

proper course to follow was, either to dismiss the suit, or, if the parties so desired, to appoint a *shebait* and place the properties in his hands. This latter order could be properly made only after amendment of the plaint. The plaintiff has accordingly asked for permission to amend the plaint by the insertion of an additional prayer clause to the following effect: that if the title of the plaintiff as *shebait* under the *arpannama* be held invalid, the Court may appoint a suitable person as *shebait*. This application is not opposed by the respondent, and is granted. The plaint will be amended accordingly.

The costs of this litigation up to the present stage will be borne by the parties themselves; the costs subsequent to the remand may, if the Subordinate Judge so directs, be paid out of the estate.

O. M. *Appeal allowed; case remanded.*

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Chapman.

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*Transfer—Appeal—Powers of Court to whom case is transferred for trial—
Limitation—Practice.*

When an appeal has been transferred for trial by a District Judge to a Subordinate Judge, the Subordinate Judge has, for the purpose of disposing of the appeal, under the Bengal, North-Western Province and Assam Civil Courts Act, all the powers which could be exercised by the District Judge.

* Civil Rule, No. 5901 of 1911, against the order passed by S. C. Ganguli, Subordinate Judge of Faridpur, dated Aug. 8, 1911.

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Where, therefore, an appeal was presented to the District Judge after the period of limitation, owing to a mistake of law as regards the appealability of the suit, and the District Judge admitted the appeal under s. 5 of the Limitation Act and transferred the appeal to the Subordinate Judge for disposal, the Subordinate Judge has power to consider whether the appeal was competent or barred by limitation.

Jhotee Sahoo v. Omesh Chunder Sircar (1) not followed.

CIVIL RULE obtained by the auction-purchaser and appellant in the appeal in connection with which this Rule was issued.

The petitioner in this Rule, a stranger, purchased certain lands in execution of a mortgage-decree held at the instance of the decree-holder, the mother of the opposite party. Thereupon, the father of the opposite party, alleging that he was a puisne mortgagee, applied for setting aside the sale under O. XXI, r. 89 of the Civil Procedure Code. The mother of the opposite party, the decree-holder, upon certain other allegations applied for setting aside the sale under O. XXI, r. 90. Before these applications were disposed of, both the father and the mother of the opposite party died, and he got himself substituted in both the applications and wanted to prosecute both of these. The petitioner in this Rule objected. The first Court overruled the objections, and held that the opposite party was competent to maintain both the applications. The Court, however, granted the application under O. XXI, r. 89, and set aside the sale, and kept the other application pending. The petitioner moved the High Court and a rule was issued, but at the final hearing the rule was discharged on the ground that, under the new Civil Procedure Code, the auction-purchaser was competent to appeal against the order setting aside the sale. Thereupon, the petitioner filed an appeal in the Court of the District Judge against

the order setting aside the sale. As the appeal was filed out of time, the District Judge called upon the petitioner to show cause why the appeal should not be dismissed, but after hearing the appellant's arguments, supported by an affidavit, and considering the special circumstances of the case, he admitted the appeal under section 5 of the Limitation Act, and thereafter transferred the appeal for disposal to the Subordinate Judge. At the final hearing, the Subordinate Judge allowed the respondent to raise a preliminary objection that the appeal must fail, as it was filed out of time, and dismissed the appeal on that ground. The present petitioner then moved the High Court against the order on the ground that the Subordinate Judge had no jurisdiction to consider the question of limitation, whereupon this Rule was issued.

Babu Prakash Chandra Majumdar, for the petitioner. The Subordinate Judge had no jurisdiction to re-open the question of limitation already decided by the District Judge: *Jhotee Sahoo v. Omesh Chunder Sircar* (1). See also *Manick Dukandar v. Naibulla Sircar* (2), which really follows the last mentioned case, and only lays down further that where the District Judge appears to have admitted an appeal without being satisfied whether there were good grounds for extension of time, the Subordinate Judge to whom the case is transferred for trial may dismiss the appeal on that ground. *Bishendut Tewari v. Nandan Pershad Dubay* (3) and similar other cases relating to the different Division Benches of the same High Court are not applicable. Apart from the authority of *Jhotee Sahoo's Case* (1), the Subordinate Judge had no new facts and circumstances

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(1) (1879) I. L. R. 5 Calc. 1.

(2) (1898) 2 C. W. N. 461.

(3) (1907) 12 C. W. N. 25

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placed before him which could justify him in coming to a diametrically opposite conclusion to that of the superior Court. Finally, any order passed under section 5 of the Limitation Act is not defective on the ground of being *ex parte*. The respondent cannot claim any right of hearing, as the language of the section "when the *appellant* satisfies the Court" would indicate.

Babu Mohinimohan Chatterji, for the opposite party. *Jhotee Sahoo's Case* (1) is no longer good law. It was decided before the present Civil Courts Act (XII of 1887). Section 22 (3) has been newly added, giving the same powers to the Court of the Subordinate Judge to which the appeal is transferred. In this suit the Subordinate Judge's Court would be practically the same as the District Judge's Court. Hence the principle of *Bishendut Tewari v. Nandan Pershad Dubay* (2) and similar cases would apply. Lastly, the order having been passed *ex parte*, was subject to revision: *Moshauallah v. Ahmedullah* (3), *Sarat Chander Bose v. Saraswati Debi* (4). The Bombay and Madras High Courts also have held that Subordinate Judges can revise such *ex parte* orders.

