

am not prepared to subscribe to the view that no proceeding can be a "case" unless it terminates in a decree. But giving the word "case" the widest meaning that was given to that word in section 622 of the Code of 1882, I am unable to hold that the order against which this application for revision is presented decided any "case." It appears to me that there is a clear distinction between the case of an application for permission to sue or appeal *in forma pauperis* being dismissed or rejected and the case in which a similar application is allowed. In the former it may be said that the case had been decided, while in the latter the order appears to be merely interlocutory.

By THE COURT.—The application is rejected with costs.

*Application rejected.*

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.*

BATUL KUNWAR (DEPENDANT) v. MUNNI LAL (PLAINTIFF).\*

*Code of Civil Procedure (1882), section 43—Portion of claim—Intentional omission—Civil Procedure Code (1908), order II, rule 2 (2).*

G, who was the tenant of a holding, died, leaving a mother and a daughter, both of the same name. The plaintiff sued the mother, as representing G, for arrears of rent for 1313 Fasli and obtained an *ex parte* decree. In respect of the year 1314 he sued the daughter and obtained a decree. The decree in respect of 1313 was set aside and at the rehearing the daughter was made a party. It was found that at the time the plaintiff brought the suit in respect of 1314 he was not aware that the daughter was the tenant in 1313. *Held* that the plaintiff having no knowledge, when he brought his suit in respect of 1314, that the daughter was the tenant in 1313, could not be said to have omitted to sue in respect of that year, and the suit for 1314 was not barred by the provisions of section 43 of the Code of Civil Procedure (1882). *Amanat Bibi v. Imdad Husain* (1) referred to.

THE facts of the case were as follows:—

One Gokul Singh, an agricultural tenant, died leaving him surviving his mother and a daughter, both of the name of Batul Kunwar. They continued to reside on the holding of Gokul Singh. On the 17th of July, 1906, the plaintiff sued the mother for the rent of the year 1313 F. and obtained an *ex parte* decree

1910

MUHAMMAD  
AZAB  
v.  
MUHAMMAD  
MAHMUD.

1910  
May 27.

\* Appeal No. 1 of 1910 under section 10 of the Letters Patent,

(1) (1888) L. R., 15 I. A., 106; I. L. R., 15 Calc. 800.

1910

BATUL  
KUNWAR

MUNNI LAL.

on the 31st of August 1906. The rent for the succeeding year having fallen into arrears, the plaintiff, on the 10th of January, 1907, brought a suit against the daughter for the rent of that year. This suit was also decreed *ex parte*. On the 27th of March, 1897, after an application to the same effect made by the daughter had proved infructuous, the mother applied for a rehearing of the suit in respect of the rent for 1313 Fasli. Her application was granted. Whereupon the plaintiff, who had meanwhile become aware that the real tenant in 1313 Fasli was the daughter, applied to have the daughter's name brought upon the record as a defendant, and this was done, and in the end the plaintiff obtained a decree against the daughter in respect of the rent for 1313 Fasli. This decree was confirmed on appeal by the District Judge, and the defendant's appeal to the High Court was dismissed by a single Judge of the Court. The defendant appealed under section 10 of the Letters Patent.

Mr. M. L. Agarwala, for the appellant.

Dr. Tej Bahadur Sapru, for the respondent.

STANLEY, C. J. and GRIFFIN, J. :—This appeal arises out of a suit for rent for the year 1313 Fasli. The defence set up was that the suit was barred by the provisions of section 43 of the old Code of Civil Procedure, a decree having been obtained against the appellant in a suit instituted on the 10th of January, 1907, in respect of the rent for the year 1314 Fasli. The former tenant of the holding was one Gokul Singh. He died leaving his mother of the name of Batul Kunwar and a daughter of the same name. They continued to reside on the holding of Gokul Singh. On the 17th of July, 1906, the plaintiff sued the mother, Batul Kunwar, for the rent for the year 1313 Fasli, and obtained an *ex parte* decree on the 31st of August, 1906. The rent for the succeeding year having fallen into arrears, on the 10th of January, 1907, the plaintiff sued Batul Kunwar, the daughter for that rent. The plaintiff at this time had become aware that Batul Kunwar, the daughter, was or claimed to be the tenant. This suit was also decreed *ex parte*. After this in March, 1907, Batul Kunwar, the daughter, filed an application in the suit relating to the arrears of rent for 1313 Fasli, under section 108 of the old Civil Procedure Code, asking for a rehearing

