Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1881
March 18.

BIKRMAJIT SINGH (DEFENDANTS) *v.* HUSAINI BEGAM (PLAINTIFF). *

Remand under s. 566 of Act X of 1877 (Civil Procedure Code)—Finding in favour of respondent who had not appealed or objected under s. 561—Right of respondent to benefit by such finding.

H sued *B* for arrears of rent, alleging that the annual rent payable by the latter was Rs. 212-1-0. The Court of first instance gave *H* a decree based on the finding that the annual rent payable by *B* was Rs. 94. *H* appealed, and the lower appellate Court gave him a decree based on the finding that the annual rent payable by *B* was Rs. 128-12-0. *B* appealed to the High Court from the lower appellate Court's decree. *H* did not appeal from that decree, neither did he take any objections thereto under s. 561 of Act X of 1877. STUART, C. J., and OLDFIELD, J., before whom such appeal came for hearing, remanded the case to the lower appellate Court for a fresh determination of the question as to the amount of the annual rent payable by *B*. The lower appellate Court then found that the annual rent payable by *B* was Rs. 212-1-0.

Held by STUART, C. J., (OLDFIELD, J., dissenting) that such second finding of the lower appellate Court should be accepted and the amount awarded by its decree be enlarged accordingly, notwithstanding *H* had not appealed from that decree or preferred objections thereto.

THIS was a suit for arrears of rent. The plaintiff asserted that the annual rent payable by the defendant, an occupancy-tenant, was Rs. 212-1-0. The defendant asserted that the annual rent payable by him was only Rs. 94. The Assistant Collector trying the suit found that the annual rent payable by the defendant was Rs. 94, and gave the plaintiff a decree in accordance with this finding. On appeal by the plaintiff the District Judge (Mr. G. E. Knox) found that the annual rent payable by the defendant was Rs. 128-12-0, and modified the decree of the Court of first instance accordingly. The defendant appealed to the High Court from the decree of the District Judge. The plaintiff did not appeal from that decree, neither did he prefer objections thereto under s. 561 of Act X of 1877. The appeal came for hearing before Stuart, C. J., and Oldfield, J., and those learned Judges, being of opinion that the District Judge had found that the annual rent

* Second Appeal, No. 16 of 1880, from a decree of G. E. Knox, Esq., Judge of Benares, dated the 30th September, 1879, modifying a decree of Syed Ali Hasan, Assistant Collector of the first class, Jaunpur, dated the 6th February, 1879.

1881

BIKRMAJIT SINGH v. HUSAINI BEGAM.

payable by the defendant was Rs. 128-12-0 without sufficiently inquiring into the facts of the case, on the 30th August, 1880, made an order remanding the case for the fresh determination of the question as to the amount of the annual rent payable by the defendant. In the meanwhile Mr. G. E. Knox had been transferred, and his successor, Mr. M. S. Howell, found, on the case coming before him under the High Court's order of remand, that the annual rent payable by the defendant was Rs. 212-1-0.

On the return of this finding the case again came before Stuart, C. J., and Oldfield, J., for disposal.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Hanuman Prasad, for the respondent.

The Court delivered the following judgments:—

STUART, C. J.—In our remanding order we expressed the opinion that the decision of the Judge (Mr. Knox) as to the amount of rent annually payable was not satisfactory. We further expressed the opinion that it was unsatisfactory to determine the rent payable now by the amount decreed more than twelve years before, without ascertaining why that sum had never been realized, by which we meant that Mr. Knox's view as to the effect to be given to the decree of 1863, by which he appears to regard the matter of that decree as showing in this suit a *res judicata*, could not be maintained. We therefore remanded the case for trial of the question indicated in our remanding order, and we have now got the finding on that remand by Mr. Howell, the present Judge and Mr. Knox's successor, who finds that the decree of 1863, if not conclusive, throws the burden of proving a less amount than Rs. 128-12-0 on the defendant, but who at the same time shows that the payments by the defendant have varied at different times. Thus he states that the defendant paid Rs. 128-12-0 or Rs. 129-7-0 according to different accounts in 1271 fasli; Rs. 110 in 1279 fasli; Rs. 114-6-0 or Rs. 116-10-0 in 1281 fasli, the reasons for the discrepancies being explained by the patwari. Mr. Howell's conclusion is that the defendant has all along been in possession of

