

APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

1897

May 4.

MATHURA NATH GHOSE (AUCTION-PURCHASER) v. NOBIN CHANDRA KUNDU BISWAS (PETITIONER) AND ANOTHER (DEGREE-HOLDER) AND OTHERS (JUDGMENT-DEBTORS.)^{*}

Second appeal—Order refusing to set aside a sale—Appeal from an order remanding a case—Code of Civil Procedure (Act XIV of 1882), section 588, clauses 16 and 28, and section 562.

Though orders under section 562 of the Code of Civil Procedure are appealable under clause 28 of section 588, yet the provisions of the latter section are subject to its last paragraph which says that "orders passed under this section shall be final"; and, therefore, no second appeal lies from an order passed under section 588, clause 16, notwithstanding that it is an order passed by the lower Appellate Court remanding the case under section 562, inasmuch as the order was made in a case which was itself an appeal from an order allowed by section 588 of the Code.

THE facts of the case, so far as they are necessary for the purposes of this report, and the arguments, appear sufficiently from the judgment of the High Court.

^{*} Appeal from Appellate Order No. 427 of 1896, against the order of Babu Syam Chand Roy, Subordinate Judge of Jessore, dated the 30th of September 1896, reversing the order of Babu Bidhu Bhushan Banerjee, Munsif of that District, dated the 16th of May 1896.

mortgage, settling the conditions of sale, and causing the sale to be duly advertised.

"A sale is usually advertised for a month (see section 290 of the Civil Procedure Code) except when any property comprised in the mortgage is out of Calcutta. It is then advertised for a longer period, and is also proclaimed in the District where the property is situate, the procedure being regulated by rules 392 and 403, Belchambers' Rules and Orders, p. 194.

"A sale may be postponed if the Registrar is unable to attend on the day appointed for the sale, or for want of bidders or sufficient bidding, "or for other sufficient cause, or with the consent of the parties;" see rules 407, 408 and 412, Belchambers' Rules and Orders, pages 195 and 196. Instances may be referred to where a sale has been repeatedly postponed, requiring another

Dr. *Rash Behary Ghose* and *Babu Kishori Lall Sankar* for
the appellants.

Mr. *N. Chatterjee* and *Babu Nalini Nath Sen* for the
respondents.

The judgment of the High Court (MACLEAN, C.J., and
BANERJEE, J.), was delivered by

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BANERJEE, J. (MACLEAN, C. J., concurring).—This appeal arises out of an application made by the respondent for setting aside the sale of a *ganti* tenure in execution of a decree for arrears of rent, on the allegation that he holds a subordinate tenure under the *ganti* tenure. The application purported to be made under sections 244 and 311 of the Code of Civil Procedure.

day to be fixed and the sale to be re-advertised or re-proclaimed under rules 413 and 414, the effect being to defer the day of payment.

“It should also be noted that time is always allowed to the purchaser to pay the purchase money [see rule 393 and form of conditions of sale, *Belchambers’ Rules and Orders*, pages 191 and 460]; that he may fail to do so in due time, and it may be necessary to proceed against him under rule 425; that, on the other hand, he may, if not prepared to accept the title, pay the purchase money into Court under rule 424 subject to his right to object to the title; that generally after a sale objection may be taken and the sale set aside, or compensation allowed for error or misstatement in the particulars or description of the property: see rules 420 to 423, pages 197 and 198, and form of conditions of sale, p. 460.

“It will thus be seen that the purchase money can in no case be immediately available for payment to the mortgagee, and may in some cases be withheld for an uncertain period dependent upon the result of proceedings by or against the purchaser.

“According to the decision of the Allahabad High Court, a mortgagee cannot, under any circumstances, be allowed interest “beyond the date which has to be fixed within six months from the date of the decree.”

“Previous to the Transfer of Property Act decrees for sale were made by the Calcutta High Court in mortgage suits as well as in other suits. Its subsidiary rules of procedure passed under clause 37 of the Letters’ Patent, 1865, and under section 652 of Act X of 1877 [as amended by Act 12 of 1879], are contained in *Belchambers’ Rules and Orders*, and include a body of rules for regulating sales by the Registrar (p. 189 *et seq*) to which attention is called and especially to the two following rules which came into effect on the 1st of May 1885.

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The Munsif held, and I think rightly held, that section 244 has no application to a case like the present; and he rejected the application on the ground that the applicant was not entitled to make any such application under section 311.

Against the order of the Munsif the applicant preferred an appeal; and the learned Subordinate Judge in the Court below has set aside the order of the Munsif and directed him to entertain the application and to dispose of the same according to law. Against this order of the Subordinate Judge the auction-purchaser has preferred this second appeal.

At the hearing of the appeal, a preliminary objection is taken

“Rule 555 at p. 228.—‘Unless otherwise ordered interest shall be computed on a mortgage, at the rate mentioned therein, until the end of six months from the date of the decree or until the end of any further period to which the time may be enlarged. Such interest shall be added to the principal, and thereafter interest shall be computed on the aggregate amount at the rate of six per cent per annum.’

