(1950) 03 GAU CK 0012

In the Gauhati High Court

Case No : Second Appeal No. 24A of 1948

Sib Charan Das APPELLANT

Vs

Manik Chandra Agarwalla and Another RESPONDENT

Date of Decision : 15-03-1950

Acts Referred:

Assam Land Revenue Act — Section 118, 147, 148, 148(8), 151
Chancery Procedure Act, 1852 — Section 28, 50
Civil Procedure Code, 1859 — Order 21 Rule 63, Order 41 Rule 33, Order 7 Rule 7, 15, 9
Specific Relief Act, 1963 — Section 42

Citation : (1950) 03 GAU CK 0012

Hon'ble Judges : Thadani, C.J;Ram Labhaya, J

Bench : Division Bench

Advocate : K.R. Baroah and B.N. Deka, for the Appellant; J.N. Borah, for the Respondent

Judgement

Ram Labhaya, J.—This is an appeal from the judgment and decree of the Special Subordinate Judge, A. V. D., by which the order of the Sadar Munsiff, dated 31st July 1947, decreeing plaintiff''s suit was reversed and plaintiff''s suit dismissed.

2. The suit was for a declaration that; the order of the Revenue Tribunal dated 27th April 1946 setting aside the sale of the land belonging to defendant 1 was illegal and without jurisdiction. The plaintiff it is alleged also prayed for khas possession of the land in suit.

3. The facts leading to the litigation are as follows:

4. The land covered by patta No. 152 of Majgoan village stood in the name of Manik Chandra Agarwalla, defendant 1. The land was sold for recovery of arrears of land revenue for the year 1348 and 1349 B. s. on 29th November 1943. The plaintiff was the purchaser. The sale was confirmed on 11th May 1944, and the sale certificate was issued on 12th May 1944. On plaintiff''s application for delivery of possession, the Additional Deputy Commissioner directed the Sub-

Deputy Collecter on 19th May 1944 to deliver possession of the property to him. The possession was delivered on 4th November 1944. The patta in respect of the land stood in the name of Manik Chandra Agarwalla, defendant 1, In this patta he was shown as a minor with his mother as the guardian.

5. Dhanaraj Agarwalla, father of Manik Chandra Agarwalla, acting as guardian of his son, preferred an appeal against the order directing sale of the minor''s property and prayed that the sale be set aside, The appeal was sent by registered post and it was received in the office of the Revenue Tribunal on 27th August 1945. On 27th April 1946, the Revenue Tribunal, ordered that the sale be set aside on usual conditions, viz.,

On payment of the arrears of revenue for which the estate was sold, the cost of the sale, interest at 6 percent per annum of the purchase money, as also intermediate payments of Government dues that may have been made by the auction-purchaser or any sum paid out or decreed as surplus sale proceeds.

6. The order of the Revenue Tribunal was a very brief one. The appeal was described as a case for setting aside the Bale u/s 151, Assam Land & Revenue Regulation, The sale was set aside on the ground that the revenue for the two years (1348 and 1319 B. S.) was actually sent by money order to the Mouzadar but owing to the change of Mouzadars the amount was not credited to the Government as the statement showed. The gist of the finding was that the Mouzadars had failed to function and this had materially contributed to the sale and the ? loss of an estate to a minor. It was observed that the delay in moving the Court had not been satisfactorily explained but it was condoned in the special circumstances of the case. The only special circumstances referred to in the order are that the sale was of a minor''s estate and the failure on the part of the Mouzadar to function properly had contributed to the sale materially.

7. The plaintiff, who was the purchaser, instituted the suit out of which this appeal arises. His case was that the defaulter Manik Chandra Agarwalla was not a minor at the time of the revenue sale. He had attained the age of majority at the time. His father could not represent him in his appeal or application for setting aside the sale. The appeal that was preferred wa8 barred by time and the order of the Revenue Tribunal setting aside the sale was illegal and without jurisdiction.

8. The main defence was that the sale itself was invalid and the order of the Revenue Tribunal whether right or wrong could not be challenged in a civil Court. The allegation that defendant 1 had attained the age of majority at the time of the sale was denied. The learned Munsiff found that on the date of sale defendant 1 was not a minor. He had attained the age of majority. The land revenue for the years for which the land was sold had not been received by the Mouzadar who had reported about the accumulation of arrears. He had received only a portion of the amount due for one year. The finding arrived at thus was that some money on account of land revenue was due on the date of sale. It was

further found that the order of the revenue tribunal setting aside the sale was without jurisdiction and therefore null and void. As regards the relief, the learned Judge held that the plaintiff had not asked for possession of the property, he had not paid the court-fee on this relief and that it was not necessary to grant consequential relief. He treated the suit as in substance a suit for declaration only and granted plaintiff a declaration that the order of the Revenue Tribunal dated 16th April 1946 was null and void and not binding on the plaintiff.

9. On appeal the learned Sub-Judge reversed the decree of the trial Court holding that the order of the Revenue Tribunal was not in excess of jurisdiction or illegal and therefore was not assailable in the civil Court. He also found that plaintiff was not in possession of the property. He had not prayed for this consequential relief which was available to him and was not therefore entitled to even the declaratory relief [9] Plaintiff has appealed. His learned Counsel has assailed the correctness of the appellate decree on both the grounds on which it rests.

