Before Mr. Justice Tottenham and Mr. Justice Banerjee.

1889. *March* 5

SHAMA DASS (PLAINTIFF) *v.* HURBUNS NARAIN SINGH AND OTHERS (DEFENDANTS).*

Appeal—Ex parte decree—Order setting aside ex parte decree—Civil Procedure Code (Act XIV of 1882), *ss.* 108, 588—*Notification in "Gazette."*

There is no appeal from an order setting aside an *ex parte* decree.

THIS was an appeal against an order setting aside an *ex parte* decree, on the ground that the summons had not been served upon the defendants.

Mr. *Bonnerjee* and Baboo *Umakali Mookerjee* for the appellant.

Mr. *C. Gregory* and Baboo *Romesh Chunder Bose* for the respondents.

Mr. *Gregory* took a preliminary objection that there was no appeal from such an order.

The following judgments were delivered by the Court (TOTTENHAM and BANERJEE, JJ.)

TOTTENHAM, J.—This is an appeal against an order passed by the lower Court setting aside an *ex parte* decree.

A preliminary objection was taken on the part of the respondents by Mr. Gregory, that from such an order no appeal lies under s. 588 of the Code.

This question was argued at considerable length; and reserving our judgment upon it, we also heard the appeal on the merits. Upon consideration, I am of opinion that Mr. Gregory is right, and that no appeal lies. When Act XIV of 1882 was passed, the wording of s. 588, cl. 9, was to this effect: "Orders rejecting applications under s. 108, or an order to set aside a decree *ex parte*." Under this clause, apparently an appeal would lie from the order now before us; but I find that the word "or" in the clause after s. 108 was by an error placed for the word "for." In August 1882, that is, one month after the Act came into force, a corrigendum was

* Appeal from Order No. 434 of 1888, against the order of Baboo Rakhal Chunder Bose, Subordinate Judge of Shahabad, dated the 13th of August 1888.

published in the *Gazette of India*, under the signature of the Secretary to the Government in the Legislative Department, by which it was notified that the word "for" ought to have stood for "or" in this clause. I think I am justified in taking judicial notice of this notification and acting upon it. It is true that the amending Act (VII of 1888) assumes the original wording of the clause to have been correct, for the Act deliberately provides that the word "for" shall stand in the place of "or;" but in the statement of objects and reasons, which accompanied the Bill when framed, it was stated that the amendment of this clause was only intended to correct a typographical error. It is clear to me, therefore, that the Legislature never intended to enact that there should be an appeal from an order setting aside a decree passed *ex parte*.

That being so, I allow the preliminary objection in this case and dismiss the appeal with costs.

BANERJEE, J.—I also am of the same opinion. I think that the Code of Civil Procedure, even as it stood previous to the passing of the amending Act (VII of 1888), did not allow any appeal from an order granting an application for setting aside an *ex parte* decree.

It was contended that cl. 9 of s. 588, as it stood before the amendment by Act VII of 1888, allowed such an appeal. If that clause stood alone, this contention would have been right. But that is one of a series of clauses; and regard being had to the context, and especially to the language of cl. 8, which immediately precedes, it is clear that the word "or" in cl. 9 is a misprint for the word "for." Orders against which appeals are provided for by s. 588 are invariably referred to in the plural number, and where more descriptions of orders than one are provided for in one and the same clause, they are connected by the word "and," and not by the disjunctive particle "or." Clause 14 may be referred to in this connection. Referring to the state of the law as it stood before the passing of Act XIV of 1882, we find the same view supported; for cl. 9 of Act XII of 1879, which in other respects agrees word for word with the clause now under consideration, has the word "for" in the place of the word "or," thereby indicating that