“Rule, 324 at p. 168.—‘Unless the Court or a Judge shall otherwise order every decree in a suit for the sale of mortgaged property shall contain a direction that if the money to arise by such sale shall not be sufficient for the payment in full of the amount of principal, interest, and costs payable under the decree, the defendant do pay the amount of the deficiency, with interest at the rate of six per cent. per annum.’ See the note under this rule.

“In mortgage suits the procedure was regulated by the rules of Court and the Civil Procedure Code, until the Transfer of Property Act came into effect.

“Section 104 of that Act gives the High Court power to make rules as follows: ‘The High Court may from time to time make rules consistent with this Act for carrying out in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter.’

“Under that section the Calcutta High Court made rules for the Original Side, a printed copy of which is annexed. The rules regulating sales by the Registrar were then considered, with the result that some were repealed and some amended. Rule 555 which directs the allowance of further interest was amended, but without modifying or in any way affecting that direction.

“It thus appears that the interpretation of the law by the Allahabad High Court is opposed to the interpretation of the law by the Calcutta High Court as evidenced by its rules. And it should be added that the course of practice followed by the Calcutta High Court has been uniformly in conformity with its rules.”

by the learned Counsel for the respondent, that no second appeal lies in this case. The ground upon which the preliminary objection is based is this, that the order passed by the Court of appeal below was an order passed under section 588, clause 16, in an appeal from an order of the Munsif refusing to set aside a sale of immoveable property, and being an order of that nature is final, as provided by the last paragraph of section 588.

In answer to this objection the learned Vakil for the appellant urges that this appeal is allowed by clause 28 of section 588 of the Code. It is argued that the order appealed from is a remand order by the lower Appellate Court made under section 562, and is therefore appealable; and the cases of *Kirte Mohaldar v. Ramjan Mohaldar* (1), *Collector of Bijnor v. Jafar Ali Khan* (2), and *Mohadev Narsingh v. Ragho Keshav* (3) are relied upon as lending support to this contention.

But we are of opinion that the preliminary objection ought to prevail, and that the cases cited for the appellant are distinguishable from the one before us. It is true that orders under section 562 remanding a case are appealable under clause 28 of section 588; but the provisions of the section are subject to the last paragraph of the section, which says that "orders passed in appeals under this section shall be final." The effect of this last paragraph of the section is to bar an appeal from an order passed in an appeal allowed under the section; and where a remand order is made in a case which is itself an appeal from an order allowed by this section, the order, even though it be one remanding the case, is, we think, an order that is not appealable. To reconcile clause 28 of section 588 with the last paragraph of the section, we must read clause 28 as referring only to orders made under section 562 in cases which are appeals from decrees.

As for the cases cited, they are all of them cases of remand orders made, not in appeals from orders, but in appeals from original decrees. The objection that was raised in those cases to an appeal from a remand order being entertained was this, that the cases being of the Small Cause Court class, and a second

(1) I. L. R., 10 Cal., 523.

(2) I. L. R., 8 All., 18.

(3) I. L. R., 7 Bom., 292.

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1897 appeal being barred in such cases by section 586, an appeal from a remand order which would be a second appeal, would not lie; and the objection was overruled upon the ground that clause 28, section 588, was not subject to the exceptional provisions of section 586, which was a provision relating to appeals from appellate decrees and not to appeals from orders. Whether that view of the law is right or not is a question which we need not consider in this case. It is enough to say that this case is clearly distinguishable from the cases cited.

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That being so, we think effect ought to be given to the preliminary objection, and this appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

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March 24.

ADHAR CHANDRA DASS (DECREE-HOLDER) v. LAL MOHUN DAS
AND OTHERS (JUDGMENT-DEBTORS.)^a

Limitation Act (XV of 1877), Schedule II, Article 179, clause (4)—Step in aid of execution of decree—Application for substitution of the heirs of the deceased judgment-debtor—Application in accordance with law—Code of Civil Procedure (Act XIV of 1882), sections 234, 235, 248 and 273.

An application by the judgment-creditor for substitution of the heirs of the deceased judgment-debtor, though disallowed, is an application in accordance with law to take some step in aid of execution of the decree within the meaning of sub-section 4 of Article 179 of the Limitation Act.

An application by the judgment-creditor for the execution of his decree, which has been attached, as well as an application by him to execute another decree which he had attached in execution of his own decree, though disallowed, are applications in accordance with law.

THE facts of the case and the arguments appear sufficiently from the judgments of the High Court.

Babu *Manmatha Nath Mitter* for the appellant.

Babu *Baikant Nath Das* for the respondents.

^a Appeal from Order No. 320 of 1896, against the order of H. E. Ransom, Esq., Officiating Additional Judge of Dacca, dated the 5th of June 1896, reversing the order of Babu Shyam Chunder Roy, Officiating Subordinate Judge of that district, dated the 6th of September 1896.