10. The first question that arises for determination in this appeal is whether the order of the Revenue Tribunal is without jurisdiction. The learned Counsel for the respondent has urged with considerable vigour that an appeal had been preferred to the Revenue Tribunal on behalf of defendant 1. This appeal was against the order of the Deputy Commissioner directing the sale of the property and was covered by Section 147 (b), Assam Land & Revenue Regulation. The Tribunal in the exercise of its powers u/s 118 Clause (3) of the Regulation condoned the delay and then set aside the sale on the merits. The order, he contended, was entirely within the scope of the powers of the Revenue Tribunal and the civil Court was precluded from exercising jurisdiction in the case as the claim of the plaintiff arose out of the collection of land revenue. In fact, he contended that it arose directly from the process of sale for the recovery of the arrears of land revenue. In support of this contention he relied on Section 154 (g), Assam Land & Revenue Regulation.

11. The sale in this case was held on 29th. November 1943. It was confirmed on 11th May 1944. The appeal to the Revenue Tribunal must be deemed to have been preferred on 27th Augusts. 1945 on which date it was actually received in the office of the Revenue Tribunal some 15 months after the date of confirmation of the Bale. The order directing sale is an appealable order. It is covered by Section 147 of the Regulation, Under Clause (b) an appeal would lie to the Revenue Tribunal if the order directing sale was passed by the Deputy Commissioner as in this case. The learned Counsel for the appellant had nothing at all to say against this view. It is also clear that the Revenue Tribunal had the power to admit the appeal after time if it was satisfied that the appellant had sufficient cause for not presenting the appeal within the period allowed by law. Even on this point there is no conflict between the learned Counsel for the parties. But from this point onward, there is no agreement. The learned Counsel for the appellant urges that there was no sufficient cause for admitting the

appeal after time. The Tribunal in its order observed that no satisfactory explanation for the delay had been given. In extending time, in spite of this finding, presumably with a view to save the defendant, who was wrongly described as a minor, from possible hardship, it exceeded its powers and acted in defiance of the pro. visions of the law contained in Clause (3) of Section 148. He reliea on this contention as the first ground of his attack.

12. His second and the main ground of attack was that in setting aside the sale u/s 151, the Revenue Tribunal clearly exceeded its jurisdiction. His contention was that remedies for getting orders of sale set aside are all contained in chap. v of the Regulation and a sale tinder no conceivable circumstances can be set aside by the Tribunal in the exercise of its powers u/s 151. The remedies against orders of sale contained in chap. V, he urged, are exhaustive. An application for setting aside sale may be made u/s 79 on the grounds specified in the section. The sale may be annulled by the Revenue Tribunal u/s 81 on an application made to it on the ground of hardship or injustice within one year from the date of the sale becoming final. A suit for annulment of the sale may be instituted u/s 82 but that it was not open to the Revenue Tribunal to interfere with any order of sale in the exercise of its very wide powers u/s 151 under any circumstances.

13. In order to decide whether the Revenue Tribunal acted within the limits of its jurisdiction, we have first to determine under what provision of the law the Tribunal acted. The Tribunal had an appeal before it admittedly, and a time barred appeal at that. Before condoning delay it treated the appeal as an application u/s 151 without giving any reasons for the adoption of this course. The delay in preferring the appeal, inordinate though it was, was condoned but without reference to the provisions contained in Section 148 (8) and in spite of the finding that this delay had not been satisfactorily explained. Such a condonation could more appropriately be ordered u/s 151 which prescribes no limitation for petitions under it. The sale itself was set aside on the ground that a minor''s estate had been sold when the land revenue for the period in question appeared to have been remitted to the Mouzadar though the amount had not been credited to the Government owing to the change of Mouzadars, which in the opinion of the Tribunal materially contributed to the sale. The learned Munsif who heard the suit giving rise to this appeal, had to submit a report to the Tribunal in a different capacity before the Tribunal directed that the sale be set aside. His report then was that the appeal was time barred though interference was possible on the ground of hardship and also on the ground of irregularity in publishing or conducting the sale. The Tribunal evidently was not satisfied that there was any irregularity in publishing or conducting the sale but it set it aside presumably on the ground of hardship.

14. We are driven to this conclusion as according to the order of the Tribunal the land revenue for the two years in question had not been credited. The evidence in the case shows that a part of the revenue had not been even remitted to the outgoing Mouzadar. There was still some balance due from the pattadar

(defendant 1). The report before the Tribunal indicated hardship. The order directing sale could not be shown to be illegal and without jurisdiction. No irregularity in publishing or conducting the sale is mentioned or referred, or in the order. There was thus no other ground for setting aside the sale except that of hardship. The word ''hardship'' has not been used by the Tribunal. But as there was no other conceivable basis on which the Tribunal could set aside the sale, we think, the Tribunal was influenced by the consideration that the sale occasioned hardship to the pattadar. This to our mind is the only reasonable interpretation of the order.

15. We now proceed to consider whether the Tribunal could set aside the sale on the ground of hardship. This is the crucial question in the case. The powers of the Tribunal u/s 151 of the Regulation are apparently very wide. It may pass any order it deems fit after calling for the proceedings held by any subordinate officer. But it will be readily conceded that it has no power to pass arbitrary orders. This section, correctly interpreted, merely empowers the Tribunal to pass any orders it may deem fit within the scope of its authority. Its orders also must be legal and within the limit of its jurisdiction. This limitation on its apparently unrestricted powers is necessarily implied. The orders, therefore, must be within the framework of the Regulation. The Tribunal cannot for instance pass an order which the Regulation forbids. Whether the jurisdiction that the Tribunal is exercising is original or appellate or revisional, it cannot pass orders in disregard of any statutory direction contained in the Regulation whether express or implied. It may therefore interfere on appeal or in revision u/s 151 with orders of sale on all legal grounds. But if a sale is sought to be set aside on the ground of hardship and injustice, it could be set aside only within one year from the date the sale became final. The Tribunal even in the exercise of its revisional jurisdiction cannot enlarge its powers in this respect.

