

## APPELLATE CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Carnuluff.

RAGHUNATH SINGH

v.

ABDHUT SINGH.\*

1911

Jan. 9.

*Appeal—Jurisdiction—Sambalpur—Appeal against decree or order passed by Deputy Commissioner acting as a Civil Court—Central Provinces Land Revenue Act (XVIII of 1881), as amended by Act IV, B.C., of 1906, ss. 136 H (1) and 22, cl. (b)—Bengal, North Western and Assam Civil Courts Act (XII of 1887)—Second Appeal, if it lies to High Court when original appeal decided by the wrong Court.*

Section 136 H (i), introduced into the Central Provinces Land-revenue Act of 1881, by Act XVI of 1889, qualifies s. 22, cl. (b) of the original Act, with the result that under it, read with s. 3 of the Sambalpur Civil Courts Act, 1906 (Ben. Act IV of 1906), an appeal against a decree or order passed by the Deputy Commissioner acting as Civil Court lies to the District Judge.

Where, in such a case, an appeal was wrongly preferred before the Commissioner, no second appeal from the Commissioner's decision lies to the High Court.

SECOND APPEAL by the defendant.

This was originally an application for partition filed in the Court of the Sub-Divisional Officer of Sambalpur, who was vested with the powers of a Deputy Commissioner under the Central Provinces Land-revenue Act, 1881. The co-sharer of the applicant opposed the application, contending, *inter alia*, that the Court had no jurisdiction to entertain the application, the value of the subject-matter of dispute being over Rs. 1,000, and that the estate was impartible. The Court of first instance over-ruled the objections, and ordered partition. The non-applicant thereupon appealed to the Commissioner of Cuttack. The appeal was dismissed. He then preferred this second appeal.

\*Appeal from Appellate Decree, No. 1284 of 1910, against the decree of E. V. Levinge, Commissioner of Cuttack, dated Feb. 28, 1910, affirming the decree of Krinaji Ananta Shirale, Sub-Divisional Officer of Sambalpur, dated Dec. 18, 1909.

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*Babu Sateesh Chandra Ghose (Babu Anilendra Nath Ray Chowdhury with him)*, for the respondent, raised a preliminary objection to the hearing of the second appeal on the ground that no second appeal lay to the High Court. If the appeal, in the first instance, was preferred before the District Judge, as it should have been, a second appeal would have lain to this Court. The appellant has, however, lost his remedy by preferring an appeal before the Commissioner. It is true that s. 22, cl. (b), provides that an appeal lies to the Commissioner. See, however, s. 136 H (1). The latter section read with ss. 4, 7, 8 and 17, cl. (2), of the Central Provinces Civil Courts Act (XVI of 1885) makes it clear that the appeal would lie to the District Court. The "Commissioner" should now be called the "Divisional Judge." Sections 3 to 10 of the Central Provinces Civil Courts Act (II of 1904) enumerate the different classes of Courts and their respective functions. Read section 3 of the last-mentioned Act. Also Schedule D, Part II, VI (b) of the Bengal and Assam Laws Act (VII of 1905), and *Calcutta Gazette*, 18th October 1905, Part I, p. 1804. The District Judge of Cuttack is the Divisional Judge. A Second Appeal lies to the High Court against a decree or order passed by the District Judge in appeal: *Jaffar Hussen v. Abdul Kadar* (1), *Loknath Dube v. Bissessar Dube* (2), *Seth Birdhichand v. Kaim Bi* (3).

*Maulvi Shamsul Huda (Mr. D. N. Sarkar with him)*, for the appellant. The appeal was rightly preferred before the Commissioner. The Second Appeal therefore lies to the High Court. The law regulating the Civil Courts in Sambalpur, that is now in force, is Bengal Act IV of 1906. Section 21 of Act XII of 1887 speaks of Munsifs and Subordinate Judges only, and not of Commissioners or Deputy Commissioners. It makes no provision for appeals from decrees or orders passed by the Deputy Commissioner. There is no provision that appeal would lie to the District Judge. The Deputy Commissioner might not have jurisdiction to decide civil matters after

(1) (1902) 15 C. P. L. R. 81.      (2) (1902) 15 C. P. L. R. 153.