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the Legislature then allowed appeals only against orders rejecting applications for setting aside *ex parte* decrees, and not against orders allowing such applications. And going further back, and referring to Act VIII of 1859, we find that the state of the law was the same under that Act. The reason of the thing would show that there is no ground for thinking that the Legislature intended to make any change in the law; for whereas an order rejecting an application for setting aside an *ex parte* decree leaves the party against whom the order is passed without any further remedy except an appeal against that order; an order allowing an application for setting aside an *ex parte* decree, leaves the party against whom the order is made ample remedy by prosecuting his suit, in which, if he is in the right, he may yet succeed. All this was conceded in argument; and the learned Counsel for the appellant admitted that, if the construction of this clause depended merely upon a construction of s. 588, the preliminary objection would be almost unanswerable. But it was contended that the Legislature, by having recourse to the process of legislation for the purpose of altering the word "or" into "for," has shown that we are no longer at liberty to suppose that it was a misprint for "for." I do not see much force in this contention. All that the Legislature did was only to guard against any possibility of error in construing s. 588; and, as my learned brother has shown, a reference to the statement of objects and reasons for making the change in question shows that what the Legislature meant to do was merely to correct a typographical error. If that is their express object, there is no force in the argument that we must presume their object to have been to alter the law and make it by the amending Act something different from what it was originally intended to be.

T. A. P. *Appeal dismissed.*

CIVIL RULE.

Before Mr. Justice Pigot and Mr. Justice Beverley.

IN THE MATTER OF ANUND CHUNDER ROY (AUCTION-PURCHASER) *v.* NITAI BHOOMIJ (JUDGMENT-DEBTOR).* 1889 *February* 20.

Appeal—Appeal newly given by law—Proceedings instituted prior to change in procedure—Appeal from order under s. 312, *Civil Procedure Code* (*Act XIV of* 1882)—*Act VII of* 1888, *ss.* 55 *and* 56.

It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made.

Held, accordingly, that an appeal from an order under the second paragraph of s. 312 of the Civil Procedure Code, although made before Act VII of 1888 came into force, would, upon the operation of that Act, lie to the Court, to which an appeal would lie from the decree in the suit in relation to which such order was made. *Hurrosundari Dabi* v. *Bhojohari Das Manji* (1) explained and distinguished.

ON the 5th September 1887, Anund Chunder Roy purchased a tenure at an auction sale held in execution of a decree for rent against Nitai Bhoomij. On the 7th June 1888, the sale was set aside by an order made by the Munsiff of Purulia under the second paragraph of s. 312 of the Code of Civil Procedure. In July 1888, a few days after Act VII of 1888 came into operation, Anund Chunder Roy appealed from this order to the Deputy Commissioner of Manbhoom, who dismissed the appeal on the ground that he had no jurisdiction to hear it, observing: "It is, however, clear that no appeal lies. By s. 588, clause (16) and s. 589, it is provided that an appeal lies *to the High Court* from 'orders under s. 294, the first paragraph of s. 312 or s. 313, for confirming, or setting aside, or refusing to set aside a sale of immoveable property.'

"The difference between the terms of s. 588, clause (F) of Act X of 1877, the former Civil Procedure Code, appears to indicate that the Legislature advisedly took away the right of appeal in cases in which the objection had been allowed, and the sale set aside. Even if this were otherwise, the appeal, if any,

* Civil Rule No. 1302 of 1888, against the order passed by E. N. Baker, Esq., Deputy Commissioner of Manbhoom, dated the 27th of August 1888.

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would lie to the High Court, and not to this Court. I have, therefore, no jurisdiction.

"By ss. 55 and 56, Act VII of 1888, an appeal has been allowed in this class of cases to the District Court. This Act came into force on the 1st July 1888, a few days before this appeal was filed; and it is argued that the procedure and jurisdiction in the case before me are therefore governed by its provisions. This, however, does not appear to be correct. In *Hurrosundari Dabi* v. *Bhojohari Das Manji* (1), it was held that the words 'any proceedings commenced before the repealing Act shall have come into operation' in s. 6 of the General Clauses Act I of 1868 include an appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit. The *ratio decidendi* of this case applies equally whether the repealing Act repeals an entire Act, or only portion of an Act. It follows, therefore, that this appeal is governed by the law as it stood at the time of institution of the original suit, *i.e.*, in the year 1883. As already stated, no appeal lies to this Court under the law as it stood then."

On the 16th November 1888, Anund Chunder Roy moved the High Court, and obtained a rule, calling upon the judgment-debtor, respondent, Nitai Bhoomij, to show cause why the order of the Deputy Commissioner of Manbhoom, dated the 27th August 1888, refusing to hear an appeal from an order under s. 312 of the Civil Procedure Code, made by the Munsiff of Purulia, and dated the 7th June 1888, should not be set aside on the ground that the Deputy Commissioner had jurisdiction to entertain the appeal under the provisions of Act VII of 1888.

