

1920

SHAM DAS
v.
BABADUR
SINGH.

Gobind Rai v. Banwari Lal (1). It is true that in the present case the plaintiff does not formally seek to recover possession of the plots of which rent was taken wrongfully by Hanuman Prasad, but practically the present suit is to recover possession of the said plots by establishing his title to recover rent from Shibban. We think that the claim of the plaintiff in the form in which it was decreed by the learned Munsif is maintainable in a Civil Court. We therefore set aside the decree of the lower appellate court and remand the case under order XLI, rule 23, to it for disposal according to law. The costs in this Court will abide the event.

Appeal decreed and cause remanded.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BINDHYA CHAL[SINGH AND OTHERS (OBJECTORS) v. NAWALRAJ
KUNWARI (OPPOSITE PARTY).*

1920

December, 9.

Execution of decree—Jurisdiction—Appellate decree—Objection raised in execution that appeal had abated and the decree was void—No objection taken in the appeal itself.

Held that it was competent to the court executing a decree to entertain an objection that the decree, which was the decree of an appellate court, had in fact been passed at a time when the appellant was dead and no representative of his had been brought upon the record of the appeal within the prescribed period of limitation, although no plea to this effect had been taken at the hearing of the appeal.

THE facts of this case appear from the following judgment of the lower court:—

“This objection to the execution of the decree, dated the 1st of March, 1918, is filed by three of the judgment-debtors. The undisputed circumstances in which the decree was passed, are as follows. The suit was originally instituted in this court by Mahesh Singh. It was dismissed. The defendants to the suit were, *inter alios*, the present objectors. Mahesh Singh preferred an appeal to the Hon'ble High Court. The present objectors, who were among the respondents, filed an objection to the validity of the appeal on the ground that Mahesh Singh had died before the appeal was filed. This objection was overruled, and Mahesh

* First Appeal No. 55 of 1920 from a decree of Maheshwar Prasad. Subordinate Judge of Gorakhpur, dated the 14th of February, 1920.

Singh's son Baz Bahadur Singh was brought upon the record in place of Mahesh Singh appellant who died during the pendency of the appeal. The Hon'ble High Court decreed the appeal on 1st March, 1918. It is alleged by the present objectors that the appeal was heard in the Hon'ble Court on 1st March, 1918, or on 20th February, 1918; and by the applicant for execution of the decree, that it was heard within a week before 1st March, 1918, so that it is common ground that the appeal was heard some time between the 20th of February, 1918 and the 1st of March, 1918. The objection raised by the objectors is that Baz Bahadur Singh died on the 17th of April, 1917, during the pendency of the appeal, that the appeal was heard long after Baz Bahadur Singh's death and the decree is void; that, therefore, the present applicant for execution, who is Baz Bahadur Singh's mother, cannot take out execution, and that the proceedings in the Hon'ble Court which resulted in Baz Bahadur Singh having been brought upon the record in place of Mahesh Singh were also void. The preliminary point for consideration is whether or not the objectors can go behind the decree. It is admitted on their behalf that the objectors respondents never raised the question in the Hon'ble Court that the appeal should abate by reason of Baz Bahadur Singh's representative not having been brought on the record within the six months from his death. (See the statement of the objector's pleader). According to the objector's version, the appeal was heard in February or March of the year 1918, although Baz Bahadur Singh had died on the 17th of April, 1917, that is to say, more than six months previous to the appeal being heard. From order XXII, rules 3 and 11, of the Code of Civil Procedure, coupled with article 178 of the Limitation Act, it is clear that the respondents should have applied to the Hon'ble Court for an order abating the appeal, within six months from the alleged date of Baz Bahadur Singh's death. They did not do so. The appeal was heard as if Baz Bahadur Singh, appellant, was still alive. On the 1st of March, 1918, a decree was passed in favour of Baz Bahadur Singh for possession and mesne profits. In my opinion, the objectors who were the respondents and who had an opportunity of applying for the abatement of the appeal, cannot, in the execution department, go behind the decree.

1920

BINDHYA
CHAL SINGH
v.
NAWALRAJ
KUNWAR.

1920

BINDHYA
CHAE SINGH
v.
NAWALRAJ
KUNWARI.

The ruling in *Sripat Narain Rai v. Tirbeni Misra* (1) has no application to the present case. That was a case in which a decree was passed against a dead person and its execution was sought against the representatives of that person. Those representatives had no opportunity of preventing the decree from being passed. In the present case, the respondents had an opportunity of bringing about the abatement of the appeal, and some of those respondents are the objectors in execution. I hold that the validity of the decree can not be questioned by the objectors, and disallow the objection with costs."

The objectors appealed to the High Court.

Pandit *Rama Kant Malaviya* for the appellants.

Munshi *Jang Bahadur Lal*, for the respondent.

PIGGOTT and WALSH, JJ.:—We think the court below had jurisdiction to inquire into and to determine the question of fact which it has refused to determine. We send down the following issue:—

Was *Baz Bahadur Singh*, the minor son of *Mahesh Singh*, living or dead on the date on which the appeal, pending in his name before this Court, was heard and determined and a decree passed in his favour on the 1st March, 1918?

On receipt of the finding, ten days will be allowed for objections.

Issue remitted.

Before Mr. Justice Piggott and Mr. Justice Walsh.

SHANKAR LAL (DEFENDANT) v. BABU RAM (PLAINTIFF).*

Act No. IV of 1882 (Transfer of Property Act), section 106—Landlord and tenant—Notice to quit—Notice adding that on failure to vacate, tenant would be liable for a certain enhanced rent—Construction of document.

A notice of ejection served by a landlord on his tenant contained, besides the usual terms of a notice to quit, a further statement that if the tenant did not vacate the house by the time specified, the landlord would hold him liable from that date to rent at an enhanced rate. The tenant did not attempt to treat this latter statement as an offer to renew the tenancy at the enhanced rate of rent.

*First Appeal No. 56 of 1920 from an order of *Shams-ud-din Khan*, Additional Subordinate Judge of Meerut, dated the 13th of February, 1920.

(1) (1918) I. L. R., 40 All., 429.

1920.
December, 9.