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reason to think that he did not fully carry out the directions we gave him in the order of remand. We, however, were ready to hear the learned pleader for the appellants and were ready that he should refer us to the evidence which was taken in the court below originally and also on remand, so that we might dispose of the case ourselves without any further delay. The learned pleader admitted that he is not in a position to refer us to this evidence.

We, accordingly, must dismiss the appeal with costs.

Appeal dismissed.

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November 25.

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

MAHARAJA OF BENARES (DEFENDANT), *v.* BALDEO PRASAD (PLAINTIFF).*

Act (Local) No. II of 1901 *(Agra Tenancy Act) section* 177*—Appeal—Question of proprietary title—Jus tertii pleaded by defendant—Third person added as a defendant—Question decided against latter.*

In a suit for assessment of revenue on land in the possession of the defendant, the defendant pleaded that the land belonged, not to the plaintiff, but to a third person. The third person was brought upon the record as a defendant and claimed the land as his, and, on the question of ownership being decided against him, appealed. *Held* that the question raised in the suit was a question of proprietary title which arose directly and substantially in the suit and that an appeal lay to the District Judge.

THIS was an appeal under section 10 of the Letters Patent from a judgement of GRIFFIN, J. The facts of the case are stated in the judgement under appeal which was as follows:—

"This is a plaintiff's appeal arising out of a suit instituted under sections 150 and 158 of the Tenancy Act. The plaintiff's claim was that the defendants should be assessed to revenue in respect of certain land in their possession. According to the plaintiff he was the zamindar of the land in dispute and the defendants had no right to hold it free of revenue. The defendants pleaded that the Maharaja of Benares was the zamindar and that they were entitled to hold the land rent and revenue free. The Assistant Collector decreed the suit. There was an appeal to the Commissioner, who remanded the case with directions that the Maharaja of Benares be made a party. This was done, and the Assistant Collector again decreed the suit. The Maharaja of Benares appealed to the Commissioner, who returned the memorandum of appeal with directions that it should be presented to the District Judge. The latter has now decreed the appeal preferred to him by the Maharaja of Benares. The plaintiff comes here in second appeal. It appears that in the Court of the Assistant Collector certain public records were produced and it was on the strength of the entries in these records

* Appeal No. 149 of 1909 under section 10 of the Letters Patent.

that the Assistant Collector decided the case in favour of the plaintiff. No copies of these entries, however, were placed on the record, so that when the case came before the District Judge there was practically no evidence on the record to support the finding of the Assistant Collector. The District Judge was asked to receive certified copies of the entries in the public records, but he refused to do so. This refusal is made one of the grounds of appeal to this Court. I think that under the circumstances of the case the learned District Judge would have exercised a proper discretion in receiving certified copies of the entries in the public record which had been inspected by the Assistant Collector.

"The next ground of appeal is that the District Judge had no jurisdiction to hear the appeal. The question is one of some difficulty. The section giving a right of appeal under the provisions of the Tenancy Act is section 177 which is to the following effect:—'An appeal shall lie to the District Judge from a decree of an Assistant Collector of the first class in all suits in which (*e*) a question of proprietary title has been in issue in the court of first instance and is a matter in issue in the appeal.' In the present case there was an issue in the court of first instance as to whether the plaintiff or the Maharaja of Benares was the zamindar of the land in suit, and the same issue was raised in the appeal preferred by the Maharaja of Benares. It is, however, pointed out that there was no decree against the Maharaja of Benares and as such he was not competent to appeal against the decree. I am referred to a Full Bench ruling reported in I. L. R., 3 All., 150, in which, however, the facts were different from those of the present case. There is no doubt whatever that in a series of decisions of this Court where a third party had been brought in under the provisions of section 148 of Act XII of 1881 it has been held that the remedy of an unsuccessful intervenor lay in a suit in a Civil Court and not by an appeal. It is true that the corresponding section of the Tenancy Act, section 198, does not apply to the facts of the present case, inasmuch as the suit is not a suit between a landholder and his tenant. But I think the principle deducible from these rulings is applicable to the present case. It is desirable that a question of proprietary title should be fought out and decided in a Civil Court. The present suit is a suit for assessment of revenue. So far as the original defendants are concerned, the only question was whether the land was liable to be assessed to revenue or not. The Maharaja of Benares was brought in by the order of a Revenue Court, with the result that there was a question of proprietary title raised between him and the original plaintiff. This question of title, no doubt, was of considerable importance both to the plaintiff and the Maharaja of Benares, but it made no difference to the original defendants whether they should have to pay the revenue which was assessed to the one or the other. Following, therefore, the principle laid down in I. L. R., 13 All., 364, and other rulings to the similar effect, I think the remedy of the Maharaja of Benares lay in a separate suit in a Civil Court and not by an appeal to the District Judge. I therefore allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs."

Babu *Jogindro Nath Chaudhri*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondent.