Babu Prakash Chandra Majumdar, in reply. Section 22 (3) of Act XII of 1887 did not introduce any new principle. The actual words used in the section were "the same rules shall apply," and not that the same powers were given. In fact a glance at other sections, *e.g.*, 3, 21 and 22 would show that the Court of the District Judge is still a superior Court, and in no suit can it be said to be the same Court as the Subordinate Judge's. As such *Jhotee Sahoo v. Omesh Chunder Sircar* (1) is still good law, and the other cases do not apply.

(1) (1879) I. L. R. 5 Calc. 1.

(2) (1907) 12 C. W. N. 25.

(3) (1886) I. L. R. 13 Calc. 78.

(4) (1907) I. L. R. 34 Calc. 216.

BRETT AND CHAPMAN JJ. The petitioner in the present Rule appealed to the Court of the District Judge of Faridpur against a decision passed against him by the Munsif of that district. The appeal was presented to the District Judge considerably after the period of limitation ; but the petitioner when presenting the appeal represented that, owing to an error in law, he had, instead of appealing to the District Judge, applied to this Court in revision, and that, owing to the delay in the disposal of that application and also to a mistake which he fell into as to the result of that application, he was not aware of the true facts until the end of January 1911. He filed his appeal on the 13th February 1911. The District Judge, on a consideration of the facts represented by the petitioner, admitted the appeal under section 5 of the Limitation Act. Afterwards the appeal was transferred to a Subordinate Judge for disposal. The Subordinate Judge, after issuing notices to the respondent and hearing the preliminary objection which they seem to have taken to the competency of the appeal on the ground that it was presented after the period of limitation, came to the conclusion that in fact the appeal was barred by limitation at the time when it was preferred, and therefore he dismissed it. The petitioner then applied to this Court for a Rule on the opposite party to show cause why the decree of the Subordinate Judge should not be set aside. In passing the order for the issue of the Rule, the learned Judges of this Court remarked as follows :—
 “The applicant appears to have a decision in *Jhotee Sahoo v. Omesh Chunder Sircar*(1) in his favour. We, out of deference to that decision, issue a Rule calling on the other side to show cause why the decree of the Appellate Court should not be set

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aside on the ground that the Subordinate Judge had no jurisdiction to decide whether or not the appeal was within time." The main ground which was advanced in support of the application and which has now been pressed before us in support of this Rule is that, after the District Judge had, by his order passed under section 5 of the Limitation Act, admitted the appeal, the Subordinate Judge had no jurisdiction to set aside that order and to dismiss the appeal on the ground that it was barred by limitation at the time when it was admitted. We have referred to the decision of this Court in the case of *Jhotee Sahoo v. Omesh Chunder Sircar* (1) on which the petitioner relies. That judgment, no doubt, supports the contention that, after the District Judge has, by an *ex parte* order, directed that an appeal be admitted, a Subordinate Judge, to whom the appeal has been transferred, is not competent to revoke the order of the District Judge. The learned pleader who appears to oppose this Rule has invited our attention to the fact that the learned Judges who decided that case remarked that, where an appeal had been admitted on the *ex parte* statements of the appellant, because at that time the respondent had not entered appearance, still, on a proper cause being shown, such an *ex parte* order was liable to be cancelled by the Court which passed it. This is the view which has been adopted and accepted by this Court in similar cases where appeals have been admitted by an *ex parte* order of a Division Bench, and the propriety of the order has subsequently been brought into question before the Bench trying the appeal. This Court has invariably held that the Bench trying the appeal is not bound by the order of the Bench which admitted the appeal by an order passed under section 5 of

(1) (1879) I. L. R. 5 Calc. 1.

the Limitation Act. The learned pleader, who appears for the opposite party, has also drawn our attention to the fact that the decision of this Court in *Jhotee Sahoo v. Omesh Chunder Sircar* (1), was passed in 1879 before the Bengal, North-Western Provinces and Assam Civil Courts Act was passed in 1887, and he relies on clause (3) of section 22 of the said Act to support the contention, that, when an appeal has been transferred for trial by a District Judge to a Subordinate Judge, the Subordinate Judge has, for the purpose of disposing of the appeal, all the powers which could be exercised by the District Judge. It has not been disputed before us that, in a case like the present, the District Judge would, on further cause being shown by the respondent, have had the power to revoke the order passed by him under section 5 of the Limitation Act. We see no reason to hold why, under the provisions of the Civil Courts Act, similar powers should not be considered to have been given to a Subordinate Judge trying the appeal. The view taken by this Court in the case of *Jhotee Sahoo v. Omesh Chunder Sircar* (1) does not appear to have been followed in the other High Courts in India, nor does it appear to have been accepted as a rule in this Court after the passing of the Civil Courts Act. In these circumstances, we are of opinion that the decision on which reliance is placed by the petitioner and with reference to which the Rule was issued, is not a sufficient authority to support the conclusion that, in the present case, the order of the Subordinate Judge dismissing the appeal is not in accordance with law. The result must, therefore, be that the Rule is discharged with costs.

S. M.

Rule discharged.

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