Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

1889
March 23.

GOPAL DAS (PETITIONER) *v.* ALAF KHAN AND ANOTHER (OPPOSITE PARTY.)*

Second appeal—Order on appeal affirming order granting application for review of judgment—High Court's power of revision—Civil Procedure Code, ss. 584, 622, 629.

No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment.

The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by way of appeal from the final decree at the rehearing.

THIS was an appeal under s. 10 of the Letters Patent, from an order of Straight, J., dismissing an application for revision under s. 622 of the Civil Procedure Code. The facts are stated in the judgment of Straight, J.

STRAIGHT, J.—The following are the facts out of which this application for revision has arisen. The respondents before me, Alaf Khan and Jungbaz Khan, brought a pre-emption suit in the Court of the Subordinate Judge of Mainpuri against Sundar Lal, vendor, and Gopal Das, vendee, in respect of a sale by the former to the latter of a fifteen-biswansi zamíndári share on the 16th September, 1885. A second suit by one Kharagjit, impeaching the same transaction, on the ground of pre-emptive right, was subsequently instituted in the same Court, and Alaf Khan and Jungbaz Khan were made parties, defendants, to that suit, and Kharagjit defendant to their suit. Both suits were tried together, and, in the result, that of Kharagjit was decreed by the Subordinate Judge, on the ground that he was the superior pre-emptor and had the call of the two plaintiffs in the other suit, which was in turn dismissed, and no appeal was preferred from either that decree or the decree in favour of Kharagjit, as plaintiff. By this last-mentioned decree, Kharagjit was directed to deposit in Court the purchase-money found to have been paid by Gopal Das to Sundar Lal, within two

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months, otherwise his suit would stand dismissed. This Kharagjit failed to do, and thereupon Alaf Khan and Jungbaz Khan applied for review of judgment, setting up this failure on the part of Kharagjit, and the admitted fact of their being next to him in order of pre-emptive right as the grounds for the application. On the 20th May, 1887, the Subordinate Judge admitted the application for review, holding that it was covered by s. 623 of the Civil Procedure Code, the ascertainment by the petitioners of the failure of Kharagjit to deposit the money within time being the discovery of "a thing which was not known before."

To this order of the Subordinate Judge objection was taken by Gopal Das by way of appeal to the Judge in the manner indicated in s. 629 of the Code, and on the 5th September, 1887, the Judge upheld the order and dismissed the appeal with costs. It is this order of the Judge that is the subject of this application for revision before me under s. 622 of the Code. Now, I take it to be the recognised rule of this Court that, if a party to civil proceedings applies to us to exercise our powers under s. 622, he must satisfy us that he has no other remedy open to him under the law to set right that which he says has been illegally or irregularly or without jurisdiction done by a Subordinate Court. Now, when the Subordinate Judge admitted the application of Altaf Khan and Jungbaz for review, the petitioner before us, Gopal Das, who was prejudiced thereby, had two alternatives open to him under s. 629 of the Code, namely, to object to such admission *(a)* by an appeal from the order granting the admission upon the grounds therein specified, or *(b)* in any appeal against the final decree or order made in the suit. Gopal Das availed himself of the first of these alternatives by taking an appeal to the Judge and staying further proceeding with the rehearing pending its decision. The Judge has decided against him by dismissing his appeal, and the first question I have now to consider is, does any second appeal lie from the order of the Judge? I am very clearly of opinion that it does not. A right of appeal is the creation of a statute, and unless I can find any specific provision in the Code of Civil Procedure in

terms conferring such a right I cannot hold it to exist. Turning to that law I find in Part VI "of appeals" that there is an appeal from the decrees or from any part of the decrees of the Courts exercising original jurisdiction (s. 540), to a High Court from all decrees passed on appeal by any Court subordinate to a High Court (s. 584), from the orders specified in s. 588 and from no other such orders, in respect of which the orders passed in appeal "shall be final," and, in s. 629 to which I have already referred, from an order admitting an application for review of judgment. But as to this last matter there is no mention anywhere in terms to be found recognising a right of second appeal from an order passed on appeal from such an order. It is clear to my mind that an order passed on appeal from an order objecting to the admission of an application for review is not a "decree;" indeed, it is in terms contradistinguished in s. 629 from a decree. Consequently s. 584 which contains the only sanction to a second appeal, and that only from a "decree," cannot apply. So far, then, as the immediate proceeding under s. 629 which the petitioner has adopted is concerned, he has no power under the law to carry it further, except of course as provided in s. 622, if I consider that section to be applicable. But then arises the further question whether, as an appeal is provided by law from any decree that may hereafter be passed by the Subordinate Judge at the rehearing of the suit, that will, if his and the Judge's order of review remains untouched, take place, I should upon this application in anticipation determine the point as to whether it will be open to him to again contest the propriety of the order admitting the review. I am of opinion that I ought not to do so, and for the obvious reason that, assuming the case to be decided against the petitioner, not only will he have an appeal to the Judge from the decree but a second appeal to this Court; which if I refuse now to interfere under s. 622, on the ground that he has a remedy *in future*, will not have expressed any opinion upon the question of the propriety of grant of the review. If the case is decided in his favour, *cadit quæstio*. I therefore refuse to interfere under s. 622 of the Code and dismiss the petition, but costs will be costs in the cause.

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The petitioner appealed from this decision under s. 10 of the Letters Patent.

EDGE C. J., and TYRRELL, J.—We agree with the view taken by Mr. Justice Straight, and we think that he exercised a sound discretion in refusing to interfere under s. 622 of the Civil Procedure Code.

We dismiss the appeal with costs.

Appeal dismissed.

1889
April 9.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MUHAMMAD SAMI-UD-DIN KHAN (PLAINTIFF) *v.* MANNU LAL AND OTHERS (DEFENDANTS).*

Mortgage, usufructuary—Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption—Res judicata—Civil Procedure Code, s. 13—*Foreclosure—Act IV of* 1882 *(Transfer of Property Act), s.* 93—*Estoppel—Act I of* 1872 *(Evidence Act), s.* 115.

In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct.

Held, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct.

Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property.

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* Second Appeal No. 1182 of 1887 from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 30th March, 1887, confirming a decree of Maulvi Saiyad Muhammad, Subordinate Judge of Aligarh, dated the 6th April, 1886.