

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.

1878
July. 11.

PORAN SOOKH CHUNDER AND OTHERS (DEFENDANTS) v. PARBUTTY
DOSSEE (PLAINTIFF).*

*Suit by Person in possession of Land to establish Title—Declaratory Decree—
Act VIII of 1859, s. 15—Practice—Grounds of Appeal taken in Argu-
ment—Specific Relief Act, I of 1877.*

The plaintiff in a suit to establish her lakheraj right to lakheraj land, stated in her plaint that she was in possession of certain land by virtue of the will of her husband; that while in possession of the land, a suit was brought against her in the Small Cause Court for rent by the defendants, who obtained a decree; and that there being no appeal against the decision, the lakheraj rights in respect of the lands were consequently injured; she therefore brought the present suit.

Held, that such a suit was not maintainable, as the claim which the defendants set up was no longer in the condition of a mere assertion or a claim for right, but had passed into a decree.

Held further, that in this case the plaintiff was not without a remedy, for if a further suit for rent be brought, she might file a suit and apply for an injunction to prevent the other party from proceeding so long as her suit was not disposed of and an absolute relief given her.

Held further, that although, as a rule, the Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum of appeal, yet where a decree comes before it which is upon its very face illegal, the Court is bound to take up the point itself and rectify the mistake.

Semle per JACKSON, J.—That the plaintiff might, if a fresh suit for rent be brought, again raise the question of her lakheraj title, because the Small Cause Court has no power to determine finally a question of right.

THE facts of this case were as follows:—

The defendants brought a suit in the Munsif's Court against the plaintiff to recover rent on certain lands in the plaintiff's occupation, and the amount sued for being less than Rs. 50, and the land being situated within the limits of the Katwa Municipality, the Munsif tried the suit in his jurisdiction of Small

* Special Appeal, No. 647 of 1877, against the decree of Baboo Nobin Chunder Gangooly, Additional Subordinate Judge of Zilla East Burdwan, dated the 18th February 1876, reversing the decree of Baboo Promptonath Banerjee, Munsif of Katwa, dated the 28th March 1876.

Cause Court Judge, with which he was vested by Government, and gave judgment for the plaintiffs in that suit, the now defendants. The plaintiff then brought the present suit, alleging that she was entitled to the land in question under the will of her husband who had purchased it as lakheraj or rent-free land; and after setting out the proceedings in the Munsif's Court, she concluded her plaint in these words:—"There being no appeal against the said decision, no measures have been taken; consequently the lakheraj right in respect to the lakheraj land mentioned in the schedule has been injured, and therefore I have brought this suit for establishment of lakheraj right to the lakheraj land, and laid the claim at Rs. 94, the price thereof."

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The defendants, amongst other things, contended that the suit would not lie, in that it indirectly sought to impeach the previous Small Cause Court decree which was final.

The Court of first instance overruled this objection, but upon the merits he found against the plaintiff and dismissed the suit. On appeal by the plaintiff this judgment was reversed, and the present appeal was thereupon preferred by the defendant.

Baboo *Mohini Mohun Roy* for the appellants.—This suit cannot be maintained. It seeks a declaratory order in respect of the title to land in the possession of the plaintiff. It is also an illegal attempt to set aside a decree of the Small Cause Court which is final, and cannot therefore be impeached. [JACKSON, J.—You do not take this objection in your grounds of special appeal.] That is so, but this is an objection which, if valid, goes to the jurisdiction of the Court which entertained the suit; this Court is therefore bound to give it effect.

Baboo *Sreenath Doss* with him Baboo *Hemchunder Banerjee* for the respondent.

The following judgments were delivered by

JACKSON, J.—It appears to us that the objection taken during the argument of this special appeal, although it was not taken in the memorandum of appeal, is a valid objection to the decision. The facts of this case are shortly these: (The learned Judge

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stated the facts of the case as set out above, and having remarked that the particular question before the Court might not have been discussed by the defendants in the Court of first instance, continued).—The defendants appeal specially to this Court, and of course we are not only entitled, but bound to consider an objection which raises the question whether the plaintiff was entitled to maintain the suit and to obtain the decree which she asked for. It has been constantly ruled in this Court and in the other High Courts, and the law is stated in the case noticed by Mr. Broughton in his edition of Act VIII of 1859—*Padngalingam Pillay v. Shanmugham Pillay* (1)—that a suit ought not to be maintained where “the plaintiff who merely seeks for a declaration of title is in possession.” In the present case the plaintiff was and is in possession of the land to which she says she is entitled. But she says, “inasmuch as the defendants claim to be entitled to take rent from me in respect of these lands, and inasmuch as I claim to hold the land lakheraj, free from payment of any rent, by that claim of the defendants, and by the fact that under such a claim they recovered a decree against me in the Small Cause Court, a cloud has been thrown on my title.” And she alleges that, as a justification for this suit. ‘There are no doubt cases—I am speaking now of the state of the law before the Specific Relief Act was passed—in which a plaintiff has been allowed to say:—“The defendant sets up a title, a mortgage or any other title, embodied in a certain document. I have accordingly brought the document into Court, and I call upon the Court to look into that document, the alleged mortgage, or whatever it might be, and to determine whether that is a valid mortgage.” And if the Court held that the mortgage was not valid, then the mere invalidation of the document relied upon by the defendant has been considered such relief as the plaintiff might properly ask for (2).

