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no such instrument was required, and the provisions of the will followed by the appropriation of villages and delivery of possession vested in the *guzara*-holders a good and sufficient title. The appellant has certainly no equitable claim to relief; indeed it would be most inequitable if, after making the appropriation, and delivering possession and collecting rent upon the basis of the appropriation so made, he were permitted to repudiate the transaction and recover possession of the allotted villages. This contention, therefore, also fails.

Their Lordships will accordingly humbly advise His Majesty that these appeals fail, and should be dismissed with costs,

J. V. W.

*Appeals dismissed.*Solicitors for the appellant: *Barrow, Rogers & Nevill.*Solicitors for the respondents: *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KAMPA DEVI (DEFENDANT) v. KISHORI LAL (PLAINTIFF) AND
JAGANNATH AND OTHERS (DEFENDANTS)*.

Act No. XXVI of 1917 (Transfer of Property (Validating) Act), section 3, proviso (3)—Review of judgment—Judgment reviewed that of appellate court—“Former court.”

Where action is taken by an appellate court on an application for review presented in accordance with the provisions of Act No. XXVI of 1917, and an appeal which had been dismissed is restored, the “former court” mentioned in proviso (3) to the section is not the court of first instance but the appellate court.

THE plaintiff in this case sued as assignee of a simple mortgage executed on the 28th of October, 1910, and asked for a decree for sale of the mortgaged property. The court of first instance found that the mortgage-deed sued on had not been properly attested, and therefore refused to grant a decree for sale; but it gave the plaintiff a simple money decree for the amount of his claim. The plaintiff appealed to the District Judge, again asking for a decree for sale of the mortgaged

* Second Appeal No. 940 of 1918, from a decree of E. R. Neave, District Judge of Meerut, dated the 12th of June, 1918, modifying a decree of Gopal Das Mukerji, Additional Subordinate Judge of Meerut, dated the 16th of May, 1914.

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property, but his appeal was dismissed upon the same ground of want of proper attestation. The plaintiff then applied to the District Judge for a review of judgment according to the provisions of section 3 of the Transfer of Property (Validating) Act, 1917. On this application the District Judge restored the appeal, but refused to hear the respondents on a plea raised by them of defective consideration, because, according to him, that question had already been decided by the court of first instance, the decision of which—as being the “former court” mentioned in proviso (3) to section 3 of the Act mentioned above—was binding on him. The District Judge accordingly granted the plaintiff a decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure. The defendant thereupon appealed to the High Court, urging that the District Judge was wrong in refusing to consider the plea raised as to the genuineness of the consideration for the mortgage.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *Surendra Nath Sen*, for the appellant.

Mr. *B. E. O'Connor* and *Uma Shanker Bajpai*, for the respondents.

PIGGOTT and WALSH, JJ.:—The learned District Judge was, in our opinion, mistaken when, at the conclusion of his judgment, he held that he was bound by the finding arrived at in the trial court, that is to say, by the court of first instance, on the question of the consideration for the mortgage deed in suit. The question turns on the wording of section 3, proviso (3), of Act No. XXVI of 1917. When the learned District Judge, by his order of the 27th of April, 1918, granted the plaintiff's application for review, the plaintiff's appeal against the decree of the trial court dismissing his claim for a decree for sale on the mortgage and granting him only a simple money decree, became once more a pending appeal on the file of the District Judge of Meerut. We are not at all certain from the form of the order before us that this fact was fully realized in the court below. The order itself is headed as being an order in a miscellaneous case and the learned District Judge begins his judgment by describing the matter before him as application for review of judgment under Act No. XXVI of 1917. He is certainly wrong there, as the

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application for review of judgment had been granted by his predecessor on the 27th of April, 1918. What he had before him was the appeal itself for decision on the merits and on any plea that might be raised before him by either of the parties. The position then was that the trial court had found in favour of the plaintiffs on every point except as regards the formal execution of the deed of mortgage. That point the court was now bound to decide in favour of the plaintiff under Act XXVI of 1917, but the mere filing of the appeal had opened a door to the defendants to support the decision of the trial court on any point which had been decided against them. The order under appeal shows that they actually tried to do this, for they asked the District Judge to reconsider the finding on the question of payment of consideration and to record a new finding in their favour. The learned District Judge seems to have taken this point into consideration and to have discussed it, but we cannot treat his remarks on the point as equivalent to the recording of a finding, in view of the fact that he goes on to say that he holds himself bound by the original finding of the Subordinate Judge. That he was not so bound is, in our opinion, clear for two reasons. When the review was granted by the District Judge it was a review of his order dismissing the appeal. The decision of the "former court," referred to in proviso (3) to section 3 of Act XXVI of 1917, was the decision of the District Judge, the court of first appeal, and not that of the Subordinate Judge, the original trial court.

Moreover, the question of the payment of consideration for this mortgage had not been finally determined when an appeal was brought against the decree of the trial court by the plaintiff. It was an issue which required to be determined in the appellate court after the question of execution had been decided in favour of the plaintiff. We have come to the conclusion that the proper way for us to deal with this matter is to remit an issue on the question of consideration to the lower appellate court so as to secure a clear finding. The issue then is as follows:—

"Was the consideration for the mortgage-deed in suit actually paid, and if so, was it such as to bind the interests of Jagannath's son in the property mortgaged"?

Ten days will be allowed for objections after return of finding.

Issue remitted.

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SHEONATH SINGH (APPLICANT) v. MUNSHI RAM (OPPOSITE PARTY)*

Act No. III of 1907 (Provincial Insolvency Act), sections 16 (2) and (6), and section 38—Insolvency—Date of vesting of insolvent's property in the Receiver—Alienation of property by insolvent between the dates of the presentation of the petition and the order of adjudication.

The effect of sub-sections (2) and (6) of section 16 of the Provincial Insolvency Act, 1907, is that, while no vesting of the property of the insolvent in the Receiver takes place until an order of adjudication is made, and it is the order of adjudication which vests the property, nevertheless, by a legal fiction, the vesting of the property of the insolvent in the Receiver must be deemed to have taken place, when once an order of adjudication has been made, at the date of the presentation of the petition, or, in other words, the commencement of the insolvency. It follows, therefore, that the insolvent cannot make a valid alienation of his property between the dates of the presentation of the petition and the order of adjudication. *T. V. Sankaranarayana v. Alagiri Aiyar* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Dr. S. M. Sulaiman, Babu Piari Lal Banerji and the Hon'ble Saiyid Raza Ali, for the appellant.

The Hon'ble Dr. Tej Bahadur Sapru and Munshi Girdhari Lal Agarwala, for the respondent.

PIGGOTT and WALSH, JJ. :—This is an appeal from an order of the District Judge of Moradabad sitting in insolvency, dismissing an application filed by the Receiver for an order that a certain transfer made by the insolvent was void under the insolvency law and that the property be handed over to the Receiver. So far as the question decided by the learned Judge and now before us in appeal is concerned, the facts are not in dispute. The respondent suggests that there may be grounds for attacking the order of adjudication and the *locus standi* of the original petitioning creditor, but these are not matters which can be decided upon this application, and he must be left to take such

* First Appeal No. 191 of 1919, from an order of V. E. G. Hussey, District Judge of Moradabad, dated the 30th of May, 1919.

(1) (1918) 49 Indian Cases, 283.