

*Before Mr. Justice Markby and Mr. Justice Birch.*

SHIROKUMARI DEBI (DEFENDANT) *v.* SHITARAM HAZDRA AND OTHERS (PLAINTIFFS).\*

*Money paid in Execution of Decree, Suit for—Parties appearing on Decree not Parties to Suit—Suit for Money had and received—Suit cognizable by Small Cause Court—Act XI of 1865, s. 6.*

1874,  
January 12  
&  
March 9.

In a previous suit brought by Shirokumari Debi, the present appellant, against one Sheikh Kheja Mullick to recover possession of certain land, Shitaram Hazdra and others claiming to be the owners of the property, asked leave to come in and defend the suit, which leave was refused. The suit was dismissed, and Shirokumari appealed, and in her appeal she named Shitaram Hazdra and his cosharers as respondents, and a notice was consequently served upon them in the usual form. Shitaram and his cosharers did not appear, and the judgment of the first Court being reversed, a decree for recovery of possession was given on 2nd November 1868, in which they were included. Subsequently, Shitaram and his cosharers brought a suit to have their title to this very property declared, one of the defendants being Shirokumari herself. Shitaram and the other plaintiffs obtained a final decree declaring their title to the lands claimed by them on 31st December 1870:

Whilst this second suit was pending, Shirokumari took proceedings in execution of her former decree to recover a sum of Rs. 375 awarded her by that decree either for costs or mesne profits (it was not clear which), whereupon Shitaram and his cosharers, in order to prevent a sale of the property, deposited in Court the amount claimed under protest, and Shirokumari received that amount on account of her decree.

Shitaram and his cosharers now brought the present suit against Shirokumari to recover the amount so paid. The Court of first instance gave the plaintiffs a decree, and that decree was affirmed on appeal, Shirokumari appealed to the High Court.

Baboo *Rashbehari Ghose* for the appellant.—The money was paid in execution of the decree in the first suit. It was paid under compulsion of law, and cannot be recovered back; see *The Duke de Cadaval v. Collins* (1). This suit is unnecessary; the matter ought to have been determined by the Court which executed the decree in the first suit. [MARKBY, J.—Shitaram and his cosharers were not parties to the first suit.] In the Court of first instance

\* Special Appeal, No. 480 of 1873, against the decree of the Judge of Zilla West Burdwan, dated the 18th December 1872, affirming the decree of the Munsif of Sonamookhi, dated the 31st January 1872.

1874  
 SHIROKUMARI  
 DEBI  
 v.  
 SHITARAM  
 HAZDRA.

they applied to be made parties, and their application was refused, but in the Appellate Court they are on the record as respondents. An Appellate Court has the same powers as an original Court, Act XXIII of 1861, s. 37. The Appellate Court served them with notice, and they might have appeared and objected to being made parties, and I submit they cannot now bring a second suit. The presumption must be that the Court acted properly.

Baboo *Srinath Das* for the respondents.—This appeal must fail, as the suit is one for damages for an amount less than Rs. 500, and is cognizable by the Small Cause Court, from whose decision there is no appeal.

Baboo *Rashbehari Ghose* in reply.—The suit does not come within the purview of Act XI of 1865, s. 6. it was for money had and received—a *quasi contract*—and not for damages.

The judgment of the Court was delivered by

MARKBY, J.—I think that the decree in this case is right, and that the special appeal ought to be dismissed.

In special appeal it is contended that the money now sued for was recovered in execution of the process of the Court, and cannot be recovered back. As a general rule, no doubt this is so; and had the decree in execution of which this money was recovered remained in force, the plaintiffs might not have been able to recover in this suit. But in this case both Courts appear to me to have found that the judgment in the first suit has been set aside so far as the present plaintiffs are concerned, by the proceedings in the second suit. It seems to me, therefore, that there is no impediment to this suit.

It is also said that the question being one relating to the execution of the decree in the first suit rising between the parties to that suit, it is to be determined by the Court executing the decree in that suit, and not by a separate suit, and that this present suit is, therefore, improper. But I think the present plaintiffs have been shown not to have been parties to the first decree. Their names, it is true, appeared on the decree, but that was owing to the misrepresentation of Shirokumari that they were defendants in the Court below. The record has been searched, and it appears that Shitaram and his cosharers were never made defendants in the first suit. On the contrary, the only order was a refusal of their own application that they might become so. The erroneous insertion of their names in the proceedings of the Appellate Court was due to the misrepresentation of Shirokumari, and that error has been rectified by the subsequent suit.

The other objection that this is a suit in which no appeal lies to this Court need not be considered, inasmuch as having heard the argument, we are satisfied that the judgment of the Court below was right.

The appeal is dismissed with costs.