APPELLATE CIVIL.

Before Das and Adami, JJ.

TAUSUKH RAI

v.

GOPAL MAHTON.*

1929.

Jan. 16.

Appeal—suit dismissed—finding on some issues against defendant—defendant, whether can appeal.

Where a suit was dismissed against a defendant but the trial court had come to a certain finding adverse to the defendant, the suit having been dismissed in spite of that finding.

Held, that the defendant had no right of appeal against that finding.

Ram Bahadur Singh v. *Lucho Kuer*(1), *Nundo Lal Bhattacharji* v. *Bidhu Mookhy Dey*(2) and *Midnapur Zamindari Co., Ltd.* v. *Naresh Chandra Roy*(3), followed.

Appeal by the defendants.

The facts of the case material to this report are stated in the judgment of Das, J.

C. C. Das (with him *Hareswar Prasad*), for the appellants.

Pugh (with him *S. S. Bose*), for the respondents.

DAS, J.—In my opinion there is no right of appeal. The plaintiffs sued on two mortgages, one dated the 4th February, 1903, and the other dated the 8th January, 1904, both alleged to have been executed by one Jibdhan Charan, the son of Jado Charan, the proprietor of Dharguli Estate. The appellants are

*First Appeal no. 3 of 1927, from a decision of Babu Ashutosh Mukherji, Subordinate Judge of Hazaribagh, dated the 1st October, 1926.

(1) (1885) I. L. R. 11 Cal. 301, P. C.
(2) (1886) I. L. R. 13 Cal. 17.
(3) (1921) I. L. R. 48 Cal. 460, P. C.

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defendants 9—12 who are the holders of subsequent mortgages executed by Jibdhan. The suit was contested on the ground that the consideration money was actually received not by Jibdhan but by Jado Charan and that as the Dharguli Estate had been attached under the provisions of the Chota Nagpur Encumbered Estates Act, Jado Charan could not execute the mortgages in question but got them to be executed by Jibdhan. The learned Subordinate Judge has held that the mauza which was mortgaged by Jibdhan to the plaintiffs and subsequently to the predecessors-in-title of defendants 9—12 is not the khorposh village of Jibdhan; and that so far as the mortgages sued upon are concerned, they were executed by Jibdhan as the benamdar of Jado Charan who was incompetent to deal with his estate or any portion thereof as his estate had already been attached under the provisions of the Chota Nagpur Encumbered Estates Act. On this ground the learned Subordinate Judge has dismissed the plaintiffs' suit; and he has dismissed it as against all the defendants including defendants 9—12. Defendants 9—12 are however embarassed by the finding in the judgment of the learned Subordinate Judge that the mauza mortgaged in these different transactions was not the khorposh mauza of Jibdhan and they contend that although the decree is in their favour, they are entitled to appeal from the finding which is against them. It seems to me however that the case is concluded by the decision of the Judicial Committee in *Run Bahadur Singh* v. *Lucho Kuer*(1) which has been followed in decisions too numerous to mention including another decision of the Privy Council in *Midnapur Zamindari Co., Ltd.* v. *Naresh Chandra Roy*(2). In regard to this question, the Judicial Committee said as follows: "The widow has not appealed against the decree, nor could she because it is in her favour, but she has appealed against the finding that the brothers were joint in

(1) (1885) I. L. R. 11 Cal. 301, P. C.
(2) (1921) I. L. R. 48 Cal. 460, P. C.

estate. It may be supposed that her advisers were apprehensive lest the finding should be hereafter held conclusive against her, but this could not be so, inasmuch as the decree was not based upon it, but was made in spite of it." The decision was followed, as it had to be followed by the Calcutta High Court in the subsequent case of *Nundo Lal Bhuttacharji* v. *Bidhu Mookhy Dey*(1). The facts of that case were as follows: The landlord instituted a suit against the tenant for ejectment. The suit was resisted on two grounds; first on the ground that no notice to quit had been served on him; and secondly, on the ground that the tenure was a permanent one. The suit was dismissed on the first ground, the Court holding at the same time that the tenure was not a permanent one. In a subsequent suit for ejectment from the same holding, brought by the same plaintiff against the same defendant the defence was that the tenure was a permanent one. The question which the Calcutta High Court had to decide was whether the trial of the question was barred by the decision in the previous case. The learned Judges pointed out that though the former suit was between the same parties, the decree dismissing the suit was not based on the finding adverse to the defendant in that case, but in spite of it; and they held that the decision of that issue in the former case did not operate as res judicata between the parties in the subsequent litigation. Identically the same view was taken by the Judicial Committee in the case of *Midnapur Zamindari Co., Ltd.* v. *Naresh Chandra Roy*(2).

In my opinion therefore defendants 9—12 have no right of appeal and the appeal must accordingly be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) (1886) I. L. R. 13 Cal. 17.
(2) (1921) I. L. R. 48 Cal. 460, P. C.