16. It is noteworthy that the Regulation does not empower the Tribunal to extend the period of one year in order to exercise its jurisdiction on the ground of hardship or in justice. When the Tribunal extends the period for an appeal or condones delay in revision, it merely can exercise its powers, appellate or revisional, as the case may be, that it possesses but it cannot exceed those powers merely because the appeal or the petition for revision are treated as within time. Even after the condonation of delay, if the sale could not be set aside on any ground except hardship or injustice, the Tribunal had no power to set it aside after one year from the date that it became final. I understand that this was what my Lord the Chief Justice wanted to convey when he held in Mt. Monondari Nepalini v. Saruram Siring in Revenue Appeal No. 54 of 1948 that where the subject-matter of the case before the Court involved a setting aside of the sale, it would be governed by Section 81 which prescribes a period of limitation within which powers given to the Tribunal could be exercised. In this view of the matter, it must be held that the Tribunal exceeded its jurisdiction in setting aside the sale more than one year after the date on which it became final. In doing so, the Tribunal also contravened an express direction contained in

the statute and this transgression on its part makes the order easily assailable in the civil Court on the ground of obvious illegality.

17. Section 154 of the Land and Revenue Regulation will not help defendant respondent if the Tribunal in setting aside the sale exceeded its jurisdiction. This proposition has not been disputed. In fact, the matter is concluded by the decision of their Lordships of the Privy Council in AIR 1940 105 (Privy Council) wherein their Lordships have gone further and have laid it down that

exclusion of jurisdiction of the Civil Court is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into oases where the provisions of the Act have not been complied with, or the statutory Tribunal has not acted in conformity with the fundamental principled of judicial procedure.

18. This pronouncement of their Lordships was followed by a Division Bench of the Allahabad High Court reported in Allah Taala v. Dist. Board of Pilibhit AIR 1945 ALL. 373: (I. L. R. (1945) ALL. 661).

19. It is obvious that in directing that the sale be set aside the Tribunal exceeded its jurisdiction or at least disregarded a mandatory direction contained in the statute, unconsciously though it may be, thus making it possible for the civil Court to come to the aid of the aggrieved party. The jurisdiction of the civil Court to declare the order null and void in this case is, therefore, undoubted.

20. The plaintiff, however, has another difficulty in his way. The trial Court granted him a decree for the declaratory relief claimed by him. He did not appeal from the decree of the trial Court, nor did he put in any cross objections. The defendant alone appealed and obtained a reversal of the decree of the trial Court. Plaintiff has come to this Court and has prayed for the reversal of the appellate decision and also for the modification of the order of the trial Court He now wants a decree for possession also.

21. It is clear that not having appealed from the decision of the trial Court, he allowed it to become final against him. He cannot directly appeal against the decision of the trial Court to this Court. He is entitled to ask for a reversal of the appellate decree and the restoration of the decree of the trial Court. But the decree that the trial Court granted was a decree for a declaration only. The plaintiff is out of possession. His own statement in the trial Court was that he got only symbolical possession as a result of the sale in his favour and that after the Tribunal ordered the sale to be set aside, defendant took possession of the land. His counsel now has urged that the plaint included a prayer for confirmation of possession or in the alternative for khas possession. He refers to the final para of the plaint which embodies this double relief. He contends that the trial Court was wrong in suggesting that the relief for possession was not claimed or that it was not necessary. He also urges that the appellate Court was in error in holding that the relief for possession had not been claimed. The finding arrived at the appeal

stage is one of fact. The learned Judge found that the relief though originally included in the plaint was expunged. This statement of fact is admittedly correct so far as the title of the plaint goes where the relief claimed was described. In the last para of the plaint, where also the relief claimed was described, the prayer for possession was allowed to remain. The title of the plaint and the final para were thus in conflict. The court-fee appeared to have been paid only on the declaratory relief. The trial Court''s interpretation of the plaint was that relief for possession was not meant to be claimed. He referred to the fixed court-fee of RS. 10 paid by the plaintiff in support of this view. This view was accepted without demur by the plaintiff. He did not appeal against the virtual dismissal of the suit so far as possessory relief was concerned. He did not file any cross-objection against the decision. In these circumstances it seems that the view taken by the lower appellate Court was correct. But assuming as is now urged by the learned Counsel for the plaintiff that the relief for possession was not meant to be excluded though payment of a fixed court fee of Rs. 10 is an indication to the contrary, the decree (of the Court of first instance) as pointed out above cannot be modified in plaintiffs favour as he did not appeal from the decision of the trial Court. A modification of the trial Court''s decree at the stage would involve permitting an appeal direct to this Court from the decision of the Court of the first instance. This is not possible in law and this view is fully supported by clear pronouncements from their Lordships of the Privy Council contained in Nobin Chandra v. Chandra Madhab 44 Cal. 1: (A.I.R. 1916 P. C. 148) and Mahomed Khaleef Shirazi & Sons v. Les Tanneries, AIR 1926 P. C. 34: (49 Mad. 485). In the latter case, Mahomed Khaleef Shirazi & Sons v. Les Tanneries AIR 1926 P. C. 34: (49 Mad. 435), it was held that an appeal direct to His Majesty in Council from the decree of the trial Judge is not allowable under the CPC or under the Letters Patent of the High Court, and that Order 41, Rule 33 is not intended to apply to such cases.

