APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson, and Mr. Justice Pontifex.

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HURDEO NARAIN SAHU (PURCHASER IN EXECUTION) *v.* GRIDHARI SINGH (JUDGMENT-DEBTOR).*

Appeal to Privy Council—Letters Patent, 1865, *cl.* 39—*Order made on Appeal —Order made under* 24 *&* 25 *Vict., c.* 104, *s.* 15—*Sale in Execution— Confirmation—Act VIII of* 1859, *s.* 259.

Certain property having been sold in execution of a decree, the judgment-debtor applied to have the sale set aside. This application was rejected; but a view of the order rejecting it was subsequently granted, and the sale set aside; and an application by the auction-purchaser for the cancelment of the order setting aside the sale was refused. Thereupon the, purchaser applied by petition to the High Court praying that the order made on review might be reversed. In his petition he submitted that "the sale ought to have been confirmed" when the application of the judgment-debtor to have it set aside was first rejected, but the petition did not contain a formal prayer for confirmation of the sale. A rule, however, was granted calling on the judgment-debtor to show cause why the order reversing the sale should not be set aside and the sale confirmed, which rule, after argument, was made absolute. The judgment-debtor having obtained leave to appeal to the Privy Council from the order making the rule absolute, the purchaser objected that such order was not appealable under cl. 39 of the Letters Patent, 1865, on the ground that it was not an order "made on appeal."

Held, that as the purchaser had obtained a rule calling on the judgment debtor to show cause why the sale should not be confirmed, and had allowed that rule to be made absolute, he could not contend that the order making the rule absolute was not an order made on appeal.

Semble.—Orders made by the High Court under s. 15 of 24 & 25 Vict. c. 104, are subject to appeal to the Privy Council.

Raja Syud Enaet Hossein v. *Rani Roushun Jehan* (1) distinguished.

APPEAL from an order of Markby, J., dated the 14th August 1873, admitting an appeal to Her Majesty in Council from an

* Appeal under cl. 15 of the Letters Patent of 1865, against the decree of Markby, J., made on the 14th of August 1873, in Rule No. 171 of 1873, connected with Privy Council Appeal No. 12 of 1873.

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order made by a Division Bench (Kemp and Pontifex), JJ.) on the 11th March 1873.

The appeal arose out of the following proceedings :—

In execution of a decree obtained against the present respondent Gridhari Singh, his property was sold on the 9th September 1872 and purchased by the appellant Hurdeo Narain Sahu. An application by Gridhari to the Subordinate Judge of Bhagulpore to have the sale set aside on the ground of irregularity and inadequacy of price was rejected on the 1st October 1872. No order, howe ver, confirming the sale was then made; and on the 4th Nove mber 1872, the Subordinate Judge admitted a petition from Gridhari applying for a review of the order of the 1st October, and stating that he had brought within the amount due under the decree with interest. Upon this, and without further enquiry, the Subordinate Judge ordered that the amount, if really brought, should be deposited, and on the 9th of November, in the absence of Hurdeo Narain, and without notice to him, he ordered the sale to be set aside. Thereupon, on the 11th November, 1872, Hurdeo Narain presented a petition to the Subordinate Judge, in which he contended that the order of the 9th November 1872 setting aside the sale was erroneous and without jurisdiction. This petition was rejected, and Hurdeo then applied to the High Court on the 23rd November 1872 to set aside the order of the 9th November, the following being the grounds raised in his petition :—

"1*st*.—That, under s. 257 of the Civil Procedure Code, the sale ought to have been confirmed when, on the 1st October 1872, the Subordinate Judge rejected the petition of the judgment-debtor to set aside the sale; that the right of the petitioner to have the sale confirmed became absolute, subject only to an appeal to the High Court. The Subordinate Judge, therefore, acted without jurisdiction in entertaining an application of review of the order disallowing the objections to the sale.

" 2*nd*.—That the order of the Subordinate Judge, dated the 1st October 1872, rejecting the judgment-debtor's objections to the sale, not being a decree, the provisions of s. 376 of Act VIII of 1859 do not apply, and the Subordinate Judge had no jurisdiction to entertain the application for review.

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"3*rd*.—That if, for argument's sake, it be conceded that the Subordinate Judge had jurisdiction to entertain the application for review, still the order that was passed for setting aside the sale was without jurisdiction, inasmuch as no notice was issued to the petitioner, and the procedure prescribed by Ch. xi of Act VIII of 1859 had not been carried out.

