

it was admitted by the learned vakil for the appellant that the plea of limitation also could not succeed.

On these grounds we are of opinion that this appeal should fail, and we accordingly dismiss it with costs.

H. T. H.

Appeal dismissed.

1894

AJUDHIA
PERSHAD
v.
BALDEO
SINGH.

Before Mr. Justice Ghose and Mr. Justice Gordon.

ROGHU SINGH (AUCTION-PURCHASER) v. MISRI SINGH (APPLICANT) AND ANOTHER (JUDGMENT-DEBTOR) AND ANOTHER (DECREE-HOLDER)*

1894

May 18.

Appeal—Bengal Tenancy Act (VIII of 1885), section 173—Order setting aside sale in execution of decree for rent.

No appeal lies from an order setting aside a sale under section 173 of the Bengal Tenancy Act.

THIS was an application under section 173, sub-section 3 of the Bengal Tenancy Act, to set aside an execution sale on the ground that the purchase had been made by the judgment-debtor in the name of Roghu Singh. The applicant Misri Singh claimed to be a co-sharer with the judgment-debtor Khiali Singh, though he was not sued for the rent in execution of the decree, for arrears of which the sale took place.

The Munsif, after holding that the application was not barred by limitation, found on the merits that Khiali, the judgment-debtor, had himself purchased the property in order to deprive Misri Singh, the applicant (who was found to be a relative of the debtor), of it. The Munsif, therefore, ordered that the sale be set aside.

The auction-purchaser Roghu Singh appealed to the Judge, who held that no appeal lay from the order, and this is the only question material to this report. As to this the Judge said:—

“In this case I am asked to hear an appeal from an order of the Court below setting aside a sale under section 173 of the Bengal Tenancy Act. It is admitted on both sides that such an order is not appealable under section 588 of the Civil Procedure Code; but it is contended for the appellants that not being provided for in section 588 it must be taken to be a ‘decree.’ I cannot agree to this proposition. The word ‘decree’ and the word ‘order’ are both defined in the Civil Procedure Code; and if all orders which are not included in section 588 are decrees, then there is no occasion for any definition and no occasion for section 588 being enacted at all. Section 588 says that

* Appeal from Order No. 216 of 1893 against the order of R. Holmwood, Esq., Officiating District Judge of Bhagulpur, dated 2nd of June 1893, affirming the order of Babu Soshi Bhusan Chowdhri, Munsif of Monghyr, dated 14th of April 1893.

1894 the orders mentioned therein are the only orders appealable under the Code.
 ROGHU SINGH v. MISRI SINGH. There must therefore be other orders contemplated by the definition. An order setting aside a sale cannot in my opinion be a decree, as it is not a formal expression of an adjudication upon any right claimed or defence set up: it is an order in a proceeding incidental and subsidiary to a decree. It certainly does not make the receiver of the relief a decree-holder as defined in the Code. When the definition of a decree says that an order specified in section 588 is not within the definition, it must be held that the same class of orders under other Acts are not decrees, and therefore not appealable unless expressly made so by law, for section 588 itself excludes such orders from the ordinary appellate jurisdiction in decrees, and makes them miscellaneous matters. The setting aside of a sale is not contemplated in section 244 of the Civil Procedure Code, so that I must hold that I have no jurisdiction to entertain this appeal. There is no ruling on the subject so far as the Court and the pleaders engaged have been able to discover, and it is with a view to getting the question authoritatively decided that the appellant has preferred to take my order on appeal rather than to withdraw the appeal and petition the High Court against the Munsif's decision."

The appeal was, therefore, dismissed with costs; and Roghu Singh appealed to the High Court on the ground that the Judge was in error in holding that the order under section 173 of the Bengal Tenancy Act was not appealable.

Dr. *Trailokya Nath Mitter* and *Babu Degumber Chatterjee* for the appellant.

Babu Rajendro Nath Bose, and *Babu Amarendro Nath Chatterjee* for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

We think that the learned District Judge was right in holding that no appeal lay against an order setting aside a sale under section 173 of the Bengal Tenancy Act. The order in question could not be regarded as a "decree" as defined by the Code of Civil Procedure, nor could it fall within section 244 of that Code, because the appellant was an outsider, and not a party to the suit in which the decree was made. The Bengal Tenancy Act itself does not provide for an appeal against an order like this, and we are not aware of any provision in the Civil Procedure Code allowing an appeal against such an order.

That being so, this appeal will be dismissed with costs.

Appeal dismissed.