22. The learned Counsel for the appellant has relied on Ponnari Rao v. Lakshmi Narasamma AIR 1938 Mad. 822: (177 I. C. 693), Tricomdas Cooverji v. Gopinath Jiu Thakur AIR 1916 P. C. 182: (44 Cal. 759) and (1931) LXI MLJ 367 (Privy Council) for showing that it is open to this Court under Order 41, Rule 33 to pass any order which in the view of the Court may be necessary for doing complete justice between the parties. It is not necessary to consider these oases in detail as the question now before the Court did not arise in any of these three cases. They have really no bearing on the point. Besides the pronouncements of their Lordships of the Privy Council referred to above leave no room for doubt in the matter and I am quite clear that it is not open to this Court now even in the exercise of its powers under Order 41 Rule 33 to grant plaintiff any other relief than the restoration of the trial Court''s decree.

23. The question then arises whether the declaratory relief allowed by the trial Court offends against the provisions contained in Section 42, Specific Belief Act. The learned Counsel for the appellant contends that Section 42, Specific Belief Act does not stand in the way of the plaintiff getting the relief allowed to him by

the trial Court. This contention of his is based on the view of a Division Bench of the Calcutta High Court expressed in Mahomed Manjural Haque V. Bissesar Banerjee 47 C. W. N. 408: (A.I.R. 1948 Gau. 361). Relying on this the learned Counsel argues that in this case the decree has the effect of giving present relief in addition to the declaration that the order of the Revenue Tribunal setting aside the sale was null and void and was therefore governed not by Section 42, Specific Relief Act but by the provisions of the Civil Procedure Code.

24. In order fully to appreciate the view expressed in Mahomed Manzural Haque v. Bisseswar Banerjee 47 CWN 408: (AIR 1948 Cal. 861), it is necessary to refer to the facts of this case.

25. The suit was for a declaration that a certain order made by the Board of Revenue, Bengal, was ultra vires and void. A certain share of a revenue paying estate was sold for the recovery of arrears of land revenue. The plaintiff was the purchaser at the revenue sale held u/s 18, Bengal Land Revenue Sales Act, 1869 (Act XI [11] of 1859). The sale was confirmed and a certificate of sale was issued to the purchaser u/s 28 of the Act. On 7th April 1937, the Collector ordered delivery of possession to him u/s 29. Before the last order could be carried out and plaintiff placed in possession, the defendants preferred an appeal to the Commissioner praying that the sale be set aside. The appeal was dismissed as barred by time. On 25th May 1937, they presented a petition to the Board of Revenue against the Commissioner''s order. The Board after considering the report from the Commissioner set, aside the sale It appeared from the order of the Board that it was influenced by considerations of hardship. It was against this order of the Board that the suit was mainly directed. The relief asked for in the plaint was as follows:

That the Board''s order be declared ultra vires void and unenforceable and set aside;

That the plaintiff be declared entitled to get possession of the property in suit u/s 29 of the Bengal Land Revenue Sales Act;

That such other or modified reliefs as the plaintiff may be entitled to, be granted to him, besides coats and interest.

26. The suit was decreed in the trial Court, On appeal, it was contended that the suit was not maintainable without a prayer for recovery of possession as consequential relief and without the addition of the Collector as a party.

27. On behalf of the appellants reliance was placed on Moothoo Vijia v Dorasinga Tevar 2 I. A. 169: 5 Beng. L. R. 83 P. C. and Sheo, parsan Singh v. Ram Nandan Prasad, 43 I. A. 91 (AIR 1916 P. C 78), while the respondents'' counsel contended on the strength of Robert Fischer v. Secy. of State 26 L A. 16, (33 Mad. 270 P. C.) that Section 42, Specific Belief Act was not exhaustive of the cases in which a declaratory relief without more may be granted. In Moothoo Vijia v. Dorasinga Tevar 2 I. A. 169: (15 Beng. L. R. 83 P. C.), their Lordships laid

down that the Courts in India bad no power to make a merely declaratory decree otherwise than u/s 15, Code of Civil Procedure. of 1859 which was as follows:

No suit shall be open to objection on the ground that a merely declararory decree or order is sought thereby, and it shall be lawful for civil Courts to make binding declarations of right without granting consequential relief.

28. In delivering the judgment of their Lordships Sir James Colville said:

They (their Lordships) at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon Section 15 Code of Civil Procedure., the effect of which has been so much discussed. Mr. Deyne, however, raised some question as to that and suggested that the power was possessed by the Courts in the mofussil before the CPC was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Civil Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable.

29. Their Lordships were of the opinion that the application of Section 15, Code of Civil Procedure. must be be governed by the same principles as those upon which the Court of Chancery proceeded in reference to the Chancery Procedure Act, Section 50. The Code of 1859 was repealed by the Code of 1877 and the provision as to declaratory decrees was taken out of the CPC and Appeared in a modified form in the Specific Relief Act as Section 42.

