

Before Mr. Justice Prinsep and Mr. Justice Ghose.

LALA PRYAG LAL AND OTHERS (DEFENDANTS) v. JAI NARAYAN
SINGH AND ANOTHER (PLAINTIFFS.) *

1895
February 8.

Public Demands Recovery Act (Bengal Act VII of 1880)—Order of Revenue Commissioner setting aside sale—Review of order setting aside sale—Civil Procedure Code, section 566—Remand—Power of High Court in second appeal.

A revenue-paying *taluk* was sold for arrears of *dad* cess under the Public Demands Recovery Act. The sale was set aside on appeal by the Revenue Commissioner, but on an application for review made to his successor, the sale was confirmed and the purchaser took possession. In a suit to recover possession of an 8-annas share of the *taluk* on the grounds, among others, that the order on review was passed without jurisdiction and without notice to the plaintiffs, and as such conferred no title on the purchaser, the District Judge, on appeal, held that the order on review not having been set aside remained in force, but he remanded the case under section 566 for trial of the question of notice. On the case coming back to the Appellate Court, before another Judge, he held the order on review to be *ultra vires*, and the trial of the question of notice to be unnecessary. The defendants preferred a second appeal against the last judgment.

Held, that on the hearing of the appeal, the entire case, including the order of remand, was open to consideration, and that the High Court had power to determine whether that order or the order subsequently passed was correct on the merits.

Held also, that the provisions of the Code of Civil Procedure relating to reviews of judgment were not extended to proceedings under Bengal Act VII of 1868 and VII of 1880, and that in the present case, the order passed on review, confirming the sale, was *ultra vires* and of no effect.

Held, further, following the ruling in *Sadhu Saran Singh v. Panchdeo Lal* (1) that an appeal lay to the Revenue Commissioner against the Collector's order affirming the sale.

THE facts of this case, so far as they are material for the purpose of this report, are sufficiently stated in the judgment of the High Court.

* Appeal from Appellate Decree No. 1574 of 1893, against the decree of H. Holmwood, Esq., Officiating District Judge of Bhagulpur, dated the 28th June 1893, reversing the decree of Babu Gopal Chandra Bose, Subordinate Judge of Bhagulpur, dated the 2nd May 1892.

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Sir *Griffith Evans*, Dr. *Trailakyanath Mitra* and Babu *Jogesh Chundra Dey*, for the appellants.
 Babu *Rajendra Nath Bose* and Dr. *Ras Behari Ghose*, for the respondents.

The judgment of the Court (PRINSEP and GHOSH, JJ.) was delivered by

PRINSEP, J.—This is a suit brought by Darsanbati Koeri and her husband, Joy Narain Singh, to obtain possession of a revenue-paying *taluk* which had been sold under a certificate issued under Bengal Act VII of 1880 and purchased by the defendant, who, on his death, is represented by his legal representatives.

It seems that the name of Joy Narain Singh was recorded on the Collector's register, but that on the 22nd November 1884 Darsanbati obtained an order for registration of her name in the place of her husband as purchaser from him. The certificate under Act VII of 1880 bears date the 10th December 1884, but notwithstanding the order for registration of Darsanbati's name proceedings were taken against Joy Narain, and not against Darsanbati. Darsanbati then applied to the Collector to set aside the sale, but her application was refused on the 4th June. She next applied for a review of that order, but this was also refused on the 24th of the same month. An appeal was made to the Commissioner, Mr. Barlow, who set aside the sale by an order of the 23rd September 1885. This was followed by an application for review of the said order by the purchaser, which came before the Commissioner, Mr. Alexander, who, on 8th June 1886, set aside the order of his predecessor, Mr. Barlow, and restored the Collector's order affirming the sale. The auction-purchaser has accordingly obtained possession, and the object of this suit is to set aside the sale and the possession acquired under it.

The Sub-Judge considered that the only point for his decision was whether the order of Mr. Alexander gave a valid title to the defendant as purchaser at the sale held by the Collector; and, finding that it was a valid order, he dismissed the suit. In appeal the District Judge, Mr. Badcock, found that only two points were raised, first, that "as the plaintiffs have never taken any steps to get Mr. Alexander's order set aside, they cannot regard it

as a nullity ; and, second, that the order was legal, because every Judge has an inherent right to review, to correct, or reverse any error or defect." The District Judge found that Mr. Alexander's order was illegal, but he agreed with the Sub-Judge on the first point, holding that, "when an incorrect order is passed, it should be set aside in a proper way by the person prejudicially affected by it, and he is not entitled to ignore the proper procedure and, at some future time, to come forward and claim that the order should be treated as a nullity." The meaning of this is not clear ; for neither the Sub-Judge nor the District Judge has stated what was the proper course for the plaintiffs to take, or why the Civil Court had no jurisdiction in the matter if the order of Mr. Alexander was passed without jurisdiction so as to make it of no effect. Probably they meant to hold that the only remedy open to the plaintiffs was to apply to the Board of Revenue for the exercise of the power of supervision and control conferred by section 24, Bengal Act VII of 1880. But although the District Judge held that he could not touch Mr. Alexander's order for the reasons stated, he remanded the suit on the objection that Darsanbati was not properly before Mr. Alexander, because she had never received any notice of that application.

