(1868) 02 CAL CK 0002

Calcutta High Court

Case No: Miscellaneous Appeal No. 17 of 1867

Luckhun Singh		APPELLANT
	Vs	
Kooldeep Narain Singh and Others		RESPONDENT

Date of Decision: Feb. 3, 1868

Judgement

Sir Barnes Peacock, Kt., C.J.

It appears to me that the view which was expressed with reference to s. 257 by the Full Bench in the case of Mahomed Hossein v. Sheikh Afzul Ali Post, App., 1 is correct. That decision has been followed at least in one case, if not in other cases; see Abdool Kurreem v. Ooghun Lal 6 W.R., Mis., 119. S. 257 relates to applications for setting aside a sale under an execution on the ground of some material irregularity in publishing or conducting the sale. Generally speaking, Courts of Justice have the sole control over the execution of their own process, and if any irregularity is committed in the execution of their process, and the Court upholds what has been done under the execution, no action can be brought in another Court to upset, on the ground of an irregularity, that which the Court itself out of which the execution issued has upheld. But, in this country, the Legislature appears to have thought it unsafe to leave the question as to whether there has been an irregularity in publishing or conducting a sale under an execution to the final decision of the Court out of which the execution issued, and consequently an appeal was allowed from the decision of that Court. That was going one step beyond the ordinary course with reference to mere irregularities. Probably the Legislature thought that there were already very considerable difficulties in an execution-creditor''s obtaining the fruits of his judgment; that no very difficult point of law was likely to arise in deciding whether there was an irregularity in publishing or conducting a sale: and, therefore, that justice would be sufficiently protected by giving one regular appeal in such a case upon any question of fact or law.

2. If the objection be allowed, the order made to set aside the sale is final; that, as I understand it, means final for all purposes. This would cause no great hardship, for

if the objection were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale: but he could not be greatly injured, for when a sale is set aside, the purchaser is entitled by s. 258 to receive back his purchase-money with or without interest.

3. But if the objection be disallowed, the order confirming the sale is to be open to appeal, and such order, unless appealed from, and if appealed from then the order passed on the appeal, is to be final. Much injury might be done by confirming a sale where a material irregularity has been committed in publishing or conducting the sale, for, in consequence of such irregularity, the property might be sold much under its value. It was reasonable, therefore, to allow an appeal against the order; but as no difficult question of law could arise, and the question of regularity or irregularity would turn more upon fact than upon law, it seems to have been thought unnecessary to allow a special appeal, consequently it was enacted that the order made on appeal should be final.

4. The section, however, proceeds:--"And the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim." If the Legislature had merely said that the order shall be final, it might have been supposed that they meant final only as regards appeal; they, therefore, to make their meaning free from doubt, added the words which I have above quoted, and restrained the party from bringing an action for the purpose of establishing any claim arising out of mere irregularity.

5. It is contended that the word "final" is explained by the subsequent words, and that it indicated finality, not as regards proceedings in appeal, but merely as regards a fresh suit. It appears to me, however, that if the Legislature merely intended to preclude an action from being brought to try the question of irregularity, they would not have used the words "and the order passed on such appeal shall be final;" they would simply have stated that, if the objection be disallowed, the order confirming the sale shall be open to appeal, and that such order unless appealed from shall be final; and the party against whom the same shall be given shall be precluded from bringing a suit for establishing his claim. Then the word "appeal" would have left him open to appeal in the regular course. But when they said that the order foe confirming the sale "shall be open to appeal, and such order unless appealed from, and if appealed from then the order passed on the appeal, shall be final," Two different orders were declared to be final, viz., the order for confirming the sale, and the order made on appeal against the order confirming the sale.

6. It appears to me that the Legislature intended to give some effect to the words "and the order passed on appeal shall be final;" and that when they said that the order passed on appeal should be final, they meant that no special appeal should lie from such order, and thereby excluded the order passed on appeal from the general provisions of s. 372. The appeal is dismissed with costs.

