

1878

 LACHMAN
SINGH
v.
SANWAL
SINGH.

for a declaration that the plaintiff was entitled to a fifth share in the sum lent under the mortgage-deed. The plaintiff stated the principal sum to be Rs. 5,600, and his own share in that sum Rs. 1,120. He did not sue to recover any portion of the debt. He claimed by right of succession, and his cause of action was the obstruction offered by the defendants to his possession of the family estate. It appears that at the time he instituted the first suit the defendant had realised the original debt with interest to the amount of Rs. 8,624. The plaintiff had no knowledge of this fact which was concealed from him; and he now sues to recover his share of that sum. We find that the defendant wrongfully appropriated the assets of the estate, and the Judge's finding is to the effect that he dishonestly concealed from the plaintiff information that he had realised the debt. We have thus the element of fraud introduced into the transaction and giving another cause of action to that on which the former suit was brought. We concur with the Judge in holding that, under the circumstances, s. 7 of Act VIII of 1859 cannot be applicable to bar this suit. We notice that a similar view was taken by this Court in *Bulwunt Singh v. Chittan Singh* (1), and without endorsing or accepting all that is in that judgment, we consider that it expresses the course that we should adopt in this case. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

DURGA PRASAD (PLAINTIFF) v. KHAIRATI AND OTHERS (DEFENDANTS).*

*Act VIII of 1859 (Civil Procedure Code), ss. 337, 351—Act XXIII of 1861, s. 37—
Appeal—Appellate Court, powers of.*

An appellate Court, hearing an appeal *ex parte* in the absence of the respondent, cannot, *suo motu*, raise points in favour of the respondent, but must confine its decision to the questions raised by the appellant.

* Special Appeal, No. 995 of 1877, from a decree of W. Lane, Esq., Officiating Judge of Moradabad dated the 10th May, 1877, reversing a decree of Maulvi Wajih-ul-Jah Khan, Subordinate Judge of Moradabad, dated the 21st January, 1875.

(1) H. C. R., N.-W. P. 1871, p. 27. For a case in which the omission was due to a *bonâ fide* mistake, and it was held, following *Buzloor Ruheem v. Shamsunissa Begum*, 8 W. R. P. C. 3, that the result

was the same as if there had been an act of deliberate relinquishment, see *Ganes Chandra Chowdhry v. Ram Kumar Chowdhry*, 3. B. L. R. A. C. 265; S. C., 12 W. B. 79.

 1878
January 2.

1878

DURGA
PRASAD
v.
KHARATI.

THE facts of this case are sufficiently stated for the purposes of his report in the judgment of the High Court, to which the plaintiff in this suit appealed against the order of the lower appellate Court remanding the suit to the Court of first instance for a new trial. The plaintiff contended in special appeal that the order of remand was unauthorised by law.

Munshi *Hanuman Prasad*, for the appellant.

The respondents did not appear.

The judgment of the High Court, so far as it related to this contention, was as follows :

OLDFIELD, J.—It appears that the defendants, respondents, executed a deed of mortgage in favour of plaintiff on 9th June, 1873, for a consideration of Rs. 1,000, which was payable in one year, and the purport of the deed is to give possession to the plaintiff. On the same date another deed was executed by which the defendants agreed to take a lease of the property on payment of rent, for the due payment of which the property was hypothecated in the deed. The rent not having been paid, the plaintiff sues to recover arrears of rent, principal and interest, Rs. 164-7-1, by enforcing the charge on the property, together with interest subsequent to institution of the suit, and to obtain possession of the mortgaged property. The defendants appeared in the Court of first instance by their pleader and asked for an adjournment to enable them to put in their defence ; this was refused, and they failed to put in any reply to the claim, and the Court of first instance decreed the claim for possession, and the principal amount of rent, and dismissed the claim for interest. The plaintiff then preferred an appeal to the Judge on the matter of interest. The defendants did not defend the appeal notwithstanding that the Judge summoned them to appear in person. The Judge has held that, under s. 37 of Act XXIII of 1861, he is at liberty to open the whole case on the appeal preferred by the plaintiff, and as he considered the Court of first instance was not justified in refusing to allow time to the defendants to prepare their answer to the suit, and also that, looking into the deeds, there is reason to think that the claim to be put in possession of the mortgaged property is not maintainable and that the second deed is invalid for want of registration, he has reversed the decree of the

first Court and remanded the suit for re-trial on the merits, under s. 351 of Act VIII of 1859. This decision is open to the objection taken on special appeal.

S. 37 of Act XXIII of 1861 gives the Appellate Court the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits. But the Judge's order cannot be supported under this section. He has held that there has been an improper consideration and admission of evidence affecting the merits of the claim, although these matters were never put in issue in the appeal before him. The Judge should have confined himself to deciding the matters put in issue by the parties. S. 337 of Act VIII of 1859 shows the circumstances under which a Court may reverse or modify a decree in favour of plaintiffs or defendants who have not appealed, but this section does not apply to the case before us. The defendants might have appealed or preferred objections under s. 348, and in that case the Judge would have had to decide the questions raised, but they never appeared to defend the appeal, and, we may add, have not done so in this Court. The only question before the Judge was that raised by the appellant, the plaintiff, and he should have confined his decision to that question.

1878

DURGA
PRASAD
v.
KHAIRATI.

APPELLATE CIVIL.

1878

January 2.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

UMRAO BEGAM (JUDGMENT-DEBTOR) v. THE LAND MORTGAGE BANK OF INDIA (DECREE-HOLDER).*

Act XVIII of 1873 (North-Western Provinces Rent Act), s. 9—Landholder—Right of Occupancy Tenant—Transfer of Right of Occupancy in Execution of Decree.

S. 9 of Act XVIII of 1873 does not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. *Ablakh Rai v. Udit Narain Rai* (1) distinguished.

THE proprietary rights of the judgment-debtor in the village of Sikandarpur were sold on the 23rd October, 1876, and were

* Miscellaneous Regular Appeal, No. 96 of 1877, from an order of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 27th August, 1877.

(1) I. L. R., 1 All. 353.