30. In Robert Fischer v. Secy. of State, 26 I. A 16: (22 Mad. 270 P. C.), Section 42, Specific Relief Act came up for consideration before their Lordships of the Privy Council. In that case, the Collector, with the subsequent sanction of the Board of Revenue, ordered on notice to the proprietor and lessees of a zamindary, that separate registration and sub assessment of the appellant''s village situate therein be made under Regulation xxv [25] of 1802, Section 8, and Act I [1] of 1876 Thereafter the Government, on the application of one of the lessees, without notice either to the appellant or the Collector, ordered the latter to cancel the registration A suit was instituted by the appellant by which be prayed for a declaration that the order of the Government was ultra vires and illegal.

31. Act 1 [1] of 187G (s. 2) empowered the Collecter to hold an inquiry and either in the absence of or on disallowing objections of parties interested, to register the alienated portion in the name of the alience and to apportion the assessment of such alienated portion. Any person aggrieved by either the grant or refusal of separate registration could sue in a civil Court. It was contended before their Lordships of the Privy Council that the suit for a declaratory decree alone was not entertainable in view of the provisions contained in Section 42,

Specific Relief Act. Lord Macnaghten, who delivered the judgment of their Lordships of the Privy Council observed as follows:

Now in the first place it is at least open to doubt whether the present suit is within the purview of S 42, Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of S. SO, Chancery Procedure Act of 1852 as interpreted by judicial decision, Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act. applies to such a suit as this, what is the result? What further relief can be required? The so-called cancellation is pronounced void, the order of the Government falls to the ground, and the decision of the Collector stands good and operative as from the date on which, it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector''s book.

32. It is clear that their Lordships decided the case on the assumption that the Specific Relief Act applied They found that no further relief could have been asked for in the case. It is also noteworthy that the suit was instituted under the express provisions of the Madras Act I [1] of 1876. The jurisdiction reserved for the civil Court by that Act was in its nature appellate. Any person aggrieved by either the grant or refusal of separate registration could sue in the civil Court. The order of the Collector granting separate registration was cancelled by the Government of Madras. A declaration that the order of the Government was ultra vires would have been sufficient to restore the order of the Collector. In these circumstances the suit was held to be not open to any objection. The expression of doubt whether a suit of that nature was within the purview of s 42, Specific Relief Act, however, remains. There is also the observation that a suit which was in substance to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect was not of the type which the farmers of the Specific Relief Act had in mind. This dictum has been interpreted as implying that Section 42, Specific Relief Act is not exhaustive of the cases in which relief for mere declaration may be asked for.

33. In Sheoparsan Singh v. Ram Nandan Prasad, 43 I. A. 91: (A.I.R. 1916 P. C. 78), their Lordships of the Privy Council laid down as follows:

The Court''s power to make a declaration without more is derived from Section 42, Specific Relief Act, and Regard must, therefore, be had to its precise terms.

34. This interpretation of Section 42 was not easily reconcilable with the

observations made in Robert Fischer v. Secy, of State, 26 IA 16: (22 Mad. 270 P. C.) The learned Judges of the Calcutta High Court found themselves confronted with an apparent conflict between the two pronouncements from their Lordships of the Privy Council. They interpreted the remarks in Fischer''s case 26 IA 16: 22 Mad. 270 P. C. as conveying that Section 42 was not intended to apply to oases where the declaration asked for included present relief.

35. Now, let us see what the present relief in Fischer''s case (26 IA 16: 22 Mad 270 P. C.) was. The suit was for a mere declaration that the order of the Madras Government was ultra vires and illegal. It was under a particular provision of Act I [1] of 1876. That provision virtually allowed an appeal to the civil Court if any party felt aggrieved by the decision of the revenue authorities in the matter of registration. The declaration that the order of the Government was ultra vires could restore the order of the Collector. The restoration of the Collector''s order was to lead to the undoing of any act, e. g., entry or remarks indicating the cancellation of registration--by the Collector in pursuance of the illegal order of the Madras Government. The result would follow automatically. It was not necessary for the plaintiff to ask for any further relief in that case. The effect of the declaration in that case was exactly the same as in the case of an appellate decree of a civil Court which sets aside or modifies the decree of the Court below. If before reversal or modification the lower Court has allowed its decree to be executed, it will have to put the parties in the same position which they occupied before the original order was given effect to in execution. The declaration granted by the civil Court in Fischer''s case, (26 I. A. 16: 22 Mad. 270 P. C.) gave it the effect of an appellate order. It automatically granted all necessary relief. The plaintiff was put in the position which he had occupied before the cancellation of the Collector''s order by the Government. This, according to the learned Judges of the Calcutta High Court, would be the present relief which the declaration in that case included.

36. The situation was similar in the Calcutta case. The Collector had ordered delivery of possession. But before this order could have been given effect to, the sale was set aside by the Board of Revenue. A declaration that the order of the Board of Revenue was null and void was enough for plaintiff''s purpose. The Collector could then have given possession in pursuance of his own order which would have been revived by the declaration Bought for. The declaration impliedly gave all the relief that the plaintiff required. It was not necessary for him to ask for possession as he could get it in execution of the Collector''s order. The declaration in that case also afforded the necessary present relief.

