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receipt without the stamp. The decision of Brodhurst, J., in the case of *Bahadur Singh* (1) is not in point. In that case the acknowledgment was written in the accused's own book and at his request. The present case is really governed by the other cases cited. The conviction and sentence on Mitthu Lal are set aside. The fine to be refunded is paid.

Conviction quashed.

APPELLATE CIVIL.

1885
November 14.

Before Sir W. Comer Petheram, Kt. Chief Justice, and Mr. Justice Straight.

KRISHNA RAM (PLAINTIFF) v. GOBIND PRASAD AND ANOTHER
(DEFENDANTS)*

Dismissal of suit for non-appearance of plaintiff ordered to appear under s. 66, Civil Procedure Code—Rejection of application to set aside dismissal—Appeal—Civil Procedure Code, ss. 66, 103, 107, 540, 588 (8).

A plaintiff who had been ordered, under s. 66 of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear, and under s. 107, read with s. 102, his suit was dismissed. He then applied to the Court, under s. 103 for an order to set the dismissal aside, but his application was rejected. He thereupon preferred an appeal from the decree dismissing the suit, under the provisions of s. 540.

Held that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *Lal Singh v. Kunjan* (2) referred to.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Sukh Ram*, for the appellants.

Mr. *C. H. Hill* and Mr. *G. I. Spankie*, for the respondents.

STRAIGHT, J.—The circumstances of this case appear to be these:—The plaintiff instituted a suit in the Court of the Subordinate Judge of Azamgarh, on the 24th June, 1884, against the defendants, for establishment of his right to certain property which he alleged he had acquired by purchase in 1880, and for a declaration that such property was not liable to be sold in execution of the decree obtained by the defendant Gobind Prasad on the 29th

* First Appeal No 42 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Azamgarh, dated the 4th December, 1884.

September, 1883, against the vendors of such property to the plaintiff. The suit, which was originally instituted in the Subordinate Judge's Court, was removed to the file of the Judge of Azamgarh for trial; and on the 15th November, 1884, after settling the issues, the Judge made an order, professedly under s. 66 of the Code, for the attendance of the plaintiff in person at an adjourned hearing on the 4th December following, with certain documents he considered material for the decision of the subject-matters in dispute between the parties. On this last-mentioned date the case was called on before the Judge, and he proceeded to dispose of it in a manner to which I will presently advert. It appears, however, that prior to this the plaintiff had preferred an appeal to this Court against the order of the Judge of the 15th November, 1884, already mentioned, and that appeal was heard by Ollfield and Mahmood, JJ., who set it aside on the 27th January, 1885 (1). The Judge, however, had meanwhile dismissed the suit for want of prosecution, on the ground that the plaintiff had failed to obey his order of the 15th November, 1884; and this decision of his professes to have been passed under ss. 107 and 136 of the Procedure Code. S. 136 had nothing really to do with the matter; and this was pointed out by Mahmood, J., in his decision above referred to; and I think we must now take it that the suit was dismissed for non-appearance of the plaintiff, under s. 107 of the Code. It is provided in that section that if a plaintiff or defendant, who has been ordered to appear in person under the provisions of s. 66 or s. 436, does not appear in person or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear. The order dismissing the suit in this case has, therefore, the same effect as if it had been passed under s. 102 of the Code, and the plaintiff's remedy in such cases is indicated by s. 103 of the Code. The plaintiff was well aware of these provisions, for he did apply to the Judge of Azamgarh, under s. 103 of the Code read with s. 107, for an order to set the dismissal aside. The Judge refused that application, on grounds which are not before us, and with which we are not concerned

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in this appeal; but it is clear that the plaintiff might have, and ought to have, appealed to us against this last order of the Judge refusing to set aside the dismissal, under s. 588, cl. (8). This he has not done; on the contrary, he has preferred a first appeal as from a decree of the 4th December, which, in my opinion, he was not entitled to do.

It has been held by a Full Bench of this Court in the case of *Lal Singh v. Kunjan* (1) that a defendant against whom a decree has been passed *ex parte* cannot appeal from such decree under the general provisions of s. 540, but must adopt the remedy provided in s. 108 of the Code.

For analogous reasons to those given by the majority of the Full Bench in that case, I hold that the plaintiff is not entitled to appeal from the decree of the 4th December, 1884. He very properly applied, under ss. 103-107, to set aside the order of dismissal, and he ought, as I have before observed, to have appealed to us, under s. 588, cl. (8), against the order refusing that application. I may here remark that the propriety of this form of procedure is well illustrated by this case. Had the plaintiff followed it, all that we should have had to decide in his appeal from the order refusing to reinstate would have been as to the sufficiency or otherwise of the grounds made out by him for having the dismissal set aside. As it is, we are asked under the guise of an appeal from decree to determine not only that question but the merits of the case, which have, in fact, never been investigated or tried at all. The really crucial point is, whether the Judge had any right to do what he did under ss. 103-107 of the Code. Seeing that his order of the 15th November, for default in obedience to which he made his subsequent order of the 4th December, was set aside by this Court, it follows as a necessary consequence that had a proper appeal from his order of refusal to set aside the dismissal of the suit been made to this Court, it must have succeeded, with the result that the case would have then been replaced on his file and tried in the ordinary manner. This is precisely what, in my opinion, the law intended, and not that the matter should come up in the inconvenient form of an appeal from a decree. In

(1) I. L. R., 4 All. 387.

this view the appeal must be, and hereby is, dismissed with costs.

PETHERAM, C. J.—I concur in the order proposed by my brother Straight.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

THE HIMALAYA BANK, LIMITED, (PLAINTIFF) v. THE SIMLA BANK, LIMITED, AND ANOTHER (DEFENDANT). *

Registered and unregistered documents—Mortgage under registered deed competing with holder of decree on prior unregistered mortgage deed—Act III of 1877. (Registration Act), s. 50.

The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed.

Held that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhaiya Lal v. Bansidhar* (1), *Shahi Ram v. Shib Lal* (2), and *Madar v. Subbarayalu* (3), referred to.

THIS was a suit brought by the Himalaya Bank, Mussoorie, to recover a sum of Rs. 3,428-7-3, due on a bond, dated the 17th July, 1883, for Rs. 3,000, executed by the defendant No. 1, Mrs. E. McMullen. By this bond, certain land situate in Saharanpur and a dwelling-house thereon of value exceeding Rs. 100 were hypothecated to the plaintiffs. The bond was duly registered on the 10th August, 1883. The defendant No. 1 did not appear to answer the suit. The defendants No. 2 were the Simla Bank Corporation, Limited, who held a bond for Rs. 10,000, dated the 30th June, 1881, in which the defendant No. 1 had hypothecated to them, among other properties, the same dwelling-house as was subsequently mortgaged to the plaintiffs. This bond was executed by all the parties thereto. On the 25th July, 1881, Mrs. McMullen herself took the bond for registration to the office of the Registrar at Mussoorie,

* First Appeal No. 19 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 2nd December, 1884.

(1) Weekly Notes, 1884, p. 136. (2) Weekly Notes, 1885, p. 63.

(3) I. L. R., 6 Mad. 88.

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