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now. This principle is also recognized in the new Code of Civil Procedure, s. 13, expl. II. On the merits, we think that the possession of the defendants cannot be disturbed. (The learned Judge then proceeded to examine the evidence and continued.) When, therefore, it is apparent that this talook has been known and recognized by the ancestors of the parties in the present suit, and that the defendants or their ancestors have been in continuous possession of the lands appertaining to their share for upwards of seventy years, we think that it does not lie in the power of the plaintiffs to disturb this existing possession. If the plaintiffs could truthfully assert that they knew nothing of the existence of this talook in the possession of the defendants, and accepted the lands assigned to them under the butwara, because they were under the impression that the assets were calculated upon the rental payable by the ryots, which rental they were to receive, this would be good ground for applying to the Board of Revenue to set aside the butwara. But there is no jurisdiction in the Civil Court to disturb a butwara which has been effected by the properly-constituted authorities acting in accordance with the law.

The suit was, therefore, rightly dismissed by the Subordinate Judge.

Accordingly we affirm the judgment of the Subordinate Judge and dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878 *Mar.* 14.

POGOSE (JUDGMENT-DEBTOR) *v.* CATCHICK AND ANOTHER (DECREE-HOLDERS).*

Charter Act (24 and 25 Vict., c. 104), s. 15—Erroneous Order—No right of Appeal—Putting a Party on the Record who is not Legal Representative of a deceased Person.

Where a decree had been obtained against a British subject domiciled in India, who subsequently died intestate, and an order was made reviving the decree against one of his children, and ordering execution to proceed before

* Miscellaneous Regular Appeal, No. 342 of 1877, against the order of Baboo Nuffur Chunder Bhutto, the Officiating Second Subordinate Judge of Zilla Backergunge, dated 23rd August 1877.

letters of administration to his estate had been taken out, and without inquiry being made as to who were his legal personal representatives,—*held*, that although no appeal lay against the order, yet that as it was clearly erroneous, and as, under the circumstances of the case, it must lead to the greatest confusion and injury to the interests of the parties, if the execution was proceeded with, the Court was justified in interfering under s. 15 of the Charter Act.

IN this case a decree had been obtained against one Peter Nicholas Pogose, a British subject domiciled in India. He subsequently died intestate. The lower Court, before letters of administration were granted to his estate, and without enquiry as to who were his legal personal representatives, revived the decree against the appellant, one of his children, and ordered execution to proceed.

Mr. *McNair* for the appellant.

Baboo *Bhoobun Mohun Dass* for the respondents.

The judgment of the Court was delivered by

MARKBY, J.—In this case we think that the order of the Subordinate Judge, so far as it makes the present applicant, Mr. P. N. Pogose, a party to these execution proceedings, must be set aside.

The original judgment-debtor was dead. He was an Armenian, and, therefore, succession to his estate is governed by the Succession Act, and the only person who could be his representative is the person indicated by that Act. The only difficulty at all about the matter is whether there is an appeal against this order of the Subordinate Judge or not. Whatever our own opinion may be, however, it is better that in this particular case we should follow the decision of Mr. Justice Ainslie and Mr. Justice McDonell given in a somewhat similar case on the 28th August 1877, in which it was held that no appeal lies (1),

(1) See *Raygo* v. *Pogose*, Misc. Sp. Appeal, No. 104 of 1877 (Ainslie and McDonell, JJ.) in which the learned Judges held that s. 364 of Act VIII of 1859 prohibited an appeal from an order made on proceedings taken under s. 210 of the same Act. The rule applicable on such cases being analogous to that laid down in respect of s. 208 by the Privy Council in *Abidunnissa Khatoon* v. *Amirunnissa Khatoon*, I. L. R., 2 Calc., 327.

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and for the purposes of this case adopting that decision, we hold that no appeal lies in this case also. But nevertheless, although no appeal lies, we think it clearly a case in which we ought not to allow this erroneous order of the Subordinate Judge to stand. It is quite clear that it must lead to the greatest possible confusion and injury to the interest of the parties in this case, if this execution is proceeded with in the shape in which the proceedings now stand. Warning has already been addressed to the Subordinate Judge in the very judgment to which I have referred. Possibly, that judgment was not before him when he made the order now complained of. But it appears that there was before him another order of this Court in which it was distinctly pointed out that he had done entirely wrong in putting Mr. P. N. Pogose upon the record in defiance of the Succession Act. We are wholly at a loss to understand why the Subordinate Judge in spite of warnings of this Court insists on persevering in this course, and we think that on this occasion we are justified in interfering under s. 15 of the Charter Act. We do not intend to differ from what the Chief Justice said in the case, which was heard before himself and Mr. Justice Mitter (1). The Subordinate

(1) *The 10th Sept.* 1877.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

IN THE MATTER OF P. N. POGOSE (PETITIONER) *v.* KHAJAH ASHANOOLLAH (OPPOSITE PARTY).*

Mr. *G. Gregory* and Baboo *Chunder Madhub Ghose* for the petitioner.