37. The observations in Fischer''s case (26 I. A. 16 : 22 Mad. 270 P. C.) that the framers of the Act did not intend that Section 42 should apply to cases in which in substance the suit was to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect were, however, not made the basis of the decision in the case. It was assumed that the case was governed by Section 42

and it was then held that as no further relief was necessary the claim was not hit by the proviso to Section 42, Specific Relief Act. Similarly, in the Calcutta case the interpretation that was placed on the observations of Lord Macnaghten with a view to reconciling them with what was clearly held by their Lordships of the Privy Council in Sheoparsan Singh v. Ram Nandan Pd. 43 I. A. 91: (A.I.R. 1916 P. C. 78) was not the basis of the decision. The case was decided on the assumption that Section 42 applied to it but it was not necessary for the plaintiff to ask for possession as after the declaration that the order setting aside the sale was ultra vires he could take possession in execution of the Collector''s order who had not completed the proceedings by delivery of possession. I am in respectful agreement with the learned Judges of the High Court in the interpretation they have put on the observations of Lord Macnaghten contained in Fischer''s case (26 I. A. 16 : 22 Mad. 270 P. C.). It would seem that Section 42 can have no application to suits which are provided for expressly by the statute which gives a sort of an appellate jurisdiction to the civil Court in cases which are decided either summarily as under Order 21, Rule 63, Code of Civil Procedure., or by executive or revenue authorities as in Fischer''s case 26 I. A. 16 : 22 Mad. 270 P. C. Such oases would be outside the purview of Section 42. But the Calcutta case did not belong to this class. It, however, was not within the mischief of Section 42 as the declaration asked for served exactly the same purpose as it did in the case of Fischer.

38. Both these cases are distinguishable from the present case. The suit in this case is not covered by any provision of Assam Land & Revenue Regulation. The civil Court in entertaining this suit is not exercising any jurisdiction which is expressly vested in it by the statute. This is one feature which distinguishes it from the case of Fischer. The other distinguishing feature is that a mere declaration is not all that the plaintiff could claim. He got possession from the Collector. It was symbolical possession according to him and according to his own statement possession was taken over by defendants after the order of the Board by which the sale was set aside. The situation created was that not only was the sale set aside but plaintiff was deprived of the possession as well. A declaration that the order setting aside the sale was ultra vires would not help the plaintiff in getting possession from the Collector. He has already given him possession and did not take it back after the order of the Board. The defendants dispossessed the plaintiff. If the order of the Board is declared null and void and the sale is held to be valid, plaintiff would be entitled to possession of the land. This relief he can now obtain only by a suit. This further relief he cannot seek from the revenue authorities in the circumstances of this case. The suit is not covered, therefore, by the observations of Lord Macnaghten in Fischer''s case, (26 I. A. 16 : 22 Mad. 270 P. C.), as interpreted by the learned Judges of the Calcutta High Court. The declaration asked for in this case does not include any present relief. It will be a mere declaration which may entitle the plaintiff to sue for possession later. The circumstance that the plaintiff will be put to the necessity of instituting a separate suit for possession even if the declaration sought for is

granted to him was not present in either of the two cases relied on. In both the cases it was found as a fact that no further relief was necessary to be claimed on the facts which were different from the facts of the present case.

39. It cannot be ignored that Section 42, Specific Relief Act was applied to both the cases and thus the position that the proviso to Section 42 was imperative was recognised. The requirements of the proviso are mandatory and this case does not fulfil these requirements. It cannot be regarded as including any present relief in the sense in which the expression was understood in the Calcutta case.

40. The learned Counsel for the appellant has argued that the relief claimed in the case is that the order of the Board of Revenue is ultra vires and that it be set aside. He points out that setting aside of the order is the farther or present relief and that it is not necessary for the plaintiff to claim all available reliefs. This contention must be repelled. If the order of the Board is without jurisdiction, as we have found, it requires no setting aside. This part of the relief is a mere surplusage and cannot serve as a substitute for the substantial or real further relief without which plaintiff''s grievance cannot be completely redressed and for which a separate suit which the proviso to Section 42, Specific Relief Act aims at preventing will be absolutely necessary. In the Calcutta case also, the plaintiff had prayed that the order of the Board of Revenue be set aside. But the analogy is merely illusory. As pointed out above, the plaintiff in that case could get possession from the Collector without instituting a suit, which is not the case here.

41. My conclusion, therefore, is that the learned Subordinate Judge was right in dismissing the suit as being one for mere declaration when further relief which was available and which should have been claimed to meet the requirements of the proviso to Section 42, Specific Relief Act was not claimed. This view finds support from Jit Singh and Others Vs. Ghetlu and Others, in which it was held that:

No civil suit lies for a mere declaration that a decree of a Revenue Court was invalid for want of jurisdiction.

42. In the result I hold that this appeal must be dismissed. I shall leave the parties to bear their own costs.

Thadani, C.J.

43. I have had the advantage of reading the judgment of my learned brother. While I agree that the Revenue Tribunal in this case exceeded its jurisdiction in directing the sale to be set aside, and that the civil Court has jurisdiction to declare the order of the Tribunal a nullity, I am unable to agree that there is any impediment to the passing of a decree for the plaintiff appellant for a declaration as prayed for by him without more, having regard to the facts of this case.

44. It is true that Mr. Barooah invited us to decree the relief as to possession, as

prayed for by the plaintiff in the trial Court, which the trial Court, either deliberately or through over-sight, did not grant. But at the same time, Mr. Barooah stated that he would be content with a mere declaration that the order passed by the Revenue Tribunal is a nullity. If the plaintiff is entitled to a declaration that the order passed by the Revenue Tribunal is a nullity, the fact that he did not appeal against the judgment and decree of the trial Court which had either declined to decree the plaintiff''s prayer as to possession or had omitted to do so, is wholly immaterial when it is remembered that the suit brought by the plaintiff was, in fact and in essence, a suit to set aside the order of the Revenue Tribunal as being contrary to the provisions of the Assam Land and Revenue Regulation, and, as such, it was not hit by the proviso to Section 42, Specific Belief Act.

