

1876
July 7.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Spankie*).

RAM GHOLAM AND OTHERS (DEFENDANTS) v. SHEO TAHAL AND OTHERS
(PLAINTIFFS).*

Decree—Judgment—Appeal.

The plaintiffs in this suit claimed, as the heirs of *G*, possession from the defendants of certain lands which *G* had mortgaged to the defendant, alleging that the mortgage-debt had been satisfied from the usufruct. The defendants denied the title of the plaintiffs to redeem, asserting also that the mortgage-debt had not been satisfied. The Court of first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied.

Held, that the defendants were entitled to appeal, the case of *Pan Kooer v. Bhugwant Kooer* (1) not being applicable to this case.

The plaintiffs in this suit claimed, as the heirs of Gunnu Dubay, to recover possession from the defendants of certain lands which Gunnu Dubay had mortgaged to their ancestor in 1835 for Rs. 25, alleging that the mortgage-debt had been satisfied from the usufruct. They also claimed mesne profits.

The defendants denied that the plaintiffs were the heirs of Gunnu Dubay, asserting that they themselves were his heirs, and that they held possession of the lands in suit as such, having originally held possession of them under the mortgage. They also denied that the mortgage-debt had been satisfied from the usufruct.

The Court of first instance found that the plaintiffs were the heirs of Gunnu Dubay, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. Its decree was in these terms:—"It is ordered that the plaintiffs' claim be dismissed in its present form."

The defendants appealed impugning the decision of the Court of first instance that the plaintiffs were the heirs of Gunnu Dubay. The lower appellate Court dismissed the appeal on the ground that

* Special Appeal No 554 of 1876, against a decree of the Judge of Ghazipur, dated 17th February, 1876, affirming a decree of the Additional Subordinate Judge, dated the 8th April, 1875.

it was an appeal against the decision of the Court of first instance and not the decree, referring to *Pan Kooer v. Bhugwunt Kooer* (1). On special appeal by the defendant to the High Court it was contended that the lower appellate Court had misapplied that case.

Mir *Akbar Hussain*, for the appellants.

The *Senior Government Pleader* (*Lala Juala Parshad*), for the respondents.

The judgment of the Court was as follows :—

We are of opinion that the ruling of the Full Bench does not apply in this case. The appellant is dissatisfied with the decree of the Court of first instance. He contends that the respondents have, under no circumstances, a right to redeem, and that their suit should have been dismissed absolutely and not in such a manner that they are at liberty to come into Court again. We admit the force of the objection, and decreeing the appeal, remand the case to the lower appellate Court for decision on the merits.

BEFORE A FULL BENCH.

1876
July 27.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

ANANT DAS (DEFENDANT) v. ASHBURNER AND Co. (PLAINTIFFS).*

Act IX of 1872 (Contract Act), s. 28—Agreement not to Appeal—Void Agreement.

Where, in consideration of *A* giving *B* time to satisfy a decree against him held by *A*, *B* agreed not to appeal against the decree and did appeal, held that the agreement was not prohibited by s. 28 of Act IX of 1872, and that the appellate Court was bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow *B* to proceed with the appeal which he had instituted in contravention of it.

Ashburner and Co., the respondents in this appeal, had obtained a decree against Anant Das, the appellant. On the 24th July, 1875, while certain proceedings in execution of that decree were pending, Anant Das entered into an agreement with Ashburner and Co. by which he bound himself not to appeal from the decree if they would give him until the 20th September, 1875, to satisfy it. The agree-

* Regular Appeal, No. 109 of 1875, against a decree of the Subordinate Judge of Gorakhpur, dated the 10th July, 1875.

(1) H. C. R., N.-W. P., 1874, p. 19.