

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tekait Krishna Prasad Singh v. Moti Chand, from the High Court of Judicature at Fort William in Bengal (P.C. Appeal No. 57 of 1912); delivered the 6th March 1913.

PRESENT AT THE HEARING :

LORD ATKINSON.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALL.

[DELIVERED BY LORD MOULTON.]

This is an Appeal from an Order of the High Court of Judicature of Fort William in Bengal, dated the 18th May 1908, reversing an Order of the Deputy Commissioner of Hazaribagh, dated the 16th February 1906, which set aside the sale of a property known as Gadi Gandey, which is an impartible zamindari descending by primogeniture situated in that district.

The prolonged legal proceedings in relation to this matter give rise to many important questions of law, but in the view taken by their Lordships as to the rights of the parties, it will not be necessary to decide more than one or two of such questions. To appreciate the points necessary to be so decided it will be convenient to state first the facts of the case so far as they relate to the sale and then to deal with the legal proceedings that have been taken with regard to it.

The property originally belonged to the father of the infant Appellant, against whom the Respondent on the 27th November 1900 obtained a decree in the Court of the Subordinate Judge of Benares for Rs. 6,599.9.6 and costs. Two years later this decree was transferred for execution to the Court of the Deputy Commissioner of Hazaribagh, and the Respondent applied to that Court for execution of the same by attachment and sale of the property. While these proceedings were going on, the Appellant's father died. The Respondent continued the attachment proceedings, and on the 28th October 1903 applied for and obtained the issue of a sale proclamation fixing the sale for the 2nd January 1904. It does not appear that notice of any of the proceedings in the attachment was served on any person representing the infant.

The property consisted of 109 mouzahs or villages, and the order for the proclamation of sale directed that the sale proclamation should be served on each of the mouzahs by announcement to the public with beat of drum, and that a copy of the sale proclamation should be fixed at a conspicuous place on each property. What was actually done was as follows. The proclamation was read out without beat of drum in one only of the mouzahs, and the proclamation affixed to a tree in that village alone. The evidence as to this is perfectly clear, and it shows not only that no drum was beaten, but that in the record of the proclamation it was originally so stated. That record has subsequently been altered—evidently fraudulently—to make it appear that it was done with beat of drum.

In addition to these serious irregularities, there is another, which, as it appears on the

documents, their Lordships consider that they are entitled and bound to notice. The schedule of the property attached to the proclamation ought to have contained the particulars set out in Section 287 of the Code of Civil Procedure, 1882. As a matter of fact, it contained no statement of the encumbrances to which the property was liable. It stated the annual profit income to be Rs. 4,953.7.3, and then stated the value as being Rs. 2,000. To this last matter their Lordships attach importance, because the permission to bid which the decree-holder obtained from the Court was subject to the condition that the sale should not take place below the estimated value, and inasmuch as their Lordships are of opinion on the evidence that this was a gross under-valuation, their Lordships cannot doubt but that the decree-holder had procured the insertion of this valuation (which corresponded to the amount due to the Government in respect of unpaid taxes, &c.) for the purpose of making possible a purchase by him at this low figure.

What happened on the occasion of the sale is what might have been expected. With the exception of the collector and the decree-holder no bidder was present. The Government bidding was Rs. 2,000, the amount due for taxes, &c., from the property. The decree-holder then bid Rs. 2,020 and the property was of course knocked down to him.

Their Lordships have no doubt whatever that the matters above referred to constitute material irregularities in the publishing and conducting the sale within the meaning of Section 311 of the Code of Civil Procedure, 1882. There is abundant evidence that the infant Appellant sustained substantial injury through such irregularities. The evidence of Moulvi Syed Ejabat Hossain, who was a manager

under the Court of Wards, and who had occasion to examine into the property shortly subsequent to the sale, shows that in his opinion the property was sufficiently valuable to pay all the debts due to the judgment creditors. At a later stage of the proceedings it became necessary to ascertain the value of the property and the amount of the encumbrances thereon, and the Court referred the matter to a special referee. He heard evidence on both sides and reported that the property was worth more than two lacs of rupees after allowing for all the encumbrances. Against this evidence nothing has been cited to show that the valuation on the sale proclamation was a fair one or that the price obtained was adequate. It is true that Counsel for the Respondent called their Lordships' attention to a letter written in the course of certain negotiations for a compromise, in which it would appear that some official of the Court of Wards was not prepared to advise that a sum of Rs. 9,000 should be paid to get rid of the sale unless the estate (which was no doubt heavily encumbered) could be wound up with the assistance of the Encumbered Estates Act. But the statements in such letter, even if they supported the contention of the Respondent, would not be evidence unless the writer were called and his source of information disclosed. As it stands it is merely an expression of opinion by a person who, presumably, had no personal knowledge of the matter, and this can have no evidential value. Even if accepted it would point to the property being of a value of more than four times the sum which the decreeholder paid for it under the sale in question.

