

clusions arrived at by me in this case are wholly consistent with those arrived at in the judgment which has just been delivered. I therefore agree in the order which has been made in the case by my brother Straight.

EDGE, C. J.—In concurring with the judgment which has been delivered by my brother Straight, I should say that I understand that judgment to be in no way based upon any cases referred to in the judgment just delivered by my brother Mahmood. As to those cases and the inferences to be drawn from them I decline to express any opinion. I am of the same opinion as my brother Straight.

BRODHURST J.—I concur with my brother Straight.

TYRRELL, J.—I also concur with my brother Straight without expressing any opinion on the cases just referred to in his judgment by my brother Mahmood.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

BANSIDHAR AND ANOTHER (JUDGMENT-DEBTORS) v. SITA RAM
(DECREE-HOLDER).*

Second Appeal—Plea sought to be raised which was not taken in the memorandum of appeal—Civil Procedure Code, s. 542.

Section 542 of the Code of Civil Procedure was intended to confer upon the Court a power exercisable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Maulvi *Ghulam Muftaba*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

MAHMOOD, J.—This is a second appeal, and was admitted by my late Honorable colleague Mr. Justice Brodhurst by his order, dated the 10th January 1890.

* Second appeal No. 36 of 1890 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 26th November 1889, reversing a decree of Maulvi Ahmad Ali, Munsif of Bulandshahr, dated the 6th April 1889.

1889

KODAI SINGH
v.
JAISRI SINGH.

1891

April 22.

1891

BANSIDHAR
v.
SITA RAM.

The appeal is of the nature covered by the jurisdiction of the single Judges of this Court under rule 1 of the rules of the Court, and it is now before me for disposal.

The appellant is represented by Mr. *Ghulam Mujtaba*, holding the brief of Mr. *Madho Prasad*, and the respondent is represented by Mr. *Jogindro Nath Chaudhri*.

Upon the case being called for hearing, Mr. *Ghulam Mujtaba* has frankly admitted that both the grounds taken in the memorandum of appeal are unsustainable, but the learned pleader has asked me to consider matters other than those contained in the grounds of appeal. In making this prayer the learned pleader has relied upon s. 542 of the Code of Civil Procedure and the cases noted in the margin.

On the strength of these authorities the learned pleader has set forth in his argument matters wholly foreign to the circumstances mentioned in the memorandum of appeal, and has contended that I am bound to decide the appeal upon some grounds other than those mentioned in the memorandum of appeal.

(1) *Mahabir Tiwari v. Jhangur.*

(2) *Dharam Das v. Nand Lal Singh.*

To this Mr. *Jogindro Nath Chaudhri* objects, on the ground that no sufficient cause has been shown why the appellant should be heard on matters foreign to the grounds of appeal, and of which the respondent had no notice.

I am of opinion that Mr. *Jogindro Nath's* objection is right. Parties complaining of judgments and decrees must mention all the grounds of complaint in the memorandum of appeal, and the provisions of s. 542 of the Code of Civil Procedure are not meant to relieve them of such necessity.

The Legislature, as I understand s. 542 of the Code of Civil Procedure, meant to confer upon Courts the power to decide appeals upon grounds other than those set forth by the appellant in the memorandum of appeal, and that power is to be exercised by

(1) Weekly notes 1867, p. 213.

(2) Weekly notes 1889, p. 78.

the Court alone, and not to enable the appellant to take the respondent by surprise by urging matters of which he had no notice. Neither of the two rulings cited conflicts with this view.

The only two grounds taken in the memorandum of appeal having been abandoned, I have no alternative but to dismiss the appeal, and I do so with costs.

Appeal dismissed.

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

KISHUN LAL (PLAINTIFF) v. MUHAMMAD SAFDAR ALI KHAN AND
OTHERS (DEFENDANTS).*

1891
April 28.

Execution of decree—Sale in execution—Sale set aside—Suit by purchaser for return of purchase money—Civil Procedure Code, ss. 295, 315.

Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under s. 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in s. 315 of the said Code.

Munna Singh v. Gajadhar Singh (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *W. M. Colvin*, for the respondents.

EDGE, C. J., and KNOX, J.—This was a suit brought to recover purchase money which was paid by the plaintiff, and which had been distributed after payment amongst certain creditors of the firm of Lachmi Narain. The defendant No. 1 was one of those creditors. Lachmi Narain's firm failed. There was a large number of decrees obtained by creditors under which property of the firm was from time to time brought to sale and assets realized. On the 20th November 1885, a property of Lachmi Narain's firm was sold in

* First Appeal No. 157 of 1889 from a decree of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 21st June 1889.

(1) I. L. R., 5 All., 577.