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On remand, the Sub-Judge found that it was not proved that Darsanbati had received such notice. It would therefore seem that if the appeal had been tried out by Mr. Badcock, the plaintiffs would have succeeded. It seems hardly necessary to point out that Mr. Badcock's course of reasoning is unsound, for if the plaintiffs had no right to appeal to the Civil Court, because the order of the Commissioner, Mr. Alexander, could not be called into question, except by a procedure not resorted to, the Civil Court could not consider whether Mr. Alexander had properly tried the matter before him, because Darsanbati, the party concerned, had not received notice of that proceeding.

Mr. Badcock, however, had vacated office, and the appeal was tried by another District Judge, Mr. Holmwood, who apparently tried it on its merits and without regard to the findings of Mr. Badcock. Mr. Holmwood found that the order of the Commissioner, Mr. Alexander, was illegal, because he had

1895 no power to review the order previously passed by his predecessor in office, the law not giving a review of judgment in such cases.

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In second appeal, it is contended that Mr. Holmwood had no power to try the appeal, except on the point on which it had been remanded by his predecessor, and that his order is bad, because it reconsidered and set aside the findings of Mr. Badcock.

But, as has been already pointed out, it would be impossible to maintain Mr. Badcock's order by following the course of reasoning taken by him. Moreover, we should not be justified on the grounds pressed on us on this second appeal to remand the case to the District Judge for trial on the issue fixed by Mr. Badcock, so as to leave it open hereafter to the plaintiff, if dissatisfied with the order so passed, to raise before us on another appeal—an appeal preferred by him—the correctness of the findings of Mr. Badcock in concurrence with the Sub-Judge on the effect of Mr. Alexander's order. It seems to us that our duty is, if possible, in this appeal to endeavour to terminate this litigation rather than, by a rigid adherence to what probably may be the letter of the law in regard to the power of the lower Appellate Court, as exercised by Mr. Holmwood, to prolong these proceedings and the postponement of the ultimate decision of the real point in issue, *viz.*, the legal effect of Mr. Alexander's order.

It seems to us rather that, on the hearing of this appeal, the entire case, including the order of remand passed by Mr. Badcock, is open to consideration; and we have the power to determine whether that order or the order subsequently passed by Mr. Holmwood is correct on the merits.

There can be little doubt also that Mr. Holmwood found himself embarrassed by the form in which the appeal was presented to him, and endeavoured to deal with it in a complete manner, so as to settle the case once for all by having the entire case re-argued. He points out that, if under Mr. Badcock's view of the law, Mr. Alexander's order was illegal, all proceedings taken by Mr. Alexander were without jurisdiction, and a nullity, and he quotes authority for this. It is unnecessary to discuss how far the course taken by Mr. Holmwood was strictly correct, for we have no doubt

that it is our duty to determine the point in issue, the effect of Mr. Alexander's order, on which he and Mr. Badcock have expressed different opinions. 1895

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It therefore becomes necessary for us to determine whether, as contended by the appellants, plaintiffs, the order of the Commissioner, Mr. Alexander, was *ultra vires*, as he had no authority to review his predecessor's order, and, if so, whether the purchaser has any right or title to the property in suit. But it is objected on behalf of the defendants, appellants, that, even if there be no right of review, there was no appeal to the Commissioner, and that consequently the order of the Collector affirming the sale is the only valid order, and this suit should be dismissed.