Messrs. *Evans* and *Jackson* for the opposite party.

GARTH, C. J.—(MITTER, J., concurring). We think that this rule should be discharged. It is an application under s. 15 of the High Courts Act to set aside an order made by the Subordinate Judge of Dacca admitting the applicant a defendant on the record as representing the deceased judgment-debtor, and ordering the sale of the property to proceed accordingly; and the ground upon which the rule was moved was that the Subordinate Judge had no jurisdiction to make that order.

The Subordinate Judge was, undoubtedly, wrong in making the order complained of, and the question which we have to decide is whether the order was merely an erroneous decision, in a matter which it was for the Judge to determine, or whether it was a nullity as made by him without jurisdiction.

* Rule No. 952 of 1877, in the case of P. N. Pogose *v.* Khajah Ashanoollah.

Judge had no doubt jurisdiction to decide who was the legal representative of the deceased and, if he had decided that, we should not have thought it right, having regard to what has been said by the Chief Justice in his judgment, to interfere under s. 15. But he has not decided that question in this case. He could not venture to decide that Mr. P. N. Pogose was his

The Judge was clearly not justified in placing the applicant on the record, and he ought to have known his duty better than to have made an order of this kind directly in the teeth of the provisions of the Succession Act, and without making any proper enquiry as to whether Mr. Pogose, who was put upon the record, was the legal representative of the deceased.

He was also very wrong in making an order of this kind on the very day that the sale was to take place. Such conduct was obviously calculated to induce the sale of the property at an inadequate price, and if we were satisfied that the order of the Subordinate Judge was made without jurisdiction, we should certainly have set aside the order and the sale which took place under it.

But it appears to us, having regard to the provisions of the Procedure Code, that the Subordinate Judge was the proper person to decide in point of fact as well as law, who was the proper representative of the deceased.

The person who was put upon the record was the deceased judgment-debtor's eldest son. He was summoned in the regular way, under s. 216, to show cause why he should not be made a party to the suit and why the decree should not be executed against him.

It appears that he came before the Court in obedience to that summons, and his objection there was not that he had not been duly made the legal representative of the deceased under the Succession Act, but that he had no longer anything to do with his father's property, which had been conveyed away to the Official Trustee for the benefit of the judgment-debtor's creditors.

Whether he took the proper point or not, the Subordinate Judge was very wrong in dealing with the matter as he did, but he was clearly, as it seems to us, the only proper person to decide the question before him. Suppose two persons, both claiming to have been made representatives of a deceased person under the Succession Act, had appeared before the Court, and that the only question was which of them was the legally constituted representative. That question must have been determined by the Subordinate Judge. We are, therefore, of opinion that he has not acted without jurisdiction in deciding that the applicant was the proper person to be put upon the record, but he has been guilty of an error of law, which the present applicant might have rectified, if he had appealed within the time allowed him by law.

He has not chosen to take that course. He has allowed the time to go by; and now he asks this Court to put its extraordinary powers in force to assist him out of the difficulty.

This Court, under the circumstance, has no power to help him, and the rule must be discharged with costs.

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father's representative in the face of the Chief Justice's judgment and the Succession Act. What he really does is this: He chooses to take upon himself to say that the proceedings pointed out by the law would be very inconvenient to the parties, and thinks that he would do some good to them by taking the course which he has taken. As I have already said, the result of taking that course must be disastrous to the parties, and we think we are fully justified in interfering in this case. The order of the Subordinate Judge putting Mr. P. N. Pogose upon the record as the legal representative of the deceased without enquiring whether he is so or not, is an order which cannot be allowed to stand. Properly there ought to have been a formal application under s. 15; but as there has been some difference of opinion between the Judges of this Court upon this matter, we think that we are justified in treating this case substantially as an application under s. 15, without putting the parties to further expense.

Dealing with this case under s. 15, we direct that the order of the Subordinate Judge putting Mr. P. N. Pogose upon the record as the representative of the deceased be set aside. We make no order as to costs.

Before Mr. Justice Ainslie and Mr. Justice Morris.

1877 *May* 8 & 1878 *Feby.* 6.

HURRISH CHUNDER ROY (JUDGMENT-DEBTOR) *v.* THE COLLECTOR OF JESSORE (DECREE-HOLDER).*

Under Tenure—Arrears—Sale in Execution—Execution against Property—(Beng.) Act VIII of 1869, *s.* 61.

A, a judgment-creditor, having obtained two decrees, one for money, the other for the rent of certain tenures, sold his debtor's right and interest in the tenures in execution of his money-decree, and afterwards in execution of his decree for rent again put up for sale the same tenures. At the second sale, *B* became the purchaser of whatever could pass under such sale. *A* subsequently sued and obtained a decree against *B* for arrears of rent that

* Miscellaneous Special Appeal, No. 42 of 1877, against the order of H. B. Lawford, Esq., Judge of Zillah Jessore, dated the 31st of January 1877, affirming the order of Baboo Kedaressur Roy, Subordinate Judge of that district, dated the 6th of November 1876.