

1897

SHANKAR  
DAT DUBE  
v.  
RADHA  
KRISHNA.

there can be *ex parte* decrees against defendants whether or not they have put in appearances in the suit. The prohibition of an appeal in the earlier part of section 119 is limited, to apply the decision of their Lordships of the Privy Council, to a case in which the defendant had not put in any appearance at all. In our opinion the decision of their Lordships of the Privy Council has no bearing on the case before us here.

We hold that this was a decree passed *ex parte* against a defendant within the meaning of section 108 of Act No. XIV of 1882 for, although the defendant's pleader was physically present in Court, he was not there representing the defendant in the suit. We set aside the order under appeal, and we remand this case under section 562 of Act No. XIV of 1882 to the Court of the Subordinate Judge to be disposed of on the merits. We make this order with costs to the representative of Raja Shankar Dat Dube.

*Appeal decreed and cause remanded.*

1898

January 4.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkill.*

UDIT NARAIN SINGH AND OTHERS (DEFENDANTS) v. SHIB RAI (PLAINTIFF).\*

*Cause of action—Suit for damages for removal of crop—Defendant entitled to possession under decree of a competent Court of Revenue—Plaintiff in actual possession under an illegal decree of a Civil Court—Trespass.*

A. held a decree of a competent Court of Revenue for possession of certain land as against B., and obtained under that decree formal possession of the land. B., however, was allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. B. removed his crop, and thereafter sued in a Civil Court for a declaration that he was A's tenant of the land in question holding occupancy rights. A. did not defend the suit, and the Civil Court passed a declaratory decree in favour of the plaintiff, and further proceeded to execute that declaratory decree by putting B. in possession. Subsequently B. sued A. for damages in respect of the alleged removal by A. of a second crop, which he asserted that he (B.) had sown upon the said land.

*Held* that B. had no cause of action, and that even if in fact he had sown the crop in respect of which damages were claimed, he did so at his own peril and as a trespasser.

\* First Appeal No. 50 of 1897, from an order of J. W. Muir, Esq., District Judge of Farrukhabad, dated the 12th May 1897.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *A. E. Ryves*, for the appellants.

Munshi *Gulzari Lal*, for the respondent.

EDGE, C. J. and BURKITT, J. :—This was a suit for damages based upon an allegation that the defendants wrongfully cut and appropriated the plaintiff's crop. The facts of the case, so far as they are material, are as follows :—The principal defendant, namely, Raja Udit Narain Singh, obtained an order or decree from a competent Court of Revenue establishing his title to possession of the land and establishing the fact that the plaintiff had got no title, and, the plaintiff being in possession, the Court of Revenue decreed possession to the Raja and gave him formal possession. At that time a crop of the plaintiff's was growing on the land, and the amin, apparently overlooking the fact that section 42 of the Rent Act (Act No. XII of 1881) did not apply to the case, allowed the plaintiff to continue in such necessary possession as would be requisite for gathering and removing the crop : possession of the land was given to the Raja. The plaintiff gathered and removed the crop, and thereafter brought a suit in a Civil Court for a declaration that he was a tenant of the Raja of the land in question holding occupancy rights. That suit did not lie in the Civil Court, which had no jurisdiction to entertain it. The suit was one which came under section 95 of Act No. XII of 1881. It was liable to be defeated also on another ground, namely, that, if the plaintiff was entitled, he was not in possession and could have sought consequential relief. For some reason the suit was undefended, probably through an oversight, or through indifference as to what the Civil Court might do in a suit which was not within its jurisdiction. This plaintiff got a decree declaring that he was entitled as an occupancy tenant. The Civil Court, having granted him a declaration of title in a suit in which it had no jurisdiction to interfere, next proceeded to execute its declaratory decree by giving this plaintiff possession, overlooking the fact that the only execution

1898

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UDIT  
NARAIN  
SINGH.  
v.  
SHIB RAI.

1898

UDIT  
NARAIN  
SINGH  
v.  
SHIB RAI.

of a declaratory decree is for such costs as may be decreed and may not have been paid. This plaintiff alleges that he sowed the crop in respect of which this action is brought. If he sowed the crop, he sowed it as a trespasser. He had got neither title nor lawful possession. The first Court dismissed this suit. The Court of first appeal set aside the decree of the first Court, and made an order under section 562 of the Code of Civil Procedure. From that order this appeal has been brought. The plaintiff had no cause of action. If in fact the plaintiff did sow the crop in question, which is disputed, he did so at his own risk and as a trespasser. We allow this appeal, and, setting aside the order of the Court of first appeal, we dismiss the appeal to that Court and restore the order of the first Court. The appellant here will have his costs of this appeal and of the appeal to the Court of first appeal.

*Appeal decreed.*

*Before Mr. Justice Blair and Mr. Justice Aikman.*

1898  
January 12.

THE MUNICIPAL BOARD OF CAWNPORE (DEFENDANTS) v. LALLU AND ANOTHER (PLAINTIFFS).\*

*Customary right—Prescription—Ghat dedicated to the public—Right to occupy specific portion of ghat not susceptible of acquisition by prescription—Gangaputras.*

*Held* that no exclusive right of occupation could be acquired by prescription in any specific portion of a bathing ghat the use of which was dedicated to the public. *Husain Ali v. Matukman* (1) followed. *Tyron v. Smith* (2) and *Turner v. Ringwood Highway Board* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Government Advocate (Mr. *E. Chamier*) and subsequently the officiating Government Advocate (Mr. *A. E. Ryves*), for the appellants.

Pandit *Moti Lal*, for the respondents.

\* Second Appeal No. 891 of 1895 from a decree of Babu Madho Das, Additional Subordinate Judge of Cawnpore, dated the 2nd May 1895, reversing a decree of Babu Banke Bihari Lal, Munsif of Cawnpore, dated the 27th September 1894.

(1) I. L. R., 6 All., 39. (2) 9 A. and E. 406.  
(3) L. R., 9 Eq., 418.