of that suit. That application was rejected on the ground that she was not a party to the suit. Upon this Batul Kunwar, the mother, applied for a rehearing of the case on the 27th March, 1907, and the rehearing was granted. Then the plaintiff applied to have Batul Kunwar, the daughter, made a defendant, and she was added as such on the 17th of May, 1907, and a notice was served on her on the 27th of May, 1907. The result was that the court gave the plaintiff a decree as against Batul Kunwar, the daughter. This decision was upheld by the lower appellate court, whereupon a second appeal was preferred to the High Court with the result that the decision of the lower court was affirmed. The present appeal under the Letters Patent has now been preferred, and the sole ground on which the appeal is supported is that the plaintiff was aware on the 10th of January, 1907, when he instituted his suit for the arrears of rent for 1314 Fasli, that Batul Kunwar, the daughter, was tenant of the holding and omitted to sue her for the rent of 1313 Fasli. It appears to us that the fallacy in the argument in support of the appeal lies in the fact that there is nothing to show that the plaintiff had any knowledge, that Batul Kunwar was tenant in the year 1313 Fasli. On the contrary, the fact that he had instituted a suit against Batul Kunwar, the mother, as tenant on the 17th of July, 1906, and obtained a decree against her *ex parte* shows that he had not any such knowledge. It is true that on the 10th of January, 1907, he was aware that Batul Kunwar, the daughter, was or claimed to be then tenant, but from this we cannot infer that she was tenant during the previous year. A plaintiff is not under such circumstances barred by the provisions of section 43 of the former Code of Civil Procedure, corresponding to order II, rule 2, sub-section 2 of Act V of 1908. That section provides that "if a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." If, at the time of the institution of the suit for the arrears of rent for 1314, *viz.*, the 10th of January, 1907, the plaintiff was not aware that Batul Kunwar, the daughter, was the tenant, he cannot be said to have omitted to sue for the rent of 1313 Fasli, within the meaning of the

1910

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 BATUL  
 KUNWAR  
 v.  
 MUNNI LAL.

1910

BATUL  
KUNWAR  
v.  
MUNNI LAL.

section. In the case of *Amanat Bibi v. Imdad Husain* (1) their Lordships explained the meaning of section 7 of Act VIII of 1859, which corresponds with the section now under consideration and observed in the course of their judgement as follows:—  
“It appears to us that the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a “portion of his claim” within the meaning of the section in question.” We are, therefore, of opinion that the decision of the learned Judge of this Court affirming the decision of the court below is correct, and we dismiss the appeal with costs.

*Appeal dismissed.*

1910  
May 30.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.*  
RAM PARGAS UPADHIA AND OTHERS (DEFENDANTS) v. SUBA UPADHIA  
(PLAINTIFF) AND RAJ KUMAR LAL AND ANOTHER (DEFENDANTS).  
*Act (Local) No. II of 1901 (Agra Tenancy Act), section 20—Occupancy holding—Mortgage of occupancy holding executed before the Agra Tenancy Act came into force—Act (Local) No. 1 of 1904 (General Clauses Act), section 6.*

A mortgage of an occupancy tenancy executed prior to the coming into operation of the Agra Tenancy Act is a perfectly valid transaction, and is not affected by the subsequent passing of that Act. *Babu Lal v. Ram Kati* (2) referred to. *Harnandan Bai v. Nalchedi Bai* (3) distinguished.

THE facts of this case were as follows:—

One Balgobind Rai (defendant No. 6) mortgaged his occupancy holding to Raj Kumar (defendant No. 5), on the 20th of July, 1881. Raj Kumar sub-mortgaged portions of the tenancy to the appellants (defendants Nos. 1 to 4) in 1899 and 1904, respectively. The plaintiff purchased the mortgagee rights of Raj Kumar on the 7th of July, 1907, and sued for possession by redemption of the sub-mortgagees. The court of first instance dismissed the suit. The lower appellate court

\* Second Appeal No. 831 of 1909, from a decree of Chhajju Mal, Subordinate Judge of Ghazipur, dated the 2nd of July, 1909, reversing a decree of Kalka Singh, Munsif of Ballia, dated the 17th of November, 1908.

(1) (1889) L. R., 15 I. A., 106; I. L. R., 15 Cal., 800.

(2) Weekly Notes, 1906, p. 28.

(3) Weekly Notes, 1906, p. 302.