"4*th*.—That there is no evidence in the case that the property was sold at an under-valuation; and that, without evidence of material injury to the judgment-debtor, the Subordinate Judge had no jurisdiction to set aside the sale merely in consequence of some alleged irregularity in publishing and conducting the sale."

The petition set out the facts of the case and asked that the order of 9th November might be set aside, but did not conclude with any formal prayer that the sale should be confirmed. The learned Judges, however, of the Division Bench, to which the application was made (Kemp and Glover, JJ), granted a rule on the 14th December 1872 calling upon Gridhari Singh "to show cause why the order of the Subordinate Judge, dated the 9th of November 1872, reversing the sale held on the 9th of September 1872, should not be set aside and the said sale confirmed."

The rule came on for argument on the 11th March 1873, before Kemp and Pontifex, JJ., who directed that the order of the Subordinate Judge setting aside the sale should be reversed and the sale confirmed; the learned Judges expressed an opinion that "it was the duty of the Subordinate Judge, when he rejected the application and overruled the objections of the debtor, to pass an order confirming the sale which had become absolute, and to grant a certificate to the auction-purchaser under s. 259." From this order Markby, J., on the 14th August 1873, gave the judgment-debtor, Gridhari Singh, leave to appeal to Her Majesty in Council, and the purchaser, Hurdeo Narain, thereupon preferred the present appeal on the ground that the order of the 11th March was not subject to an appeal to Her Majesty in Council.

The *Advocate-General*, offg. (Mr. *Paul*) for the appellant.—The order of the 11th March confirming the sale was not "made on appeal," but upon an application under cl. 15 of the Letters

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Patent, 1865, and therefore is not one in respect of which cl. 39 of the Letters Patent, 1865, gave an appeal to Her Majesty in Council. The order objected to by the appellant was one setting aside a sale in execution; such order is final; see s. 257, Act VIII of 1859. In *Nasiruddin Khan* v. *Indronarayan Chowdhry* (1) a Full Bench held that the word "final" in s. 378 meant final as to appeals though not as to reviews. The appellant did not pray for the confirmation of the sale. [COUCH, C.J.:—He took a rule calling on the judgment-debtor to show cause why the sale should not be confirmed.] It does not follow that that meant "be confirmed by the High Court." [PONTIFEX, J.—The terms of the rule were certainly calculated to mislead the judgment-debtor.] However that may be, the order confirming the sale was in no sense "made on appeal." See *Raja Syud Enaet Hossein* v. *Rani Roushun Jehan* (2).

Baboo *Mohesh Chunder Chowdhry* for the respondent.—If the appellant had adopted the proper course instead of taking the rule in its present form, the order of the High Court would have been merely to set aside the order reversing the sale. The case would then have been remanded, and if upon such remand the original Court had confirmed the sale, the judgment-debtor might have appealed to the High Court and would have been entitled to appeal from its order, if against him, and he has not lost this right merely because, in order to avoid circuity and expense, he waived the objection to the rule as it stood. But secondly, it is submitted that the order making the rule absolute was practically an order made on appeal. The terms of s. 9 of 24 and 25 Vict., c. 104, show that the High Court possesses only two kinds of jurisdiction—original and appellate, and this also appears from the clauses of the Letters Patent of 1865, which refer to the civil jurisdiction of the High Court. This order was not made in exercise of original jurisdiction, and must therefore have been made in exercise of appellate jurisdiction.

The *Advocate-General* in reply.—24 and 25 Vict., c. 104, s. 9, confers on the High Courts not merely such jurisdiction as is

(1) B. L. R., Sup. Vol., 367. (2) 1 B. L. R., F. B., 1.

granted by the Letters Patent, but also "all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts" abolished by the Act save as by the Letters Patent might be otherwise directed. Many orders are made under s. 15 of that Statute which are not made on appeal.

Cur. adv. vult.

The judgment of the Court was delivered by.