Seton-Karr, J.

7. I am of the same opinion. Baboo Mohini Mohun Roy, who contended before us that a special appeal did lie, pressed upon us the general argument that it must have been the intention of the Legislature to provide a special appeal in these cases as in any others, in order to the correction of anything which might be unsound or vicious in the decisions of the lower Courts on points of law. But whatever weight this argument might appear to have, it is, to my thinking, wholly done away with by the fact that at the time the Legislature enacted Act VIII of 1859, it especially limited the privilege of appeal on other points, though it was afterwards found necessary to restore certain privileges of appeal by Act XXIII of 1861.

8. Leaving the general argument, and coming to the special interpretation of the clause instated on, I see no reason, to think, from anything which I have heard in argument this day, that the opinion expressed by the Full Bench in the case of Mahomed Hossein v. Sheikh Afzul Ali Post, App., 1 is in any way unsound or incorrect. That opinion was deliberately given, though it may not have been, on the point expressly referred to the Full Bench on that occasion. But the same interpretation has been arrived at by a Divisional Bench in the case referred to by the learned Chief Justice--Abdool Kurreem v. Ooghun Lal 6 W.R., Mis., 119, and that not by a mere blind adherence to a supposed decision of a Full Bench on a question referred to it. I was one of the Judges who came to that conclusion, but I am more pressed now by the argument of my colleague (Loch, J.) as used at that time, than by any argument of my own. I think that he shows conclusively that by adopting the construction contended for by Baboo Mohini Mohun Roy, we should be really giving a double interpretation to the word "final" in one and the same section, viz., 257. When a further appeal was intended in other cases, the Legislature made use of different terms, such, for instance, as those used in s. 231 of Act VIII, "the decision passed by the Court shall be subject to appeal under the rules applicable to appeals from decrees."

9. In the case before us, the words are:--"If appealed from, then the order passed on the appeal shall be final," and the section then goes on to provide further--"and the party against whom the some has been given shall be precluded from bringing a suit for establishing his claim." Therefore, applying to the words of the Act in s. 257 the reasonable rules of grammatical interpretation, I can come to no other conclusion than that the privilege of special appeal as thereby intended is taken away.

Jackson, J.

10. I need hardly say that I feel great diffidence in retaining the opinion which I had formed, and in dissenting from the conclusion at which the Chief Justice and my other learned colleagues have arrived, and if I entertained a less strong conviction upon the subject than I at present entertain, I should certainly refrain from the

expression of my opinion, and acquiesce in the judgment of the other members of the Court. But I am bound to say that, although I feel the very great weight of the observations and opinion of His Lordship the Chief Justice, I still do retain the view which I have deliberately formed from the construction of the words of s. 257.

11. If I am right in my recollection of the terms of the Code, I think there is no mention, until we arrive at s. 372, of the limit to procedure on appeal. I find nothing in the Code until we arrive at that section, which shows whether in any given case there shall be only one appeal or a second appeal also; unless, indeed, the very section winch we are now considering could be looked upon as a provision of that kind. Everywhere I think, until we arrive at Ch. x, the word "appeal" is used generally. As to proceedings in execution of decree, there was, for a considerable time, both in the late Sudder Court and also in this Court, a difference of opinion as to whether a special appeal was allowed. That doubt arose both under the provisions of Act VIII of 1859 and also those of Act XXIII of 1861, which is to be read as part of the Civil Procedure Code. It was not until the determination by the Full Bench in the case which has been cited that a final decision was arrived at upon that point. Since that ruling it has been understood that in all cases a special appeal would lie, in cases of execution as well as in regular suits. S. 372 says:--"Unless otherwise provided by any law for the time being in force, a special appeal shall lie to the Sudder Courts from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court."