the land as tenant, but that up to 1273 he succeeded in concealing the extent of his holding, and before and after that date he has, like the other tenants, been systematically in arrears, and Mr. Howell's conclusion is that the rent payable on the defendant's holding is Rs. 212-1-0. I see no reason why we should not accept this finding. No. doubt the plaintiff, to whom Mr. Knox had given a decree for Rs. 128-12-0, has not appealed from such decree, the present appeal being on the part of the defendant, who simply complains of having to pay more than Rs. 94. But it appears to me that the fact of the plaintiff not having filed a cross appeal, or recorded any plea or objection against the limited remedy given him by Mr. Knox, should not prevent us from doing full justice in the case by giving effect to the very distinct finding by Mr. Howell in answer to our remand. The absence in the record of any plea on the part of the plaintiff calling in question the inadequacy of the relief given by Mr. Knox may be attributable to *incuriâ* or a mere oversight on the part of his pleader and should not prevent us doing him justice. It is also to be observed that the plaintiff in his plaint distinctly asks the rent of Rs. 212-1-0, which Mr. Howell has found to be his due, and he reasserts that claim in his reasons of appeal, in which too it is shewn that the Rs. 128-12-0 was the amount of rent originally payable for 31 bighas 14 biswas, but the area of the holding having been enlarged to 51 bighas 17½ biswas the proper rent appropriated to such a holding was Rs. 212-1-0, being the amount claimed in the suit by the plaintiff and found by the Judge to be his due. Further, the objection to the finding on the remand filed by the defendant-appellant does not express any objection to the Rs. 212-1-0, but simply the contention that the defendant was not liable to pay an actual rent of more than Rs. 94. It appears to me therefore that, if we disposed of this appeal on any other view of the record than that I have explained, we not only do gross and manifest injustice, but we contradict and stultify our own remand order, which strongly declares that the judgment of Mr. Knox, which caused that remand, was unsatisfactory and legally erroneous, and yet we are now asked to rule that that unsatisfactory and erroneous judgment must now in the result be reverted to and accepted by us notwithstanding the careful inquiry and distinct finding by Mr. Howell staring us

1881

BIKRMAJIT SINGH v. HUSAINI BEGAM.

in the face. I cannot be a party to such an anomalous decision. I do not consider that the case falls under s. 561 of the Procedure Code. That section only applies to "a decree," that is, to a decree complete and final, and in that respect being discretionary and not directory, and not a decree such as we have in the present case under remand and therefore incomplete. Then the remand was accepted and acted upon by both parties, and there is no objection to the finding on remand on the ground of its being inconsistent with the record, of which on the contrary it forms part under s. 567 of the Procedure Code, and upon that record the appellate Court is not to look to the laches of parties and omissions in pleading, but "shall proceed to determine the appeal," that is, to determine the appeal upon the record as it stands with the evidence taken on remand and the finding thereon. The present difficulty therefore is one that has not been provided for and is simply a *casus omissus*, our duty being in my opinion under such circumstances to give effect to the plain demands of justice. For all these reasons I consider myself justified in accepting the finding of Mr. Howell on our remanding order and decreeing the plaintiff Rs. 408-14-0, and I would vary and enlarge Mr. Knox's decree accordingly, the costs of this appeal being borne by the defendant-appellant.

OLDFIELD, J.—We have now before us the finding on the issue remitted. The Judge after careful inquiry finds that up to 1272 fasli the defendant held 31 bighas 14 biswas of land, and that a decree for rent at Rs. 128-12-0 for this land was obtained against him, and that amount of rent has been paid on one occasion. The land was after 1272 fasli found to be in area 51 bigahs 17½ biswas for which the rent entered in the rent-rolls was Rs. 212-1-0, but it is questionable whether that amount has been agreed to and accepted between the parties. There is sufficient, however, to justify the Judge's (Mr. Knox's) decree which is based on the amount of rent payable being Rs. 128-12-0 per annum. In the absence of any appeal or objections by the plaintiff to the amount decreed by the Judge we are not in a position to do more than to dismiss the appeal with costs with reference to the provisions of s. 561.