1908

DWARKA DAS v. AKHAY SINGH.

question of title. Moreover, the question of title was not directly in issue in the Revenue Court in those cases. Regarding the case of *Shebu Raut* v. *Behari Raut*, it is sufficient to remark that it lays down a correct rule of law, but has no application to the case before us, in which the original Court of Revenue, by the provisions of section 206 of the old Rent Act, is deemed to be a Civil Court.

For the above reasons, I would hold that the judgment of this Court, dated the 14th August 1905, in S. A. No. 872 of 1903, operates as *res judicata*, and would allow the appeal and set aside the decrees of the Courts below and decree the plaintiff's claim with costs.

STANLEY, C. J.—I concur in the proposed order.

BY THE COURT.—The order of the Court is that this appeal be allowed, the decrees of the Courts below be set aside, and the plaintiffs' claim be decreed with costs.

Appeal decreed.

1908
June 13.

Before Mr. Justice Banerji and Mr. Justice Richards.

BITHAL DAS AND OTHERS (DECREE-HOLDERS) *v.* JAMNA PRASAD AND OTHERS, (JUDGMENT-DEBTORS) *

Execution of decree—Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.

On the 7th October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July 1904. The suit was retried; and on the 17th September 1904 the Court of first instance made a decree in favour of plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realized by the plaintiffs and the sum finally decreed.

Held (1) that the plaintiffs were at liberty to proceed either by application or by suit—*Shaman Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), *Collector of Meerut* v. *Kalka Prasad* (2) and *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (3) referred to; and (2) that the application was

*First Appeal No. 45 of 1908, from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 29th of January 1908.

(1) (1865) 10 Moo. I. A., 203. (2) (1906) I. L. R., 28 All., 665.
(3) (1906) I. L. R., 29 All., 143.

not barred by limitation. *Harish Chandra Shaha* v. *Chandra Mohan Das* (1) distinguished.

THE facts of this case are as follows:—

On the 7th of October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction under section 492 of the Code of Civil Procedure restraining the respondents from realizing certain money deposited in Court to their credit. After the passing of the *ex parte* decree the appellants withdrew from Court Rs. 19,041 out of the sum mentioned above in satisfaction of their decree. The decree, however, was set aside on an application made by the respondents under section 108 of the Code of Civil Procedure on the 9th of July 1904; the suit was retried; and on the 17th of September 1904 the Court of first instance made a decree in favour of the plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th of December 1906. On the 17th of September 1907 the respondents made an application to the Court for refund to them of Rs. 1,804, being the difference between the amount realized by the decree-holders and the amount subsequently decreed by the Court together with interest and costs. The Court below (Subordinate Judge of Agra) granted the application.

The decree-holders thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Babu *Sital Prasad Ghose*, for the respondents.

BANERJI and RICHARDS, JJ.—The facts out of which this appeal arises are these:—On the 7th of October 1901 an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction under section 492 of the Code of Civil Procedure restraining the respondents from realizing certain money deposited in Court to their credit. After the passing of the *ex parte* decree the appellants withdrew from Court Rs. 19,041 out of the sum mentioned above in satisfaction of their decree. The decree, however, was set aside on an application made by the respondents under section 108 of the Code of Civil Procedure on the 9th of July 1904. The suit was retried; and on the

(1) (1900) I. L. R., 28 Calc., 113.

1908

BITHAL DAS v. JAMNA PRASAD.

17th of September 1904 the Court of first instance made a decree in favour of the plaintiffs for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th of December 1906. On the 17th of September 1907 the respondents made an application to the Court for refund to them of Rs. 1,804, being the difference between the amount realized by the decree-holders and the amount subsequently decreed by the Court, together with interest and costs. The Court below has granted the application. Hence this appeal.

Two contentions have been urged before us—(1) that the remedy of the respondent was a suit and not an application, and (2) that the application is time-barred.

As regards the first point we think that the respondents were competent to make an application for the refund of the money. The decree originally passed was superseded by the subsequent decree made in 1904. As observed by their Lordships of the Privy Council in *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1), "if it (the decree) has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and as their Lordships conceive, is recoverable either by summary process or by a new suit or action." The respondents were therefore entitled to apply for a refund of the money and were not bound to bring a separate suit. That they are entitled to the money can admit of no doubt, and the only question is as to the form of the remedy to which they must resort for obtaining relief. The principle of the rulings of this Court in the cases of *The Collector of Meerut* v. *Kalka Prasad* (2) and *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (3) applies to this case.

As to the question of limitation, the respondents did not become entitled to the money until the decree of the 17th of September 1904 was passed. It is true that on the *ex parte* decree passed on the 7th of October 1901 being set aside they might have applied to the Court to direct the appellants to refund the sum of Rs. 19,041 which they had withdrawn from the Court in pursuance of that decree, but as an injunction had been issued restraining them from withdrawing the money until the final

(1) (1865) 10 Moo. I. A., 203. (2) (1906) I. L. R. 28 All., 665.
(3) (1906) I. L. R. 29 All., 143.

1908

BITHAL DAS v. JAMNA PRASAD.

decision of the suit they could not apply for payment of the amount to them either by the Court or by the appellants. This distinguishes the present case from the case of *Harish Chandra Shaha* v. *Chandra Mohan Dass* (1). Upon the *ex parte* decree being set aside the parties were relegated to the position in which they were before the decree was made. Therefore the injunction which had been issued to the respondents under section 492 revived and remained in full force, and the respondents could not have asked for payment of the money. As we have said above, it was only when the suit was finally decided and the decree was made for a smaller sum than that which the appellants had taken from the Court that the respondents' right to a refund accrued. As their application for a refund was made within three years of that date, the application is not time-barred. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

1908
June 20.

Before Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Karamat Husain.

UMAN KUNWARI (DEFENDANT) *v.* JARBANDHAN (PLAINTIFF) AND RAM RAJI KUNWARI (DEFENDANT).*

Civil Procedure Code, sections 562, 588 (28)—*Remand—Appeal from order of remand filed after decision of suit in accordance therewith.*

Held that the fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. *Babu Lal* v. *Ram Kali* (2) followed. *Salig Ram* v. *Brij Bilas* (3) overruled. *Rameshur Singh* v. *Sheo Din Singh* (4), *Sheo Nath Singh* v. *Ram Din Singh* (5) and *Jatinga Valley Tea Company* v. *Chera Tea Company* (6) referred to. *Madhu Sudan Sen* v. *Kamini Kanta Sen* (7) dissented from.

THIS was an appeal in a pre-emption suit. The court of first instance (Munsif of Basti) dismissed the suit on the 30th of April 1906, but the lower appellate court (officiating Subordinate Judge of Gorakhpur) reversed this decision, and, on the 27th

* First Appeal No. 69 of 1907, from an order of Banke Bihari Lal, Subordinate Judge of Gorakhpur, dated the 27th of March 1907.

(1) (1900) I. L. R., 28 Calc., 113.
(2) Weekly Notes, 1906, p. 28.
(3) (1907) I. L. R., 29 All., 659.
(4) (1889) I. L. R., 12 All., 510.
(5) (1895) I. L. R., 18 All., 19.
(6) (1885) I. L. R., 12 Calc., 45.
(7) (1905) I. L. R., 32 Calc., 1023.