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MAHARAJA OF BENARES v. BALDEO PRASAD.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit which was brought by Pandit Baldeo Prasad, respondent, against the principal defendants for assessment of revenue on land held by the said defendants, on the allegation that they were the tenants of the plaintiff, that the land was held rent free by them in the plaintiff's zamindari, and that it was liable to assessment to revenue. The principal defendant in answer to the claim urged that the plaintiff had no right to bring the suit inasmuch as the land in question was a part of the property of the Maharaja of Benares. The Maharaja was added as a defendant and urged that the land lay in his zamindari. The conclusion to which the court of first instance came was that the land in question lay in the zamindari of the plaintiff and that he was entitled to a decree. It accordingly made a decree to the effect that the principal defendant should pay Rs. 3-11-2, exclusive of cesses, to the plaintiff, on account of revenue. From this decree the Maharaja of Benares appealed to the District Judge of Benares. The appeal was entertained, and the learned District Judge held that as a question of proprietary title had been determined by the court of first instance, and was also raised in the appeal, the appeal lay to his court. As regards the merits of the case he held that, as the documents upon which the court of first instance relied were not on the record, the plaintiff had failed to establish his claim. The learned Judge accordingly dismissed the suit.

From this decree an appeal was preferred to this Court. The learned Judge who heard the appeal was of opinion that no appeal lay to the District Judge and accordingly reversed his decision and restored that of the court of first instance.

From the decision of the learned Judge of this Court this appeal has been preferred under the Letters Patent and the first and main contention raised is that the appeal from the decree of the court of first instance was properly entertained and heard by the learned District Judge. In our opinion this contention is well-founded. Section 177 of Act No. II of 1901 provides that an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class in all suits in which a question of proprietary title has been in issue in the court of first instance and is a matter in issue in the appeal. The question

whether the land which formed the subject-matter of the suit was the property of the plaintiff or of the Maharaja defendant, was a question which arose directly and substantially in the suit brought by the plaintiff. The plaintiff could not obtain a decree unless that question was determined and found in his favour. The court of first instance determined the question of title and decreed it in favour of the plaintiff. The decree of that court was a decree not only against the principal defendant but also against the Maharaja of Benares. Upon the question of title it was clearly a decree against the Maharaja by which he was prejudiced. As a question of title was in issue in the court of first instance and was also in issue in the appeal, the appeal lay to the District Judge, and we think the learned Judge was right in holding that he was competent to entertain it.

As regards the merits of the case the learned District Judge commented on the conduct of the court of first instance and of the plaintiff in not placing on the record copies of documents, which the court of first instance inspected after sending for the records which contained them. The learned Judge held that as those documents were not placed on the record, he was justified in holding that there was no evidence on the record which supported the plaintiff's claim. The conduct of the court of first instance in sending for records and not directing copies to be produced was no doubt irregular, but we do not think that on that ground alone the plaintiff's claim should have been dismissed. We agree with our learned colleague that under the circumstances of the case the learned District Judge would have exercised a proper discretion if he had received certified copies of the entries of public records which had been inspected by the court of first instance. We think it is not right to visit the plaintiff with the consequences of the neglect of duty of the court of first instance. The appeal to the District Judge was not therefore tried according to law, and we must hold that there has been no proper trial.

We accordingly allow this appeal, set aside the decree of this Court and the decree of the lower appellate court, and remand the case to the lower appellate court with directions to readmit it under its original number in the register and dispose of it on the merits after allowing the plaintiff to produce certified

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copies of the documents relied upon by him, the originals of which had been inspected by the court of first instance. Both parties will be at liberty to adduce any further evidence which may be relevant to the matters in issue. The plaintiff will pay the costs of the appeal to this Court and of the abortive appeal to the District Judge. All other costs will follow the event.

Appeal decreed—cause remanded.

PRIVY COUNCIL.

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November 10, 11.
1911
February, 1.

ASHFAQ HUSAIN AND OTHERS (JUDGEMENT-DEBTORS) *v.* GAURI SAHAI (DECREE-HOLDER).

Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Limitation—Execution of joint decree—Decree set aside as against one of several joint judgement-debtors, against whom it has been ex parte*—Decree passed subsequently against the exempted party—Civil Procedure Code (1882), section* 108*—Order on a former application whether* res judicata.

A decree for sale on a mortgage was passed against several defendants jointly on the 25th August, 1900, and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March, 1902. Subsequently, a decree was passed on the merits against this defendant on the 15th August, 1902, and her appeal was dismissed by the High Court on the 16th November, 1904, and as against her that decree was made absolute on the 27th November, 1905. An application for execution was made against all the defendants on the 21st December, 1905, based on the decrees of the 25th August, 1900, the 15th August, 1902, the 16th November, 1904, the 21st December, 1901, and the 27th November, 1905. The defendants filed an objection to the application on the 7th February, 1906, alleging that they were no parties to the decrees of the 15th August, 1902, and the 27th November, 1905, and that, as to the decrees of the 25th August, 1900, and the 21st December, 1901, they were time barred.

Held (affirming the decision of the High Court) that the decrees of the 25th August, 1900, and the 16th November, 1904, were steps in granting the plaintiff the relief to which he was entitled. The latter decree supplemented and completed the former, and for the first time justified the plaintiff in applying for the joint execution of the decree. Time under the Limitation Act (XV of 1877) began to run from the date of the latter decree, or rather from the date it was made absolute—the 27th November, 1905, and consequently the application was not barred.

Held, also, that the plaintiff was not estopped, in the present proceedings, by the order of the 27th November, 1905, dismissing his former application for

Present:—Lord MACNAGHTEN, Lord MORRIS, Lord ROBSON, Sir ARTHUR WILSON and Mr. AMEER ALI.