12. There is no case in Act VIII of 1859 itself, I think, in which a special appeal is expressly denied, but there is a case--a very familiar case---in s. 27, Act XXIII of 1861. That is a law which is now in force, and by which a special appeal is denied, and it is denied in these words:--"No special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act by any Court subordinate to the Sudder Court in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860." Now these are very explicit terms, and expressly take away a special appeal in cases where a first or regular appeal is allowed. It appears to me that that would be the mode in which the Legislature would express their intention to deny a special appeal where the law allows a regular appeal.

13. There are several sections in that part of the Procedure Code which relates to the execution of decrees in which the Court has to come to a decision upon some point in which the parties to the suit, and occasionally other parties, are interested. Those orders, as to their issue, are divisible generally into two classes. There are the cases, such as those in ss. 246, 247, and 269, in which no appeal is allowed, but the party dissatisfied with the order is at liberty to bring a separate suit to establish his right. There are again the other class of cases which we find in ss. 231 and 257, in which an appeal is allowed, and in which the party is debarred from bringing a separate suit. Now if s. 257 is to bear the construction which the Chief Justice and

my learned colleagues here put upon it, then that section must stand in a class by itself. It must stand in the class in which no suit is allowed, and in which the right of appeal is restricted to a single appeal. Is there anything in the terms of the section which forces upon us that conclusion? For I think that unless it be forced upon us by the peremptory words of the section, then we are bound to give effect to s. 372, and to allow a special appeal. The words are these:--"If the objection be disallowed, the order confirming the sale shall be open to appeal, and such order, unless appealed from, and if appealed from then the order passed on the appeal, shall be final; and the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim."

14. It appears to me that those words correspond as nearly as possible with the provision to he found in s. 231:--"The decision passed by the Court under either of the last two sections shall be of the same force as a decree in an ordinary suit, and shall be subject to appeal under the rules applicable to appeals from decrees; and no fresh suit shall be entertained in any Court between the same party or parties claiming under them in respect of the same cause of action." I do not mean to say that the words are precisely similar, but it appears to me that the Legislature in framing these two sections, which were very probably the work of different hands, and put together at different times, had the same object in view,--namely, that of declaring that the mode of deciding orders made under both sections should be by appeal and not by regular suit. Those words in s. 257 "shall be open to appeal" do not mean shall be open to one appeal, hut shall be open to appeal in the mode which the law generally allows appeals. According to my view, the last part of the section, if fully expanded, would read thus:--"Such order unless appealed from shall be final; the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim, and if such order be appealed from, then the order passed in appeal shall be final, and the party," &c. In each case the words "and the party," meaning "that is to say, the party," &c.,--thus indicating, this is the kind of finality intended. It cannot, I think, be meant that the order is final as far as appeal goes, and also protected from being questioned by regular suit, because it is in terms presupposed that there is in the first case no appeal made, and consequently in respect of appeal it remains final by the omission of the party aggrieved.

15. I therefore look upon the words which follow as an explanation of the word "final." It appears to me that that is the construction which should be put upon these words, and it does appear to me also that the grievances to be remedied in special appeal in such cases may be very considerable. I can easily conceive a case in which the judgment-debtor should come to the Court and say:--"I can show that my property has been put up for sale without any notice of attachment or proclamation of sale having been made. I am also prepared to show that by reason of such failure, my property, worth one lakh of rupees, has been sold for Rs. 50;" but the Court might choose to say "that the irregularity is not a material irregularity, and I think fit,

to confirm the sale." He might go to the Zilla Court in appeal, and there he might urge the same grievance, might show the loss which has been sustained, and he might prove the irregularity, and that Court might possibly concur with the lower Court and say, "the irregularity complained of is not one which would induce me to reverse the sale;" and it would then become necessary in special appeal for this Court to rule, as a matter of law, that it was an irregularity to sell a man''s property where no proclamation of sale had taken place. The High Court, by exercising the function of special appeal in that case, would do an act of justice, and if it were debarred from acting in the function of special appeal, a very serious failure of justice would occur; for in such cases the party has no further remedy, as a suit is taken away from him, and his property is lost for ever.

16. For these considerations, I must say, with very great regret, I have felt unable to concur in the judgment which has been delivered.