45. The mere use of the word declaration whether in the title of the plaint or in the prayer clause, does not necessarily make a suit a suit for declaration so as to attract the proviso to Section 42, Specific Relief Act. For instance, where a suit is in substance a suit for cancellation of a deed of sale relating to immovable property, the fact that the plaintiff prays for a declaration that the deed do stand cancelled, can scarcely be regarded as being hit by the proviso to Section 42, Specific Relief Act. The moment a sale-deed is cancelled or set aside by a decree of the Court, the rights present in the parties before the execution of the sale-deed are automatically restored, even though in a given case it might be that the plaintiff would find it difficult to obtain possession, except through the intervention of a Court.

46. I am unable to subscribe to the view expressed by my learned brother that where an order passed by a duly constituted authority is without jurisdiction, it does not require to be set aside, and that the principal relief, therefore, in a case where an order does not require to be set aside, is not one setting aside the order. In my opinion, the facts of the case before us are on all fours with the facts present before the learned Judges of the Calcutta High Court in the ease reported in Mohd. Manjural Hague v. Bisseswar Banerjee, 47 C. W. N. 408: (A.I.R. 1948 Cal. 861) in which they had occasion to consider the decisions of their Lordships of the Privy Council reported in Moothoo Vijia v. Dorasinga Thevar 2 I. A. 169: (15 Beng. L. R. 83 P. C.); Robert Fischer v. Secy. of State 26 I. A. 16: (22 Mad. 270 P. C.) and Sheoparsan Singh v. Ram Nanian Prasad 48 I. A. 91: (A.I.R. 1916 P. C. 78). Rau J. delivering the judgment of the Division Bench observed at p. 112 of the report:

It would, therefore, seem that the expressions '' merely declaratory decree '' and '' declaration without more'' used in the Privy Council judgments in Kathama Natchair''s case 2 I. A 169: (15 Beng L. R. 83 P. C.)- and Sheoparsan Singh''s case 43 I. A. 91: (A.I.R. 1916 P. C. 78) refer to a declaration which merely serves to define rights, present or future, without giving present relief. The power of the Courts in India to make merely declaratory decrees in this sense is, under the above decisions, governed entirely by Section 42, Specific Relief Act.

But where a decree has the effect of giving present relief as well, the power to make it will be governed by the general provisions of the Code of Civil Procedure, e.g., Section 9 or Order 7, Rule 7 of the Code, and not by Section 42. Specific Relief Act. Such a view would be consistent not only with their Lordships'' observations in the above two cases, but also in Fischer''s case, 26 I. A. 16: (22 Mad. 270 P.C.). On this view, the present suit would not be governed by Section 42, Specific Relief Act.

47. My learned brother''s judgment is silent upon this passage from the judgment of the Calcutta High Court. If this passage from the judgment of the Calcutta High Court in Mohd, Chowdhury Mohammad Manjural Haque and Others Vs. Sebait of Sri Sri Iswar Lakshmi Narayan Jew Thakur, Sri Sri Iswari Saradia Durga Debi Thakurani and Sri Sri Iswari Jagadhatri Debi Thakurani, Bissesswar Banerjee, is to be given effect to--and it must be given effect to,--it seems to me that the presence of a fact namely that in the case the Collector had not yet delivered possession, to the party concerned is wholly immaterial. The learned Judges of the Calcutta High Court mentioned this particular fact only for the purpose of showing that the proviso to Section 42, Specific Relief Act, did not hit the plaintiff''s case, even if it were assumed that Section 42, Specific Relief Act, applied. In my opinion, their decision means that Section 42, Specific Relief Act, does not apply to a case where a plaintiff seeks to have an order set aside the existence of which is an impediment to the restoration of his rights, rights of which he has. been deprived as a result of the impugned order. This is what the learned Judges of the Calcutta High Court say at p. 418 of the report:

But even assuming that the Specific Relief Act applies to such a suit as this, let us see what is the plaintiff''s claim and who are the parties concerned. The plaintiff is undoubtedly a person who claims to be entitled to certain rights as to property, namely, the right to own and possess separate account No. 2 of Touzi No. CSS by virtue of his purchase on 14th January 1937 (as in this case). The defendants, who are the recorded owners and are in possession of that share of the estate, deny and are interested to deny his title. The Collector, on the other hand, has not denied, nor is he interested to deny, the plaintiffs'' title, although he could do nothing to assist the plaintiff after the Board has set aside the sale, (as in this case). In terms of Section 42, therefore, the plaintiff may institute a suit against the defendants, but not against the Collector, and the Court may in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not in such a suit ask for any further relief. We now come to the proviso: ''Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so''. In considering this proviso with reference to this case, we have to bear in mind that long before the Board''s order of September 1937, the Collector had already passed an order for delivery of possession to the plaintiff. Once the Board''s order is pronounced ultra vires and the plaintiff''s unimpaired title declared, the Collector''s order of 7th April 1937, would revive, and it would be his statutory duty to proceed to give effect to it u/s 14 and Section 29, Bengal Land Revenue

Sales Act, 1859. The plaintiff was not able to seek further relief in his plaint for the simple reason that he needed no more. The annulling of the Board''s order would give him all that he wanted. The circumstances are very similar to those in Fischer''s case (26 I. A. 16: (22 Mad. 270 P. C.) where the Privy Council made a declaratory decree, holding that no further relief was required. The proviso to Section 42, Specific Belief Act is no more a bar to a declaration of the plaintiff''s title in the present suit than it was in that suit.

