

1912
January,
23.

Before Mr. Justice Sir George Knox and Mr. Justice Sir Harry Griffin.
BRIJBASI LAL AND OTHERS (DEPENDANTS) v. SALIG RAM AND OTHERS
(PLAINTIFFS) AND PIYARE LAL (DEPENDANT).*

Review of judgement—Effect of order on review—Appeal from original decree.

The effect of the granting of an application for review is to supersede the decree which is the subject of such application. No appeal can, therefore, be maintained against the decree anterior to the review, but only against the subsequent decree. *Kuar Sen v. Ganga Ram* (1) and *Kanhaiya Lal v. Baldeo Prasad* (2) followed. *Uman Kunwari v. Jarbandhan* (3) distinguished.

IN this case an order absolute for sale under order XXXIV, rule 5 of the Code of Civil Procedure, 1908, was made by the Subordinate Judge of Agra on the 18th of May, 1910. An application for review of this order was made on the 18th of June, 1910, and was granted on the 29th July, 1910, and a fresh order for sale was passed. On the 24th of October, 1910, the defendants presented an appeal to the High Court against the order of the 18th of May, 1910, which appeal was admitted on the 22nd of April, 1910. No appeal was filed against the order of the 29th July, 1910. On the defendant's appeal coming on for hearing the respondents raised a preliminary objection to the effect that, inasmuch as the decree under appeal had been superseded in consequence of the order in review, the appeal could not be maintained, and reliance was placed on *Kuar Sen v. Ganga Ram* (1) and *Kanhaiya Lal v. Baldeo Prasad* (2). The appellant contended that the court below was in the circumstances not competent to review its order of the 18th May, 1910, and that the order of the 29th July, 1910, must be treated as a nullity. He relied on the Full Bench case of *Uman Kunwari v. Jarbandhan* (3).

Babu *Surendra Nath Sen* for the appellant.

The Hon'ble Dr. *Sundar Lal* (with him Pandit *Rama Kant Malaviya*) for the respondents.

KNOX and GRIFFIN JJ.—This appeal arises out of an order passed by the Subordinate Judge of Agra, on the 18th of May 1910. The Subordinate Judge had before him an application for an order absolute for sale under order XXXIV, rule 5. He

* First Appeal No. 114 of 1911 from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 18th of May, 1910.

(1) Weekly Notes, 1890, p. 144. (2) (1905) I. L. R., 28 All., 240.
(3) (1908) I. L. R., 30 All., 479.

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granted the order absolute and in that order absolute he stated the amount that would be due and payable to the decree-holder on the 2nd of March, 1910, and it is this order which we are asked to set aside on the ground that the Subordinate Judge had no jurisdiction to alter or amend a decree after it had been affirmed by the High Court, because (i) the Subordinate Judge had put a wrong construction upon the decree of this Court, and (ii) the Subordinate Judge had erred in framing a decree for a larger sum than the judgement authorized. We need not mention the other grounds of appeal and we need not consider even those above-mentioned, because the appellants are met by the respondents with an objection which appears to us fatal to this appeal. It appears from the record that after the Subordinate Judge had passed his order on the 18th of May, 1910, he was asked to review the same by an application, dated the 18th of June, 1910. The application was allowed by an order, dated the 29th of July, 1910, and the order of the 18th of May modified. The terms of the order, so far as they refer to the matter before us, run as follows:—"It is, therefore, ordered that the objections (of the judgment-debtors) be disallowed and that an order absolute for sale be prepared under rule 5, order XXXIV." This order is put forward by the respondents as the final decree in the case. No appeal has been instituted from it and no mention of it is made in the appeal which we are now considering. This appeal was presented on the 24th of October, 1910. It was not admitted, for reasons which we need not consider, until the 22nd of April, 1911. The appellants had, therefore, ample opportunity to call in question the order of the court below, dated the 29th of July, 1910. But, as we have already said, they nowhere even alluded to its existence. They have not attempted to explain why they have left that decree unchallenged, and the probability is that they have overlooked its existence. The learned vakil for the appellants addressed to us a very lengthy and elaborate argument in which he contended that the order of the 29th July, 1910, was an order passed without jurisdiction, a mere nullity, which would of itself appear when we pass a decree in the present appeal, and in support of this argument he cited the Full Bench ruling of this Court, *Uman Kunwari v. Jarbandhan* (1). We

(1) [1908] I. L. R., 80 All., 479.

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have considered that and the argument addressed to us upon that but we do not think the case to be in point. What was then under consideration was a decree of a Subordinate Judge, who had reversed a decree of a Munsif and passed an order of remand under section 562 of the old Code of Civil Procedure. While that appeal was pending in this Court, the court of first instance had carried out the order of remand and had decreed the plaintiff's claim. Upon this Court proceeding to hear the appeal before it a preliminary objection was raised to the effect that, as the order of remand had been carried out before the appeal was filed, this court could not entertain the appeal. It was held that a decree passed in pursuance of a remand was no bar, and this court proceeded to set aside the order of remand and to restore the order first passed in the case. The learned Judges who decided the case of *Uman Kunwari v. Jarbandhan*, pointed out that after the court of first instance had once decided the case, it ceased to have any jurisdiction except on review of judgement. From this it is evident that the learned Judges in no way considered the exact point before us. In *Uman Kunwari v. Jarbandhan*, the order of remand was found to be erroneous and was set aside, and everything done in pursuance of the order fell to the ground. In the case before us what has really happened is that the Subordinate Judge, who had jurisdiction to review his judgement, proceeded to review it and in reviewing it passed an order which does not commend itself to the appellants. That order may be right or wrong, but there was jurisdiction in the Subordinate Judge. There are two cases which are exactly in point, namely, *Kuar Sen v. Ganga Ram* (1) and *Kanhaiya Lal v. Baldeo Prasad* (2). We cannot find that these cases have ever been questioned, and we agree with what was held in them that the order for review under such circumstances superseded the original decree. The decree under appeal has ceased to exist and the appeal cannot be heard. We dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1890, p. 144.

(2) (1905) I. L. R., 28 All., 240.