(3) (1903) 17 C. P. L. R. 5.

the passing of Bengal Act IV of 1906, but the appeal properly lay to the Commissioner. The Deputy Commissioner is not subordinate to the District Judge.

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WOODROFFE J. The law in force at the institution of these proceedings was the Central Provinces Land Revenue Act (XVIII of 1881) and the Bengal Civil Courts Act of 1887, inasmuch as Act II of 1904 was repealed by Act IV of 1906, so far as it referred to Sambalpur. No doubt section 22 (b) of Act XVIII of 1881 provides that, when a decision or order is passed by the Deputy Commissioner, an appeal lies to the Commissioner. But, by an amendment introduced in that Act by section 136H (1), "All decrees and orders passed by the Deputy Commissioner . . . shall be held to be decrees and orders of a Court of Civil Judicature, and shall be open to appeal as if passed by the Court of the Deputy Commissioner, acting as a Court of Civil Judicature of first instance, under the Central Provinces Civil Courts Act of 1885," and to that extent that section, 136 H. (1), now qualifies section 22, clause (b), whatever may have been the case when that section, 136 H. (1), was first enacted. For we must construe the words "Central Provinces Civil Courts Act of 1855," occurring in section 136 H. (1), as referring to the Bengal Civil Courts Act. If the decree or order was passed by the Deputy Commissioner acting as a Court of Civil Judicature, then, applying the Bengal Civil Courts Act, the appeal lay to the District Judge.

In my opinion we are concerned in this case with the interpretation to be placed upon section 136 H (1). But, in any case, section 136 (1), which was framed at a time when the Commissioner was a Court of Appeal, must be read consistently with the provisions of section 136 H (1), as they have been affected by Act IV of 1906. The latter Act had the effect of repealing Act II of 1904, and of introducing the operation of the Bengal Civil Courts Act. As the appeal, therefore, lay to the District Judge, and, in fact, the appeal was taken to the

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Commissioner, there is, in my opinion, no second appeal from the Commissioner's decision to us.

The appeal must accordingly be dismissed, with costs.

The Rule *nisi*, which was one for stay of execution of the decree pending the hearing of the appeal, has come to an end with the hearing and dismissal of the appeal, and is discharged, with costs.

CARNDUFF J. I am of the same opinion. It seems to me to be clear that, under section 136 H of the Central Provinces Land-revenue Act, 1881 (India Act XVIII of 1881, as amended expressly by India Act XVI of 1889 and impliedly by Bengal Act IV of 1906), the appeal in this case lay to the District Judge, and was wrongly preferred before the Commissioner, by whom it was dismissed. That being so, the appellant has lost his remedy, and this second appeal must be dismissed.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Mr. Justice Mookerjee and Mr. Justice Teunon.*

KUMUD NATH ROY CHOWDHURY

*v.*

JOTINDRA NATH CHOWDHURY.\*

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*Substituted Service—Civil Procedure Code (Act V of 1908), o. IX, r. 13; o. V, r. 17—Ex parte decree—Original Court, jurisdiction of, to set aside an ex parte decree, while an appeal is pending—“Reside,” meaning of—Limitation Acts (XV of 1877), Sch. II, Art. 164 and Act IX of 1908, Sch. I, Art. 64—Knowledge of the decree.*

The term “residence” is not identical with “ownership.” In o. V, rules 9 and 17 of the Code of Civil Procedure, 1908, it means the place where a person eats, drinks and sleeps, or where his family or servants eat, drink and sleep.

Under o. V, rule 17, a substituted service can be justified only when it is shown that proper efforts were made to find the defendant.

\* Appeal from Original Order, No. 186 of 1910, against the order of Bhagabati Charan Kundu, Subordinate Judge of 24-Perganahs, dated April 20, 1910.