(1) 2 Mad. H. C. R., 333.

(2) See *Fakir Chand v. Thakur Singh*, 7 B. L. R., 614; *Prasanna Kumar Sandyal v. Mathurnath Banerjee*, 8 B. L. R., App., 26. The words in s. 15 of Act VIII of 1859 are to be interpreted as giving a right to obtain a declaration of title only in those cases in which the Court could have granted relief, if relief had been prayed for—*Nilmony Singh Deo v. Kalee Churn*

In the present instance the claim which the defendants have set up is no longer in the condition of a mere assertion or a claim for right; it has passed into a decree. Consequently the plaintiff could not bring this suit for the purpose of setting aside the judgment of the Small Cause Court, and therefore no relief could be had in respect of that. It appears to me, therefore, that under the law as it stood before the Specific Relief Act was passed, the plaintiff could not maintain the present suit. It was suggested that in such circumstances, unless such a suit as the present is allowed to be maintained, the plaintiff will be without a remedy. That, in the first place, is not a reason for allowing a suit to be maintained which the law does not allow. But in the next place, it does not seem that the plaintiff is without a remedy, for it is quite conceivable that if a further suit for rent be brought, she might immediately file a suit in the Munsif's Court and apply for an injunction to prevent the other party from proceeding so long as her own suit is not disposed of and an absolute relief given her. It may also be, although I do not wish to express any positive opinion on the point, that the plaintiff before us may, if a fresh suit for rent be brought, again raise the same question, because the Small Cause Court has no power to determine finally a question of right. But it is unnecessary to decide that point. All that I say is that the present suit is not maintainable. I have the satisfaction of seeing that in addition to this ground there were other good grounds of defence which the defendants had in the present suit and which the Munsif found in their favor, so that if possibly the suit might come before us for trial on the merits, we might be inclined to reverse the judgment of the lower Appellate Court also on other grounds. In both these appeals, therefore, the decrees of the lower Appellate Court will be reversed and the decrees of the Court of first instance dismissing the suit will be restored with costs.

KENNEDY, J.—I entirely concur. As a rule, this Court will not permit grounds of appeal to be taken in argument which

Bhattacharjee, 14 B. L. R., 382; see of the Court to pass declaratory decrees also *Strimathoo Natchiar v. Dorasinga* is now to be found in s. 42 of the *Tevar*, 15 B. L. R., 83. The power Specific Relief Act (I of 1877).

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have not been taken in the memorandum; but where a decree comes before it which upon its very face is illegal,—a decree which goes beyond the power of the Court which passed it under circumstances of this sort,—I take it that this Court is bound to take up the point itself and rectify the mistake, and not allow itself to become an instrument to the commission of further mistakes.

Appeal allowed.

Before Mr. Justice Kemp and Mr. Justice Morris.

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KOONJ BEHARY CHOWDHRY AND OTHERS (OBJECTORS) v. GOCOOOL CHUNDER CHOWDHRY AND ANOTHER (PETITIONERS).*

Certificate to collect debts—Questions of validity of alleged adoption—Title—Act XXVII of 1860.

The Court will refuse to grant an application for a certificate to collect the debts of an intestate who has been dead forty years at the time of making the application, the presumption being that, owing to the operation of the law of limitation, there could be now no debts due to him which could be recovered.

A question of title cannot be judicially determined between parties, in an application under Act XXVII of 1860. Therefore, where the object of such an application was to obtain a judicial determination as to the validity of an alleged adoption. *Held* that such a question could only be decided in a Civil Court.

THE appellants in this case, representing themselves as the *gyantees* (cognates) of one Gournath Chowdhry, deceased, applied, on the 26th of February 1875, for a certificate under Act XXVII of 1860, empowering them to collect the debts due to the estate of the intestate. At the time of making this application Gournath Chowdhry had been dead forty years. On the 30th March 1875 a cross-application for a similar certificate was made by Tripura Sundari and Kheema Sundari, being the widows of one Gobind Chunder Chowdhry, the alleged adopted son of the widow of the intestate. The two widows, on the 3rd May 1875, also presented a formal petition of objection to the

* Miscellaneous Regular Appeals, Nos. 36 and 37 of 1877, against the order of J. B. Worgan, Esq., Judge of Zilla Rajshahye, dated the 30th June 1876.