The above facts establish a clear case for setting aside the sale. The sole question, therefore, is whether the legal proceedings for

setting aside the sale have been regular so that their Lordships have jurisdiction to give the relief prayed for in this Appeal.

For the purposes of this part of the case it will be necessary to give in some detail an account of the legal proceedings that have taken place in the matter. The original action was in the Court of the Subordinate Judge of Benares. In 1903 the suit was remitted to the Court of the Deputy Commissioner at Hazaribagh for the purpose of execution, and on the 11th June 1903 he issued an attachment Order against the property. The decree-holder applied for the issue of a sale proclamation which for some reason was ineffective. A fresh sale proclamation was then applied for which was directed to issue fixing the 1st September for the sale. The report relating to the service of this sale proclamation was submitted on the 6th August. In the meantime the judgment debtor had died on the 27th July 1903. At that date an Order had been made for the issue of a sale proclamation for sale on the 1st September, but the sale proclamation had not been served. On the 30th July the decree-holder applied for the issue of notice on the heir of the deceased judgment debtor, and the record states that an Order was made for that issue, but there is nothing to show that anything was done under it. It is probable that the decree-holder tried to effect service on the Nazir of the Court of Benares, but that the latter refused to accept it. The sale could not be held under the sale proclamation of the 27th July 1903, and the decree-holder applied for the issue of a fresh one on the 7th September and obtained the issue of a sale proclamation fixing the sale for the 2nd November. The service of this sale proclamation was, however,

irregular, and on the 28th October he applied for and obtained one fixing the sale for the 2nd January 1904. Subsequently he obtained permission to bid at the sale, but such permission was coupled with the condition that the sale should not take place below the estimated price. This permission was only obtained on the day of the sale, and on that day he purchased the property for Rs. 2,020.

It would appear that the whole of the proceedings subsequent to the death of the original judgment debtor were without notice to anyone representing the infant. It is true that in the original proceedings in the local Court of Benares in the life-time of his father, he and three other minors were added as Defendants, and the Nazir of that Court was appointed *pro forma* guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant, applied for a postponement, but it was refused, and on the 26th January 1904 she, as the natural guardian of the infant and on his behalf, presented a petition for setting aside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant tried to induce them to intervene with regard to the sale. This led to proceedings in the Court

which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the manager of another portion of the infant's property to appear and file objections to the sale of Gadi Gandey, and for some time it was doubtful whether or not the Court of Wards would take charge of that property, and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on the 5th December 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an Order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this Order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter. On learning what had happened she presented a petition for a review of the Order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner on the 16th February 1906 allowed the prayer of the petition, having previously decided that sufficient cause had been shown to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside the decision of the Deputy Commissioner, and from that decision the present Appeal is brought.

The first contention against the competency of this Appeal is based on the provisions of Ch. 45 of the Code of Civil Procedure, 1882, which was in force at the date of the Appeal. This Chapter

regulates Appeals to the King in Council. Section 594 provides that in that Chapter the expression "decree" includes also "Judgment" and "Order" unless there be something repugnant in the subject or context. But it is argued that Orders for confirming or setting aside a sale made under Sections 311 and 312 are nevertheless excluded from the expression "decree" in this Chapter, because they are included in the Orders mentioned in Section 588. The reasoning is as follows:—In the definition of "decree" in Section 2 "Orders" specified in Section 588 are not included in the word "decree." Moreover Section 588 provides that "the Orders" "passed in appeal under this section shall be final." It is therefore contended that it would be repugnant to give to the word "decree" in Ch. 45 a meaning which would include "Orders" under Section 588. "Orders" setting aside or refusing to set aside sales of immovable property are therefore not appealable to the King in Council.