COUCH, C. J.—(who, after stating the facts, continued) :—The case came before the learned Judges, apparently under the power, which it has been considered is given to the High Court by the 15th section of the High Courts Act, to annul or reverse the decision of Courts subject to its appellate jurisdiction where the Court considers that there is a want of jurisdiction, or the jurisdiction has been exceeded. If the Court, when it made the order of the 11th of March, had simply exercised the power of annulling or reversing the order of the Subordinate Judge, the case would have gone back to him, and it would follow, from the decision of this Court, that he would have confirmed the sale: His order confirming the sale would have been subject to an appeal to this Court, and the order of this Court, assuming that the subject-matter was of the appealable value, would have been subject to an appeal to Her Majesty in Council. Instead of this course being adopted, the present appellant took a rule calling upon the opposite party, to show cause why not only the order of the Subordinate Judge should be reversed, but why the sale should not be confirmed, and allowed that rule to be made absolute. In fact, the position which he takes is, that while he seeks to have the benefit of the order of this Court confirming the sale, he contends that there can be no appeal to Her Majesty in Council from it, as it was not made by the High Court on appeal within the meaning of the clause in the Charter which gives this appeal. I think that having as it were asked the Court to make the order confirming the sale, he cannot now be allowed to say that it was not an order made on appeal by this Court; it was only by this Court acting as on an appeal to it that such an order could be made. By the appellant's own act and consent a procedure has

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been adopted in which this Court has, as a Court of Appeal, confirmed the sale without the intermediate step being taken of sending the case back to the Subordinate Judge, by whom the sale would have been confirmed, and then there might have been an appeal to this Court. I think under those circumstances it is not open to the appellant to contend that this is an order which was not made on appeal, and therefore does not come within the 39th clause of the Charter.

Although it may not be necessary in this case to decide the general question whether orders made by the High Court in the exercise of the supposed power which is conferred upon it by the 15th section of the High Courts Act are subject to appeal to the Queen in Council, I am prepared to say that I think they do come within the 39th clause. I mean that if they are not strictly within the words, they are within the intention of it. This Court is asked, under the power which it is supposed to have to reverse or annul a decision of a Court subordinate to it on account of a defect in law, a want or an excess of jurisdiction. In some cases the Court has gone beyond this in the grounds upon which it has acted. It is true that the case does not come before the Court in the form of an appeal, either regular or special, but the effect of what is done by the Court in cases of this description is the same as if the order had been reversed on an appeal. If the Court is to exercise this power under the 15th section of the High Courts Act, I think the words of the 39th clause in the Charter should be construed liberally, and so as to give the person against whom the decision of the High Court is a right of appeal to Her Majesty in Council, provided of course that the subject-matter is of sufficient value. The words are "from any final judgment, decree or order of the said High Court of Judicature at Fort William in Bengal made on appeal." If we look at the substance, the real result of the providing, the effect which it has, I think it might be considered within the intention of these words. This opinion does not so far as our decision in this case goes, conflict with the decision of the Full Bench in *Raja Syud Enaet Hossein* v. *Rani Roushun Jehan* (1). There the order was made on an

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application for a review. Whether that decision be a sound one or not, and whether it would be upheld by the Judicial Committee of the Privy Council, it is not necessary now to consider. The present case is of a different description ; and for the reasons which I have given, I think that orders made by the Court under s. 15 of the Act of Parliament ought to be subject to appeal to Her Majesty in Council. The result therefore is that we dismiss the present appeal with costs.

Jackson, J., who is not able to be present to day, concurs in this judgment.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

1874
March 5 & 21.

E. L. GASPER (FALSELY CALLED GONSALVES) *v.* W. GONSALVES.

Matrimonial Suit—Suit for a Declaratory Decree—Jurisdiction—Indian Divorce Act (IV of 1869), ss. 4 & 18—Act VIII of 1859, s. 15—Invalid Marriage.

The High Court cannot entertain a suit of a matrimonial nature otherwise than as provided by the Indian Divorce Act; and therefore has no jurisdiction to make a decree of nullity on the ground that the marriage was invalid.

Semble.—A marriage celebrated in accordance with the law of the domicile of the parties may be valid, although it would be invalid by the law of the place where the marriage was celebrated.

THIS was a suit for a declaratory decree that the plaintiff was a *feme sole*, and not the wife of the defendant, and for an injunction that the defendant might be restrained from asserting that she was his wife, and from attempting to enforce as against her any right as her husband. The facts of the case were as follows :—The plaintiff, an infant of the age of 18 years, was, on the 14th May 1855, residing in Calcutta, where her mother, her only parent then alive, was domiciled. It was not proved whether the plaintiff was a Protestant or a Roman Catholic. On the same date the defendant Gonsalves was also living in