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February 14.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

TASADDUQ HUSAIN (PLAINTIFF) *v.* HAYAT-UN-NISSA (DEFENDANT) *

Civil Procedure Code, sections 588, 591—*Appeal—Order setting aside an* ex parte *decree—Order not "affecting the decision of the case."*

Held that an order under section 108 of the Code of Civil Procedure setting aside a decree passed *ex parte*, is not an order "affecting the decision of the case," that is, affecting the decision of the case upon the merits. The alleged wrongfulness of such an order cannot, therefore, be urged as a ground of objection in an appeal from the decree in the suit, under the provisions of section 591 of the Code. *Chintamony Dassi* v. *Raghoonath Sahoo* (1) and *Gulab Kunwar* v. *Thakur Das* (2) followed.

THE suit out of which this appeal arose was a suit for sale upon a mortgage dated the 7th of August 1890, brought by Tasadduq Husain against one Zia-ul-haq and his wife Musammat Hayat-un-nissa. The suit was decreed *ex parte* as against both defendants on the 15th of March 1898, but upon the application of Musammat Hayat-un-nissa, the *ex parte* decree was set aside as against her on the 12th of June 1899. The mortgage upon which the suit was based had been executed by Zia-ul-haq for himself and on behalf of his wife as her general attorney under a power-of-attorney dated the 1st of November 1886. On the retrial of the suit as between the mortgagee and Musammat Hayat-un-nissa the defence raised was that Zia-ul-haq had no authority from the defendant to execute the mortgage, that she did not receive any part of the consideration for it, and that the condition in the bond with regard to interest was penal. The lower Court (Subordinate Judge of Allahabad) found that, although Zia-ul-haq had authority to execute the mortgage on behalf of his wife, the plaintiff was bound to prove that the amount of the loan was received and appropriated by Hayat-un-nissa, and that he had failed to do so. The suit was accordingly dismissed. From that decree the plaintiff appealed to the High Court, and the first contention raised was that the order setting aside the *ex parte* decree was illegal and was passed upon insufficient grounds.

Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the appellant.

* First Appeal No. 173 of 1900 from a decree, H. David, Esq., Subordinate Judge of Allahabad, dated the 22nd of March 1900.

(1) (1895) I. L. R., 22 Calc., 981. (2) (1902) I. L. R., 24 All., 464.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J. and BANERJI, J.—This appeal arises in a suit brought by the appellant against one Zia-ul-Haq and his wife, Musammat Hayat-un-nissa, for sale under a mortgage, dated the 7th of August 1890. The suit was decreed *ex parte* against both the defendants on the 15th of March 1898, but upon the application of Musammat Hayat-un-nissa, the *ex parte* decree was set aside as against her on the 12th of June 1899.

The mortgage was executed by Zia-ul-haq for himself, and on behalf of his wife as her general attorney, under a power-of-attorney, dated the 1st of November 1886. The amount secured by the deed was Rs. 4,000, which Zia-ul-Haq received in the presence of the Sub-Registrar, and property belonging to both himself and to his wife was hypothecated. Zia-ul-Haq himself did not dispute the claim, and he has submitted to the *ex parte* decree, in execution of which his property has been sold by auction.

The defence raised on behalf of Musammat Hayat-un-nissa was that Zia-ul-haq had no authority from her to execute the mortgage, that she did not receive any part of the consideration for it, and that the condition in the bond in regard to interest was penal.

The lower Court has found that Zia-ul-Haq had authority from his wife to borrow money for her by mortgaging her property. The learned Subordinate Judge was, however, of opinion that the plaintiff was bound to prove that the amount of the loan was received and appropriated by Hayat-un-nissa, and that he had failed to do so. On this ground the learned Judge has dismissed the claim against Hayat-un-nissa. From this decree of dismissal the present appeal has been preferred by the plaintiff.

The first contention raised on behalf of the appellant is that the order setting aside the *ex parte* decree is illegal, and was passed upon insufficient grounds. We are unable to entertain this contention. Section 588 of the Code of Civil Procedure, whilst allowing an appeal from an order under section 108, refusing to set aside an *ex parte* decree, does not allow an appeal from an order setting aside an *ex parte* decree. From this

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we infer that it was the intention of the Legislature that an order setting aside an *ex parte* decree should be final. The learned advocate for the appellant referred to section 591 of the Code, which provides that if any decree be appealed against, any error, defect or irregularity in any order, not otherwise appealable, "affecting the decision of the case," may be set forth as a ground of objection in the memorandum of appeal. We agree with the rulings in *Chintamony Dassi* v. *Raghoonath Sahoo* (1) and *Gulab Kunwar* v. *Thakur Das* (2), and hold that the words "affecting the decision of the case" in section 591 must mean affecting the decision of the case on its merits, and that consequently an order setting aside an *ex parte* decree does not come within the purview of the section.

[The remainder of the judgment, dealing with the facts and merits of the case, is not reported.—ED.]

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February 16.

Before Mr. Justice Blair and Mr. Justice Banerji.

JAFAR KHAN (PLAINTIFF) *v.* GHULAM MUHAMMAD (DEFENDANT). *

Act No. XII of 1881 *(N. W. P. Rent Act), section* 43*—Landholder and tenant—Suit to recover rent in kind—Duty of officer appointed to divide produce or appraise standing crops—Res judicata.*

Where under section 43 of the N.-W. P. Rent Act, 1881, an officer is appointed to divide produce, or estimate or appraise a standing crop as between a landholder and his alleged tenant, such officer is not empowered to come to any decision as to the liability of the tenant to pay rent, if such liability is denied. If, therefore, an officer appointed for the purposes of section 43 should take upon himself to determine any question as to the liability of the tenant to pay rent, his decision will not in any subsequent suit between the parties be *res judicata*. *Harnarain Singh* v. *Ram Nihora Lal*, (3) followed.

THE facts of this case are thus stated in the judgment of the lower appellate Court:—"This is a suit to obtain a declaration that the plaintiff is the owner of the land in dispute. The name of the plaintiff was not recorded in the khewat. In the time of recent settlement the defendant got his name recorded

* Second Appeal No. 65 of 1901, from a decree of Babu Nihal Chandar, Subordinate Judge of Shahjahanpur, dated the 26th of September 1900, reversing a decree of Babu Banke Behari Lal, Munsif of Shahjahanpur, dated 5th of June 1900.

(1) (1895) I. L. R., 22 Calc., 981. (2) (1902) I. L. R., 24 All., 464.
(3) Weekly Notes, 1903, page 40.