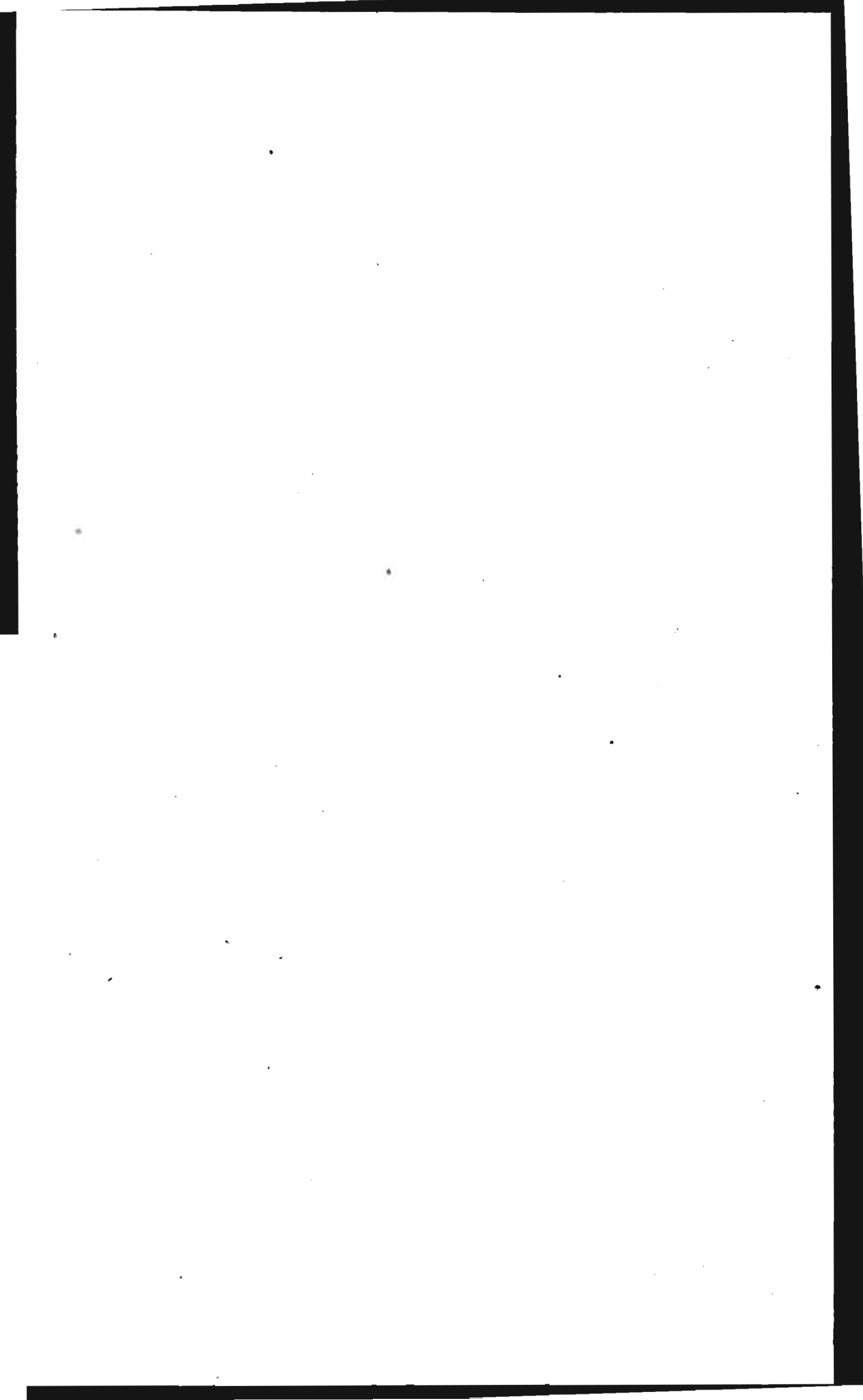
Their Lordships are unable to accept this contention. The Code in express terms adopts for the purposes of Ch. 45 a definition of "decree" which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in Section 2 is therefore not applicable, and the word "decree" in this Chapter must be read as equivalent to "decree judgment or Order." As so read there is no difficulty in construing Section 595, which determines when an appeal lies to the King in Council. If this substitution be made it is evident that final Orders may be appealed against, and therefore the provision at the end of Section 588 providing that Orders passed in Appeal under that section shall be final cannot restrict the provision that Appeals may be brought to the King in Council from them. It

should be added that Appeals of this nature have frequently been heard by this Board in times past, so that the consistent practice of the Board is at variance with this contention of the Respondent. Moreover no reason can be given why Orders of so important a character as those made under Sections 311 and 312, which deal finally with the rights of parties, should be excluded from the privilege of an Appeal.

But the main contention of the Respondent was to the effect that the mother of the infant could not represent him in these proceedings. It is so obvious that the Nazir of the local Court of Benares did not in fact represent the infant during any portion of the proceedings in the Court of Hazaribagh that neither before their Lordships nor in the Courts below was there any substantial contention that he continued to represent the infant after the removal of the proceedings to that Court. But it was contended that the only representative of the infant at the time of the sale and subsequently was the Court of Wards. It appears that on the 23rd December 1903 the Court of Wards made an Order taking over the management of some part of the property of the infant. That Order was not in evidence, and there is nothing in the record which enables their Lordships to ascertain its terms, but it is clear that the Court of Wards did not in fact take over Gadi Gandey at any time. There are concurrent findings to this effect in the Courts below and their Lordships have independently arrived at the same conclusion. Their Lordships are therefore of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale, and that it was the only way of preventing his

interests, with regard thereto being sacrificed. The proceedings taken by her were therefore in order and the Appeal from them is properly before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the Appeal be allowed and the order of the High Court be discharged with costs and the order of the District Commissioner restored and that the Respondent be ordered to pay the costs of this Appeal.



In the Privy Council.

TEKAIT KRISHNA PRASAD SINGH

v.

MOTI CHAND.

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