Now, as regards the right of appeal, it is sufficient to draw attention to the case of *Sadhu Saran Singh v. Panchdeo Lal* (1), in which it was held that the law allows an appeal against such an order of the Collector. We observe that the same point was raised in the case of *Ram Logan Ojha v. Bhawani Ojha* (2), but it was not decided, though it would seem from the judgment that some doubt in regard to the law expressed by the first decision was entertained by the learned Judges. After full consideration of the arguments in this appeal, we agree in the opinion expressed by Mitter, J., in the case first mentioned. We have no doubt that the first order passed by Mr. Barlow on the 23rd September 1885 is good in law. The heading of his judgment seems to indicate that it was on an appeal against the order of the Collector of Bhagulpur, not in affirming the sale, but in rejecting the review to reconsider the order affirming the sale. The object of the appellant, however, was no doubt to remove the effect of both those orders, that is, to set aside the sale and so to get herself restored as proprietor of the property which had been sold; and the body of the judgment shows that the appeal was really directed against the order affirming the sale. We attach no importance to the heading of the order, which seems to have been a misdescription, or, it may be, an imperfect description, of the matter brought before the Commissioner, which was intended to be an appeal and was so tried. There is, therefore, no valid objection

(1) I. L. R., 14 Calc., 1.

(2) I. L. R., 14 Calc., 9.

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I cannot admit that such a power is inherent in every Judicial or Revenue Officer. It is a power expressly given by law to Judicial Officers under certain conditions, and therefore it cannot be assumed that when not so given it is inherent in every officer. If this had been so, there need not have been any legislation on the subject. We cannot hold that all this legislation was unnecessary. But in respect of the matters now before us, we find that those portions of the Code of Civil Procedure which confer the power to review a judgment and regulate the exercise of such powers, have not been extended to proceedings under the Bengal Acts of 1868 and 1880; section 19 of the Act of 1880 declares that certain portions of the Code of Civil Procedure shall be applicable to proceedings taken in regard to certificates, but we find that the portion of the Code which refers to reviews of judgment forms no part of the law set out in that section. The sections of the Code of Civil Procedure relating to appeals are also omitted, but the reason for this omission is clear. The right of appeal is conferred by Bengal Act VII of 1868, section 2, and this, as it was held in the case of *Sadhu Saran Singh v. Panchdeo Lal* (1), in which we concur, was held to be applicable to proceedings under the Act of 1880 by reason of section 2 of that Act. There is no provision made for an application for review of a judgment passed on appeal by a Commissioner under the powers conferred by section 2 of Bengal Act VII of 1868. The Acts of 1868 or 1880 are both of them silent in this respect. We find, rather, that the law has provided other means for correcting an order passed by the Commissioner on appeal, for section 24 of the Act of 1880 has conferred on the Board of Revenue the power of general supervision and control over proceedings of Commissioners under that Act, so that any person who may be dissatisfied with an order passed by a Commissioner on appeal has thus his remedy by bringing it under consideration of the Board of Revenue. By not providing for a review of such an order, either expressly or by extending to such orders the Code of Civil Procedure relating to reviews of judgment, and by giving to a superior

(1) I. L. R., 14 Cal., 1.

authority; the Board of Revenue, the power to supervise and control any order passed by a Commissioner, the Legislature has, in my opinion, declared an intention that such an order shall not be open to review, but is open to revision by the Board of Revenue with the same result.

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For these reasons I am of opinion that the order of Mr. Alexander affirming the sale was *ultra vires* and is of no effect, and that, under the order passed by Mr. Barlow on the 23rd September 1885, which declared the sale to be set aside, the purchaser has no valid title.

For these reasons the appeal is dismissed with costs.

S. C. C.

Appeal dismissed.

Before Mr. Justice Ghose and Mr. Justice Rampini.

DWARKA NATH MISSER AND OTHERS (JUDGMENT-DEBTORS) v.
BARINDA NATH MISSER (DECREE-HOLDER.)*

1895

January 8.

Partition—Decree in suit for partition—Code of Civil Procedure (Act XIV of 1882), section 396—Application for effecting partition—Limitation Act (XV of 1877), Schedule II, Articles 178 and 179.

Plaintiff obtained a decree for partition in 1885, and first made an application to have the partition effected by an arbitrator in 1886. This application was struck off, and a second application was made on 23rd July 1888. The arbitrator then declined to act, and the application was struck off. The present application was made on the 1st August 1891, and an objection was raised that more than three years having elapsed from the date of the previous application, the present one was barred under Article 179 of Schedule II of the Limitation Act. The lower Court of appeal held that Article 178 and not Article 179 applied to the case, but that the plaintiff having applied within three years from the date when the arbitrator declined to act, the application was in time.

Held, with reference to the provisions of section 396 of the Code of Civil Procedure, that the proceedings for the purpose of effecting the partition were proceedings in the suit itself and not proceedings in execution of the decree; that no formal application was necessary, the Court being bound to proceed with the suit and make a final decree; and that the application made on the 1st August 1891 was not one to which limitation was applicable.

* Appeal from Order No. 54 of 1894 against the order of F. Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 28th of September 1893, reversing the order of Babu Anrito Lal Pal, Subordinate Judge of Ranchi, dated the 30th of June 1893.