in the suit filed by the plaintiff under section 92 of the Code of Civil Procedure. We dismiss section 115 application no. 69 of 1936 filed by Srimati Prakashwati Devi with costs.

Application allowed.

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LAL SURESH SINGH v. LEGAL REMEMBRANCER TO GOVERNMENT, UNITED PROVINCES

REVISIONAL CIVIL

Before Mr. Justice H. G. Smith

RAM NATH (DEFENDANT-APPLICANT) *v.* KEDAR NATH (PLAINTIFF-OPPOSITE PARTY)*

1937 *February*, 25

Provincial Small Causes Courts Act (IX of 1887), section 25—Civil Procedure Code (Act V of 1908), section 151—Suit dismissed for non-deposit of additional court-fee—Court's power to restore suit under section 151, Civil Procedure Code—Suit wrongly restored under section 151 and finally decided—Application under section 25, Small Cause Courts Act, attacking order of restoration but not final decree—High Court's power of interference—Proper remedy of defendant.

Where a suit is dismissed for non-payment of certain additional court-fee which is called for by the trial court the court cannot restore the suit on an application under section 151 of the Code of Civil Procedure. If, however, the suit is wrongly restored on an application under section 151 and proceeds to its termination, the High Court cannot, under section 25 of the Provincial Small Cause Courts Act, interfere with the order restoring the suit to hearing as that order is clearly an interlocutory order, and the proper remedy of the applicant is to apply under section 25 of the Small Cause Courts Act against the final decree itself. *Rameshwardhari Singh* v. *Sadhu Saran Singh* (1), referred to.

Mr. *H. H. Zaidi,* for the applicant.

Mr. *H. D. Chandra,* for the opposite party.

SMITH, J.:—This is an application by a defendant under section 25 of the Provincial Small Cause Courts Act. Section 151 of the Code of Civil Procedure is also

*Section 25 Application No. 70 of 1936, against the decree of Babu Gauri Shankar Varma, Civil Judge of Gonda, dated the 2nd of May, 1936.

(1) (1923) I.L.R., 2 Pat., 504.

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mentioned in it, but it is conceded by the learned counsel for the applicant that it is to be regarded as an application only under section 25 of the Provincial Small Cause Courts Act.

Smith, J.

The facts are somewhat peculiar. The suit out of which the application arises was instituted on the 9th of November, 1935. On the 28th of November, 1935, it was dismissed for non-payment of certain additional court-fees which had been called for by the trial court. On the 10th of December, 1935, the plaintiff applied under section 151 of the Code of Civil Procedure for restoration of the suit, and on the 2nd of May, 1936, the suit was restored to hearing. The defendant filed his written statement on the 27th of May, 1936, and on the 30th of May, 1936, the suit was decided, the plaintiff's claim being decreed in full, with costs. The present application was made on the 31st of July, 1936, that is to say, two months after the suit had been finally decided. This present application, however, does not attack the final decree itself, but attacks only the order of the 2nd of May, 1936, for the restoration of the suit. The contention is that the court below had no jurisdiction to restore the suit as the result of an application made under section 151 of the Code of Civil Procedure.

The learned counsel for the plaintiff-respondent contends that as the suit had been decided prior to the making of this present application, the decision of this application in favour of the applicant would not affect the final decree. The contention of the learned counsel for the applicant, on the other hand, is that if it is held that the court below had no power under section 151 of the Code of Civil Procedure to restore the suit to hearing after its dismissal on the 28th of November, 1935, the decree that was ultimately passed will become a nullity.

There are really three questions involved. The first is whether the court below had jurisdiction under section 151 of the Code of Civil Procedure to restore

the suit to hearing. The second is whether the order for restoration can now be attacked under section 25 of the Provincial Small Cause Courts Act, in view of the fact that the suit had been decided before this application was made; and the third question is what the effect would be if this application, which is merely against the order of restoration, is allowed.

On the first of the above questions reference has been made by the learned counsel for the applicant to a decision reported in *Rameshwerdhari Singh* v. *Sadhu Saran Singh* (1). This decision certainly supports the contention of the learned counsel for the applicant. The learned counsel for the respondent has not shown me any authority to the contrary effect, and while not conceding that this authority lays down correct law, he is willing to have it assumed that the learned court below had no power under section 151 of the Code of Civil Procedure to restore the suit to hearing. I am of opinion that the learned court below was wrong in restoring the suit on the basis of an application under section 151 of the Code of Civil Procedure, but, in view of the fact that the suit had proceeded to its termination before this present application was made, I think that I cannot now under section 25 of the Provincial Small Cause Courts Act, interfere with the order restoring the suit to hearing. That order was, in my opinion, clearly an interlocutory order, and the proper remedy of the applicant was to apply under section 25 of the Small Cause Courts Act against the final decree itself. It does not seem to me that, even if the present application were allowed, the final decree would be effected. The applicant has, in my opinion, adopted a wrong remedy. He ought not to have come here under section 25 of the Small Cause Courts Act against the interlocutory order, but he ought to have come under that section against the final judgment and decree, basing his attack upon them on the alleged wrong order of restoration.

(1) (1923) I.L.R., 2 Pat., 504.

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The result is that I must decline in all the circumstances of the case to interfere now with the order of the 2nd May, 1936, for the restoration of the suit, and I dismiss this application with costs.

Smith, J.

Civil Miscellaneous Application no. 607 of 1936 was presented on the 5th of August last, asking that "further proceedings in the case be postponed". This application purported to be made under order XLI, rule 5. It is not obvious what the further proceedings referred to were, in view of the fact that the case had been finally decided long before this application was made. The learned counsel for the applicant says that the proceedings referred to may have been execution proceedings, though they are not so described in the application. In any case, in view of my decision on the application under section 25 of the Provincial Small Cause Courts Act, the miscellaneous application must now be rejected, and I reject it accordingly. I make no separate order about the costs of it. The interim stay order passed by the learned Acting Chief Judge on the 5th of August, 1936, is discharged.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice H. G. Smith

1937
February, 25

SHEO MOORAT AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* CHHANGOO AND ANOTHER (DEFENDANTS-RESPONDENTS)*

Limitation Act (IX of 1908), Articles 142 and 144—Suit for possession both on title and on disturbance of possession—Plaintiff proving title—Burden of proof of adverse possession, if on defendant—Defendant failing to discharge onus—Plaintiff, if entitled to decree.

Where the plaintiff sues for possession both on the ground of title and on the ground of his possession having been disturbed by the defendant, the burden of establishing title by

*Second Civil Appeal No. 137 of 1935, against the decree of Pandit Kishen Lal Kaul, Civil Judge of Sultanpur, dated the 24th of January, 1935, modifying the decree of Babu Bishambhar Nath Chaudhri, Munsif of Amethi at Sultanpur, dated the 26th of May, 1934.