On the rule coming up for argument,—

Baboo *Kishori Lal Goswami* for the petitioner.

Baboo *Issur Chunder Chuckerbutty* and Baboo *Upender Chunder Bose* for opposite party.

The judgment of the Court (PIGOT and BEVERLEY, JJ.) was as follows:—

In this case an order under the second paragraph of s. 312 of the Civil Procedure Code, setting aside a sale on the

(1) I. L. R., 13 Calc., 86.

ground of a material irregularity, was made by the Munsiff of Purulia.

The order was made on the 7th June 1888, before Act VII of 1888 came into force; and, therefore, when the order was made, no appeal lay from it to the Court of the Deputy Commissioner.

Act VII of 1888 came into force on July 1st, 1888. By that enactment an order made under s. 312 is made appealable to the Court, to which an appeal would lie from the decree in the suit in relation to which such order was made. In the present case such Court would be that of the Deputy Commissioner.

After the 1st July, an appeal was presented to the Deputy Commissioner from the order of June 7th. The Deputy Commissioner rejected it, holding that the new enactment did not apply, as the suit in which the order was made was instituted under the Act of 1882, under which no such appeal was allowed to his Court; that, therefore, the old law governed the matter, and that he had no jurisdiction to hear the appeal.

From that order this appeal is brought. The decision appealed from is founded on the decision of this Court in *Hurrosundari Dabi* v. *Bhojohari Das Manji* (1), in which it was held that no appeal lay against a decree in a suit instituted under the old Bengal Rent Act VIII of 1869, although the appeal was presented after the new Act VIII of 1885 came into force, by which Act (it was assumed for the purpose of the argument) an appeal was given.

That case was decided upon the construction of s. 6 of the General Clauses Act. The appeal, if it was given, was given by the Act of 1885, which repealed the Act of 1869; and it was held, that as the repeal of the Act of 1869 could not affect proceedings commenced before the repealing Act came into operation, and as the word "proceedings" in the General Clauses Act includes an appeal against a decree made before the passing of the repealing Act, the appeal did not lie.

In the present case, the question does not arise in respect of the provisions of a repealing Act. So far as the ss. 55 and 56 of Act VII of 1888 affect the present proceedings, they do so, not by repealing the former Act, but by adding to its provisions

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an appeal in a case in which the former Act did not allow one. They advance the remedy of the subject in this particular respect. We do not think, therefore, that the General Clauses Act applies.

That being so the general principle of law is applicable, that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. That principle is contravened by the General Clauses Act (whether intentionally or not) in cases where the appeal is conferred by means of the operation of the repeal of an existing Act. But that effect of the General Clauses Act must be limited to the cases strictly covered by its provisions. The present is not such a case. We hold, therefore, that the appeal lies to the Court of the Deputy Commissioner. We make the rule absolute.

We set aside the order of the Deputy Commissioner, and direct him to entertain the appeal.

The costs of this Rule will be disposed of by the Deputy Commissioner on the hearing of the appeal we now direct him to entertain. We assess the hearing fee on each side at three gold mohurs.

C. D. P. *Rule made absolute.*

CIVIL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Trevelyan.

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RAMEN CHETTY (PLAINTIFF) *v.* MAHOMED GHOUSE AND ANOTHER (DEFENDANTS).*

Stamp Act, 1879, *Sch. I, Arts.* 11, 19—*Cheque—Bill of Exchange, Admissibility in evidence—Post-dated cheque—Stamp Act*, 1879, *s.* 67—*Penalty.*

In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself as it stands, and not any collateral circumstances which may be shown in evidence, must be looked at.

Bull v. *O'Sullivan* (1), *Gatty* v. *Fry* (2), and *Chandra Kant Mookerjee* v. *Kartik Charan Chaile* (3) referred to.

* Rangoon Reference No. 1 of 1889, made by C. E. Fox, Esq., Officiating Recorder of Rangoon, dated the 11th of January 1889.

(1) L. R., 6 Q. B., 209. (2) L. R., 2 Ex. D., 265.
(3) 5 B. L. R., 103.