

merely because the deed of gift has not been filed. If he had tried the question of possession and actual receipt of rent, his decision on that point, however wrong or improper, would perhaps have been final according to law. But as the Judge has refused to try the real issue before him, and disposed of the case on a matter wholly irrelevant to the point before him, it must be held that he has refused to exercise a jurisdiction vested in him by law. Under the powers of superintendence given to this Court by the Charter Act, I hold that we can direct Courts subordinate to this Court to do their duty, and to see that they do not avoid to try and determine cases simply because a party to the suit has not done that which he was not imperatively required to do, and which is irrelevant to the real question which the Court had to decide. This I should consider a refusal to exercise a jurisdiction which he had under the law.

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IN THE
MATTER OF
THE PETITION
OF SRIMATI
NASSIE JAN

Rule absolute.

Before Mr. Justice Glover and Mr. Justice Mookerjee.

GAJADHAR PRASAD AND ANOTHER (DEPENDANTS) v. GANESH
TEWARI AND ANOTHER (PLAINTIFFS)*

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May 3.

Appeal—Purchaser of Defendant's Interest in Subject of Suit.

The purchaser of the right, title, and interest of a defendant in a suit in and to the land, the subject-matter of that suit, has no right as such to appeal from a decree passed against the defendant.

THIS was suit to obtain possession of a mangoe garden together with 3 bigas of land.

The defendant set up in his written statement that the plaintiff was not entitled to possession, but only to receipt of rent.

The Moonsiff dismissed the plaintiff's suit.

On the 28th May 1870, the Subordinate Judge in appeal passed a decree in favor of the plaintiff.

On the 30th May 1870, in execution of another decree against

* Special Appeal, No. 2438 of 1870, from a decree of the Subordinate Judge of Tirhoot, dated the 28th May 1870, reversing a decree of the Moonsiff of that district, dated the 24th January 1870.

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the defendant, his right, title, and interest in the property in dispute was sold and purchased by Gajadhar Prasad and Hanuman Prasad.

Gajadhar and Hanuman Prasad appealed to the High Court from the decree of the Subordinate Judge.

Baboo *Chandra Madhab, Ghose* (Baboo *Tara Nath Palit* with him) for the respondent, objected to the hearing of the special appeal, on the ground that as Gajadhar and Hanuman Prasad were no parties to the original suit, they could not of themselves file an appeal to the High Court, and cited *Judoo-puttee Chatterjee v. Chunderkant Bhuttacharjee* (1):

Baboo *Gopal Lal Mitter* for the appellant, contended that as the land had been sold by auction and the appellants had purchased it, they as owners of the land could maintain the appeal in order to defend their right. The defendant in the original suit had no right left, and consequently would not join the appellants in preferring the appeal. Besides, as the decree had already been passed by the Subordinate Judge, no application could be entertained by him to add the purchasers as parties to the suit. The case of *Judoo-puttee Chatterjee v. Chunderkant Bhuttacharjee* (1) was distinguishable as there was no question of fraud in this case.

GLOVER, J.—A preliminary objection is taken to the hearing of this special appeal, and I think it must be allowed.

The plaintiff, it appears, sued *Sarman Lal* and others for *khas* possession of land. The defendant admitted the plaintiff's right to get rent, but denied his right to manual possession. The plaintiff lost his case in the first Court, but gained it on appeal to the Subordinate Judge on the 28th of May 1870.

On the 30th of the month the rights and interests of the defendant in the property, sold under this decree were sold at an auction sale and bought by Gajadhar Prasad, who at once preferred this special appeal.

(1) 9 W. R., 309.

I am of opinion that he cannot maintain it. I am very doubtful, in the first place, whether a right of making a special appeal is a thing that can be sold in execution, but if it be, the purchaser could not bring the appeal alone. He ought at the least, to have joined the original defendant's name to his own, and have applied to the Court to have them so joined. There is no section in the Civil Procedure Code that provides for the purchase of a right of appeal bringing that appeal in his own name. He seems, on the contrary, only to obtain a *status* by joining himself on to the party in the suit who had originally the right of appealing, and the Court would decide under section 73 of the Code, whether such junction could properly take place. There ought to be some power of putting a stop to merely speculative litigation.

The case of *Judooputtee Chatterjee v. Chunderkant Butta charjee* (1), though not exactly in point with the present case, is analogous, and seems to lay down the proper course of procedure.

I think that this special appeal should be rejected on the preliminary point taken by the special respondent's pleader, and with costs.

MOOKERJEE, J.—I am, of the same opinion. The appellant is a purchaser of the rights of the defendant in an execution sale held after the decision of the lower Appellate Court. I do not find any provision in Act VIII of 1859 authorizing or empowering a purchaser to prefer an appeal against the decision passed in the presence of the plaintiff and defendant without joining the defendant as co-appellant or co-respondent in the appeal. The appellant does not appear in the record as a party to the suit. I do not think that he has any right to prefer this appeal without joining the defendant as a party.

Appeal dismissed.

(1) 9 W. R., 309.

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