with regard to the order in the case of *Sheorattan Rai* v. *Mohri* (1) referred to in argument and by the Madras Court with regard to the order in the case of *Mahammad Ali Raja Avergal* v. *Ahammed Ali Raja Avergal* (2), which was not referred to. The order in the present case was not, as already stated, in our opinion an award. It was made apparently because the District Judge was of opinion that the previous order directing the payment out of the money was improperly made. Moreover [927] the order does not come under any of the orders mentioned in section 588 of the Code of Civil Procedure. We hold, therefore, that no appeal lies. The appeal therefore is dismissed with costs.

Two Rules were granted in connection with the same proceedings. These were directed to be heard along with the appeal, which has just been disposed of. The first was to show cause why the order of the 12th of May, against which the appeal was preferred, should not be set aside on the ground that the District Judge had acted illegally or with material irregularity, in that he had not acted in accordance with the directions given to him in the order of this Court remanding the case for rehearing.

We have considered the judgment of the District Judge in which the order directing the refund was made. It seems to us that he has considered the circumstances placed before him, and rightly or wrongly has come to

(1) (1899) I. L. R. 21 All. 354. (2) (1902) I. L. R. 26 Mad. 287.

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the conclusion that the order for refund was the proper order to be made. It is objected that the District Judge has not taken into consideration the right as life-tenant, which the appellant had in the house in question nor has he considered what bearing that had with reference to the money, which now represents that house, seeing that no case of waste or apprehended waste was made. The District Judge was allowed a wide discretion in considering the circumstances of the case and neither of these matters was specifically referred to in the order of remand. It is also said that the District Judge did not take into consideration certain allegations made by the appellant that the respondent or those who were acting for her were aware of the application, which was made for the withdrawal of the money.

We express no opinion as to whether the order which was made was the proper order to make under the circumstances of the case. But, in our opinion, there is nothing to show that in dealing with the matters before him, the District Judge did not act substantially in accordance with the directions that were given to him. That being so, the first Rule must be discharged, but without costs.

The second Rule was to show cause why the order, dated the 28th of November 1904, should not be set aside. That order was [928] made upon the application of the respondent in the appeal which has just been disposed of and the application purported to have been made under section 235 of the Code of Civil Procedure. The application was in the ordinary form for applications for the execution of decrees. The District Judge (though not the officer who had made the previous orders) after expressing his opinion that the petitioner was "in no way the decree-holder, and therefore could not come under section 260 of the Code of Civil Procedure except as *amicus curiæ* to ask the Court to vindicate its own injunction," stated that he considered that he was bound to issue an order under section 260 of the Code to enforce the order of refund, and he accordingly attached certain property of the appellant mentioned in the schedule to the petition upon which the application was made, and this is the order, which is now complained of. Except so far as the sections relating to the execution of decrees have been made applicable by section 649 of the Code the rules with regard to the execution of decrees would not apply to an order of this nature. Section 649 declares that the rules contained in Chapter XIX shall apply to the execution of any judicial process for payment of money, which may be desired or ordered by a Civil Court in any civil proceeding. It has been contended before us that the effect of this section is to apply, so far as they can be made applicable, the provisions of the chapter relating to the execution of decrees to the order for the payment or the repayment into Court of the Rs. 14,000, which had been withdrawn by the appellant. It seems to us that the terms of the section are sufficiently wide to cover such an order. The order which has been made, as already stated, purports to have been made under section 260. In our opinion, the section which would more appropriately apply would be section 254, which deals with a decree or order directing a party to pay money, as compensation or costs, or *otherwise*; and, it directs that such decree or order may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property in manner provided in the Code or by both. Having regard to the special terms of these sections, there may be some difficulty in their application; but it seems to us that, in a case of this kind, recourse may be had to any section which deals with an order for [929] the payment of money, and though it may be that section 260 was

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not the proper section, we think the order itself was right and that it may be justified under section 254. This Rule must also be discharged, but without costs.

Appeal dismissed. Rules discharged.

32 C. 930 (=2 Cr. L. J. 762)

[930] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

ZAFFER NAWAB *v.* EMPEROR.*

[10th and 19th May, 1904.]

Public Nuisance—Obstruction of ford by erection of bund—Prescriptive right of public to user of ford—Desuetude of right to erect bund—Use of one's right so as not to cause obstruction or nuisance—Criminal Procedure Code (Act V of 1898) s. 133.

Where the petitioner erected a *bund* in a river, the effect of which was to render it unfordable at a place where the stream had been fordable throughout the year, except for a few days during the freshets, and claimed the right to do so, but it was proved that for a period exceeding twenty years the public had used the ford, and had never been so obstructed in crossing the river on foot or in vehicles :

Held that the public had acquired a prescriptive right of way through the river and that the petitioner had lost his right of erecting a *bund* by long desuetude ;

that even if the petitioner had a subsisting right to dam the river by a *bund*, such right was subject to the maxim *sic utere tuo ut alienum non laedas* ;

that his action had caused an obstruction, which was not justifiable to the public, who were in the lawful enjoyment of a right of way ; and

that the order of the Magistrate to remove the obstruction was not illegal.

[Dist. 36 All. 209=13 A. L. J. 248=15 Cr. L. J 229=23 I. C. 181.]

RULE granted to Zaffer Nawab.

The petitioner, Zaffer Nawab, is the proprietor of a number of mouzas in the subdivision of Aurangabad in the district of Gaya, through or near the villages of which the river Poon Poon flows.

The district Board of Gaya has built a public road running north and south, and intersecting the river near a village called Kharanti. There is no bridge over the bed of the river at this point, but the water is only ankle deep in the dry season, and the stream is always fordable there all through the year, except for a few days during the freshets. A ferry boat is kept by the District Board, when the water is high. The petitioner erected a *bund* a [931] little lower down to feed two *pynes* or channels, which issue from the river and are utilized for the purposes of irrigation, and thereby increased the height of the water, thus rendering the river unfordable at the road crossing.

Upon the receipt of a police report alleging that a *bund* had been constructed, which had deepened the river and thereby caused an obstruction to passenger and vehicular traffic, and praying for the institution of proceedings under s. 133 of the Criminal Procedure Code, the Subdivisional Officer of Aurangabad drew up a conditional order under that section, on the 4th April in the terms mentioned in the judgment below.

* Criminal Revision No. 385 of 1904 against the orders passed by P. T. Rebello, Sub-divisional Officer of Aurangabad, dated April 11, 1904.