

APPELLATE CIVIL.

1887
February 12.*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

ABLAH AND ANOTHER (PLAINTIFFS) v. BHAGIRATHI (DEFENDANT) *

Appeal—Dismissal of suit for non-appearance of plaintiff—Civil Procedure Code, ss. 102, 103.

S. 103 of the Civil Procedure Code does not take away the remedy of appeal from a decree dismissing a suit under s. 102. *Lal Singh v. Kunjan* (1), *Ajudhia Prasad v. Balmukund* (2) and *Partab Rai v. Ram Kishan* (3) referred to.

THE plaintiffs in this case brought a suit in the Court of the Munsif of Ballia for possession of immoveable property. Issues were fixed by the Munsif, who then adjourned the case, fixing the 10th June, 1886, for final disposal. Upon that date the Munsif took up the case, and passed the following order:—"This case has come on to-day. Neither the plaintiff is personally present, nor has he entered his appearance through his pleader. The Court has waited for more than an hour, but no evidence has been produced. It is ordered that the claim be dismissed, and the defendant's costs, with interest at 8 annas per cent. per mensem, charged to the plaintiffs."

The plaintiffs appealed to the Subordinate Judge of Ghazipur. The Subordinate Judge dismissed the appeal on the following grounds:—"Although it is not mentioned under what section the above decision has been passed, because the non-production of the evidence has been referred to, yet in reality it has been passed in consequence of the plaintiff's absence, under s. 102 of the Civil Procedure Code, the remedy for which is prescribed by s. 103, *viz.*, an application should be made to the same Court for restoring the case to its number. In this case the provisions of s. 103 have not been acted upon, but an appeal has been preferred. This appeal is not valid. It is ordered that the appeal be dismissed. The costs of both Courts will be charged to the appellants."

In second appeal by the plaintiffs it was contended that the lower appellate Court was wrong in holding that the Munsif had

* Second Appeal No. 1840 of 1885, from a decree of Pandit Batan Lal, Additional Subordinate Judge of Ghazipur, dated the 8th September, 1885, confirming a decree of Munshi Kalwant Prasad, Munsif of Ballia, dated the 10th June, 1885.

(1) I. L. R., 4 All. 387. (2) I. L. R., 8 All. 354.

(3) Weekly Notes, 1883, p. 171.

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dismissed the suit under the provisions of s. 102 of the Civil Procedure Code ; and that even if the Court was right in so holding, it was wrong in supposing that s. 103 of the Code took away the remedy of appeal from a decree dismissing a suit under s. 102.

Mr. *J. E. Howard* and *Lala Lalta Prasad*, for the appellants.

Munshi Sukh Ram, for the respondent.

OLDFIELD, J.—In this case a decree was passed by the Court of first instance, dismissing the plaintiffs' claim by default. The plaintiffs filed an appeal in the lower appellate Court, and that Court has dismissed the appeal on the ground that the plaintiffs have no remedy by appeal in this case, but they can proceed only under s. 103 of the Civil Procedure Code, and have the order dismissing the suit for default set aside. The plaintiffs have appealed to this Court, and contend that the lower appellate Court could entertain the appeal according to law. I think this appeal must be allowed. It seems doubtful whether the Court of first instance has, as a matter of fact, disposed of the case under s. 102 of the Civil Procedure Code. But assuming that it did, I think that the plaintiffs had their remedy, not only by proceeding under s. 103 of the Civil Procedure Code, but by appeal also, as s. 103 does not in any way appear to take away such a remedy. The only authority which might be taken to be opposed to this view is a decision of a Full Bench of this Court—*Lal Singh v. Kunjan* (1). But that decision deals with the case of a defendant against whom an *ex-parte* decree has been made, and I am not prepared to accept it as binding in the case before us. In view of a later decision of a Full Bench of this Court,—*Ajudhia Prasad v. Bal-mukand* (2)—I think I am justified in holding that an appeal to the lower appellate Court would lie. I therefore set aside the decree of the lower appellate Court, and direct it to restore the case and try it on the merits. Costs to follow the result.

TYRRELL, J.—I concur in the above view and order, and it seems to me that the suit may have been dismissed under s. 155 of the Civil Procedure Code, and therefore there are still stronger

(1) I. L. R., 4 All. 287. (2) I. L. R., 8 All. 354.

reasons for holding that the plaintiffs had their remedy by way of appeal. A ruling of this Court in *Partab Rai v. Ram Kishan* (1) decided by Straight, J., and myself, is in point in this respect.

Cause remanded.

Before Sir John Elge, Kt., Chief Justice, and Mr. Justice Brodhurst.

MUHAMMAD ABDUL KARIM (DEFENDANT) *v.* MUHAMMAD SHADI KHAN
AND OTHERS (PLAINTIFFS).*

Partition of mahal—Application by co-sharer for partition—Notice by Collector to other co-sharers to state objections upon a specified day—Objection raised after day specified by original applicant—Question of title—Distribution of land—Jurisdiction—Civil and Revenue Courts—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 111, 112, 113, 131, 132, 241 (f)—Civil Procedure Code, s. 11.

Reading together ss. 111, 112, and 113 of the N.-W. P. Land Revenue Act (XIX of 1873), as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by s. 111 is to be served, *i e.*, a person who is a co-sharer in possession, and who has not joined in the application for partition.

So far as ss. 111, 112, 113, 114 and 115 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right, either in an original suit in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of an objection raising such a question under s. 113, or on appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under s. 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition proceedings or on the partition after the time specified in the notice published under s. 111. S. 132 is not to be read as making the Commissioner the Court of appeal from the Assistant Collector or the Collector upon such questions, nor does s. 241 (f) bar the jurisdiction of the Civil Court to adjudicate upon them.

Where, therefore, after the day specified in the notice published by the Assistant Collector under s. 111, and after an Amin had made an apportionment of lands among the co-sharers of the mahal, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made, and confirmed by the Collector under s. 131,—held that the objection was not one within the meaning of s. 113, that the remedy of the objectors was not an appeal from the Collector's decision under s. 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not

* Second Appeal No. 448 of 1886, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 17th December, 1885, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Bulandshahr, dated the 29th September, 1885.