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RAGHUNATH KUARI v. MUNNAN MISR.

High Court, and to another case—*Umaid Bahadur* v. *Udoi Chand* (1)—observed:—"All that these authorities, as it appears to us, establish is that, according to the Mitakshara, which is the law prevailing in these Provinces as to inheritance among Hindus, a sister's son may be heir to his mother's brother, a proposition which appears at one time to have been doubted."

On a review of all the authorities we have no hesitation in coming to the conclusion that, in the absence of nearer relatives, a man may be heir to his mother's brother as regards property which is governed by the Mitakshara law of inheritance. This disposes of the second contention of the learned counsel for the appellant. The result is that we modify the decree of the lower appellate Court by dismissing the suit as against the minor Hub Lal. As the appeal has substantially failed, the respondent will have his costs in this Court.

Decree modified.

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

1897
December 23.

SHANKAR DAT DUBE (APPLICANT) v. RADHA KRISHNA (DECREE-HOLDER).*

Civil Procedure Code, section 108—*Decree ex parte—Appearance—Pleader retained in suit but not instructed.*

A party defendant retained a pleader to defend the suit against him, and the pleader filed a vakalatnamah and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff.

Held that this decree was a decree *ex parte* within the meaning of section 108 of the Code of Civil Procedure. *Bhagwan Dai* v. *Hira* (2) and *Jonardan Dobey* v. *Ramdhone Singh* (3) referred to. *Sahibzada Zein-ul-abdin Khan* v. *Ahmad Raza Khan* (4) distinguished.

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

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* First Appeal No. 2 of 1897, from an order of Munshi Mata Prasad, Subordinate Judge of Benares, dated the 8th October 1896.

(1) I. L. R., 6 Calc., 119.
(2) I. L. R., 19 All., 355
(3) I. L. R., 23 Calc., 738.
(4) L. R., 5 I. A., 233.

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SHANKAR DAT DUBE v. RADHA KRISHNA.

Pandit *Sundar Lal* and Munshi *Kalindi Prasad*, for the appellant.

Messrs. *T. Conlan* and *D. N. Banerji*, for the respondent.

EDGE, C. J., and BLAIR, J.:—Rai Radha Krishna brought a suit against Shankar Dat Dube, then Raja of Jaunpur, on a bond alleged to have been given by the Raja's deceased elder brother. The Raja entered an appearance, filed a written statement and appointed pleaders to act for him. One of those pleaders was one Satish Chandar, a pleader practising at Benares. The suit in question was filed in the Court of the Subordinate Judge of Benares, and the vakalatnamah which was given by the Raja authorised Satish Chandar and the other pleaders therein named to conduct the suit on behalf of the Raja, and to answer any questions, &c. Satish Chandar obtained more than one adjournment, and on the 31st of January 1896, he obtained an adjournment until the 19th of March in that year. On the 19th of March when the suit was called on for hearing and disposal, Satish Chandar stated that no one had come near him on the part of the Raja, and that he had no instructions. Thereupon the Subordinate Judge proceeded to dispose of the suit upon the evidence on the record, and, arriving at a finding in favour of the plaintiff, made a decree for the plaintiff. Raja Shankar Dat Dube subsequently applied to the Subordinate Judge under section 108 of Act No. XIV of 1882 for an order to set aside the decree. The Subordinate Judge, without considering whether Raja Shanker Dat Dube was prevented by sufficient cause from appearing and maintaining his defence at the hearing on the 19th of March 1896, dismissed the application on the ground that the decree in question which he had passed against Raja Shankar Dat Dube was not a decree passed *ex parte*. He appears to have arrived at that conclusion because he considered that on the 19th of March 1896, the Raja was represented by Satish Chandar having instructions. This is an appeal from that order.

Although Satish Chandar was still the vakil of the Raja, and under his vakalatnamah had full authority to act in the suit

within the limits of that vakalatnamah for the Raja he stated that he had no instructions. We understand from that, that he had practically retired from the case. It is difficult to understand how a pleader, even in the Court of the Subordinate Judge of Benares, can conduct a case for the defendant without instructions. It appears to us that the decisions of the Court in *Bhagwan Dai* v. *Hira* (1) and of the High Court at Calcutta in *Jonardan Dobey* v. *Ramdhone Singh* (2) are authorities in favour of the contention of the appellant that an application lay in this case under section 108 of Act No. XIV of 1882. On the other hand we have been pressed by the learned counsel for the plaintiff decree-holder with the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmad Raza Khan* (3). The procedure which the Subordinate Judge must, in our opinion, have adopted was that under section 157 of Act No. XIV of 1882. That section makes applicable, so far as may be, to cases coming within the section the procedure of Chapter VII of the Code. Section 157 apparently relates to a later period in the litigation than the sections which are to be found in Chapter VII, but there is no difficulty in ascertaining the rule to be followed in cases under section 157 by reference to Chapter VII. It has been contended for the plaintiff decree-holder that the effect of the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmad Raza Khan* (3) is that there can be no decree which can be called a decree *ex parte* against a defendant who has at any time and on any occasion before the decree is made put in an appearance in the suit, although at the hearing he may have been absent and unrepresented, or may have had present merely a pleader who had no instructions. In our opinion the decision of their Lordships of the Privy Council merely referred to the opening paragraph of section 119 of Act No. VIII of 1859. That section itself shows quite clearly that

(1) I. L. R., 19 All., 355. (2) I. L. R., 23 Calc., 738.
(3) L. R., 5 I. A., 233; s. c., I. L. R., 2 All., 67.

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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 Burkitt.

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.