48. I am unable to agree that the case before us can be distinguished from the case present before the learned Judges of the Calcutta High Court, merely because in the case before us the Deputy Commissioner had not delivered possession to the purchaser. Even in the Calcutta case the recorded owners were in fact in possession as here and yet the learned Judges did not think that the existence of that fact was an impediment to the passing of a decree declaring the order of the Revenue Board a nullity. Indeed the learned Judges of the Calcutta High Court, in considering the question from the dual aspect namely--(1) whether Section 42, Specific Relief Act applied to the facts before them, and (2) whether assuming that Section 42, Specific Relief Act, applied--the proviso to Section 42, operated as a bar to the plaintiff getting a decree for a mere declaration closely followed the observations of Lord Macnaghten in Fischar''s case (26 I. A. 16: 22 Mad. 270 P. C.) which are in these terms:

Now, in the first place, it is at least open to doubt whether the present suit is within the purview of Section 42, Specific. Relief Act. There can be no doubt as to the orign and purpose of that section.... It is, in substance, a suit to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind.

49. I do not think these observations of Lord Macnaghten can be regarded as obiter dicta. The learned Judges of the Calcutta High Court apparently did not regard them in that light. The learned Judges of the Calcutta High Court have definitely stated that the suit before them was not one under the provisions of Section 48, Specific Relief Act. Just as Lord Macnaghten then proceeded to deal with the case before the Board on the assumption that the Specific Relief Act applied, the learned Judges of the Calcutta High Court proceeded to do likewise. Lord Macnaghtan had observed:

But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? What further relief can be required? The so called cancellation is pronounced void, the order of the government falls to the ground, and the decision of the Collector stands good and operative as from the date on which it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector''s book.

50. Applying these observations to the facts before us, as soon as the cancellation of the order of the Revenue Tribunal is pronounced void, it falls to

the ground and the sale of the Deputy Commissioner made in pursuance of the Assam Land and Revenue Regulation stands good and becomes automatically final u/s 80, Assam Land and Revenue Regulation, and u/s 85 of the same Regulation, the Deputy Commissioner shall put the plaintiff into possession of the property. The fact that the Deputy Commissioner in the present case delivered possession to the respondents after the Revenue Tribunal had set aside the sale, is, in my opinion, wholly immaterial for the purpose of deciding whether the proviso to Section 42, Specific Relief Act applies. The act of that Deputy Commissioner in this case after he was made aware of the order of the Revenue Tribunal setting aside the sale, was an act done in pursuance of Section 85, Assam Land and Revenue Regulation. The Deputy Commissioner will act in precisely the same way the moment he comes to know that the order of the Revenue Tribunal has been set aside by this Court He will then forthwith act u/s 85 of the Regulation, the sale having become final u/s 80 of the Regulation and put the plaintiff into possession. I can see no reason, therefore, for thinking that the decision of the learned Judges of the Calcutta High Court would have been different if, in that case, the Collector had, in fact put the other party into possession. In any case even in the Calcutta case somehow or the other the other party was in possession.

51. In my opinion, the circumstances before us are similar to those in Fischer''s case (261. A. 16 : 22 Mad. 270 P. C.) and identical with those in the case reported in Chowdhury Mohammad Manjural Haque and Others Vs. Sebait of Sri Sri Iswar Lakshmi Narayan Jew Thakur, Sri Sri Iswari Saradia Durga Debi Thakurani and Sri Sri Iswari Jagadhatri Debi Thakurani, Bissesswar Banerjee, To borrow the language of the learned Judges of the Calcutta High Court, the proviso to Section 42, Specific Belief Act, is no more a bar to a declaration of the plaintiff''s title in the present suit than it was in Fischer''s case (26 I. A. 18: 22 Mad. 270 P. C.),

or in the case reported in Mohd. Manjural Haque v. Bisseswar Banerjee 47 C. W. N. 408: (A.I.R. 1948 Cal. 361). In my opinion, the declaration of the plaintiff''s title in this case follows automatically upon setting aside the order of the Revenue Tribunal, which in my view is the principal relief.

52. In the view I have taken of the decision of the Calcutta High Court reported in Chowdhury Mohammad Manjural Haque and Others Vs. Sebait of Sri Sri Iswar Lakshmi Narayan Jew Thakur, Sri Sri Iswari Saradia Durga Debi Thakurani and Sri Sri Iswari Jagadhatri Debi Thakurani, Bissesswar Banerjee, it follows that the decision of the Allahabad High Court reported in Jit Singh and Others Vs. Ghetlu and Others, has no application to the facts of this case.

53. I will accordingly set aside the judgment and decree of the lower appellate Court and restore that of the trial Court setting aside the order of the Revenue Tribunal with no order as to costs and leave it to the Deputy Commissioner to put the plaintiff into possession of the property u/s 86, Assam Land and Revenue Regulation. ORDER

Thadani, C.J.

54. A difference of opinion having arisen between my learned brother and myself--my learned brother taking the view that the decree of the lower appellate Court should be affirmed and I taking the view that it should be set aside and that of the trial Court restored--the provisions of Section 98. Code of Civil Procedure;. are attracted, and the judgment and decree of the lower appellate Court is confirmed.