Macpherson, J.

17. I also am of opinion that there is no special appeal in this case. If the language of the section is in itself distinct, it is unnecessary, for the purpose of interpretation, to travel beyond the words of the section. In this case, the words of s. 257 of Act VIII of 1859 seem to me to be perfectly clear and distinct, and to bar a special appeal. The words are:--"If the objection be disallowed, the order confirming the sale shall be open to appeal, and such order unless appealed from, and if appealed from then the order passed on the appeal, shall be final." It appears to me that it is impossible to read these words as having reference to any order passed upon appeal, excepting an order passed upon one appeal, that is to say, upon the first appeal. To read them otherwise is to ignore the existence of the word "the" before the words "appeal, shall be final;" and no Court has any right to ignore the existence of a word, when by recognizing it, and putting upon it its ordinary and natural meaning, the construction of the clause in which it occurs becomes distinct and beyond all doubt. I rest my opinion upon the language of the clause itself. I think we need not look for assistance in the construction of it, either in the provisions made in other sections of Act VIII of 1859, or in the consideration of any questions as to the inconvenience which may result from the interpretation we put upon it. But if the matter of inconvenience be referred to as an argument, the answer is, that there are very many cases in which there is undoubtedly no appeal to this Court, and in which this Court has not the power to interfere, even although it may be clear that a great miscarriage of justice has taken place in the Courts below.
Hobhouse, J.

18. I was of the same opinion as my learned colleague Jackson, J., when this case was referred to a Full Bench. But on considering the arguments addressed to us, and the provisions of the law more accurately, I concur with learned Chief Justice and the other Judges that no special appeal will lie under this section.

19. In the words of s. 372 of the Code of Civil Procedure, a special appeal will, as a rule, lie to this Court from all decisions passed in regular appeal, unless otherwise provided for by any law in force. And it follows that, to bar the hearing of a special appeal, there must be some express provision of the law. And it seems to me, on considering the words of s. 257, and of the section which precedes it, that there is in the terms of these sections an express provision barring a special appeal. The words in s. 257 are:--"And such order unless appealed from, and if appealed from then the order passed on the appeal, shall be final; and the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim." If the words had been "and such order unless appealed from shall be final," then the words which follow immediately, "and such order unless appealed from," would, it seems to me, mean "unless appealed from under the general provisions of the Code," but when the words are added "and if appealed from then the order passed on the appeal shall be final," those words seem to me to express a distinct form of proceeding. They say that "if appealed from then the order passed on the appeal shall be final;" and when these sections, 256 and 257, are compared with ss. 230 and 231, there seems to me a manifest reason why there should have been a difference made in the proceeding under s. 257 and that under s. 231. Under s. 230, what is in dispute between the parties before the Court is the right to certain immoveable property. Therefore, it seems naturally to follow that whatever appeal, whether in the way of regular appeal or of special appeal, is provided by the Code generally in suits relating to immoveable property, would be provided for under s. 230, and thereupon follow the words in s. 231 "and the decision shall be subject to appeal under the rules applicable to appeals from decrees;" that is, the rules generally applicable,--those of special appeal, as well as those of appeal. And then follow the words "and no fresh suit shall be entertained," &c.

20. Now in ss. 256 and 257, the point ordinarily to be decided is a very simple one,--was, there, as a matter of fact, any material irregularity in publishing or conducting the sale, such as had caused substantial injury? That point does not usually involve any intricate questions, as of rights, such as are contemplated in s. 230, but questions of simple facts. The questions, then, to be dealt with under s. 257 being usually questions of fact, and there being no special appeal allowed in the Code on such questions, it was to have been expected that one appeal, and one only, would be given against orders under the said section. And then follow the express words of s. 257, viz., "and if such order is appealed from then the order passed on the appeal shall be final." I hold, then, that looking as well to the general policy of the CPC as applicable to the particular sections in question (256 and 257), and to the express terms of s. 257, there is an express provision in these sections barring a special appeal.