

of section 148 would seem to be that an order for, and the assessment of, costs should be made at the time in the presence of the parties. This being so, such costs should not be ordered and assessed by the Magistrate after a long interval and without allowing all the parties affected an opportunity to appear and show cause.

We set aside the orders of the Magistrate in both cases dated 20th January 1897.

S. C. B.

1897
 QUEEN-
 EMPRESS
 v.
 TOMJUDDI.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

UMA SUNDARI DEVI (PLAINTIFF) PETITIONER v. BINDU BASHINI
 CHOWDERANI AND ANOTHER (DEFENDANTS), OPPOSITE PARTY.^a

1897
 May 7.

Decree—Amendment or alteration of Decree—Power of the High Court to amend decree of lower Court improperly drawn—Civil Procedure Code (Act XIV of 1882), sections 206, 551—Effect of dismissal of appeal—Practice.

The order of dismissal of an appeal under section 551 of the Civil Procedure Code being a final determination of, and an adjudication on the questions raised in the appeal, is a "decree;" and in this respect there is no distinction between an appeal which is dismissed under section 551 of the Civil Procedure Code and an appeal which is dismissed under any other section of the Code after full hearing. *Royal Reddi v. Linga Reddi* (1) referred to.

When an appeal is dismissed under section 551 of the Civil Procedure Code, or in the case of a second appeal when the decree is one of dismissal, the effect practically is to make the decree which is confirmed the final decree to be executed in the suit; and the High Court making such order has power to amend the decree of the lower Court which has been in effect confirmed by it, so as to bring it in conformity with the judgment which is also confirmed.

THE petitioner brought a suit against the defendants in the

^a Civil Rule No. 7 of 1897 in Appeal from Appellate Decree No. 703 of 1895, against the decree of W. H. Lee, Esq., Officiating District Judge of Mymensingh, dated the 31st of December 1894, modifying the decree of Babu K. K. Chowdhury, Munsif of that district, dated the 19th of February 1894.

1897

UJIA
SUNDARI
DEVI
vs
BINDU
BASHINI
CHOW-
DHANI.

Munsif's Court for the recovery of possession of two plots of land *ka* and *kha*, and for the removal of a privy which stood on the latter plot. The Munsif decreed the suit as regards the plot *ka*, and dismissed it as regards *kha*. From that decree both parties appealed to the District Court with the result that the appeal of the defendants was dismissed, and that of the plaintiff decreed; but the relief to which the plaintiff was entitled was not specified in the decree, —the form of the decree being simply "appeal decreed."

The defendants preferred a second appeal to the High Court against the said decree of the District Judge, which was dismissed under section 551 of the Civil Procedure Code.

The plaintiff then sought to execute the decree as one for possession of the said plots of land and for removal of the privy by the defendants, who objected to the execution of the decree on the main ground that the decree obtained by the plaintiff was incapable of execution. Both the lower Courts disallowed the defendants' objection and ordered the execution to proceed.

The defendants appealed to the High Court against the order of the District Judge allowing execution of the decree. The High Court held that the decree, as it stood, could not be executed as regards the plot *kha*, it not being in conformity with the law which requires that decrees shall clearly specify the relief granted, and it would be impossible to gather from the decree in its present form what relief the plaintiff was entitled to; and in allowing the appeal as regards the plot *kha*, the High Court remarked that if the decree of the lower Court was not in conformity with its judgment the respondent might apply to the District Judge under section 206 of the Civil Procedure Code to get it brought into conformity. The petitioner then applied to the District Judge who had made the decree in question, to bring it into conformity with the judgment. The District Judge refused the application on the ground that he had no jurisdiction to deal with the decree as it had been the subject of an appeal to the High Court. Thereupon the petitioner applied to the High Court and obtained this rule, calling upon the opposite party to show cause why the District Judge should not be directed to alter the decree to make it clear what relief the petitioner was entitled to,

and in the alternative also prayed that a decree might be directed to be drawn up in accordance with the decision of the High Court dismissing, under section 551 of the Code, the defendants' second appeal, inserting therein all the reliefs granted to the petitioner by the judgment of the District Judge, which was thereby affirmed. In the course of the hearing of this rule the questions arose—whether an order of the High Court dismissing an appeal under section 551 of the Civil Procedure Code is a decree, and whether the High Court had power to amend the decree of the lower Court confirmed by such order.

Babu *Srinath Das*, Babu *Basanta Kumar Bose*, Babu *Kritanta Kumar Bose*, and Babu *Dwarkanath Chuckerbutty* for the petitioner.

Babu *Nilmadhub Bose*, Babu *Jogesh Chundra Roy*, and Babu *Mukunda Nath Roy* for the opposite party..

The judgment of the High Court (MACPHERSON and AMBER ALL, JJ.) was as follows:—

On an appeal from an order allowing execution of a decree, this Court held that the decree-holder was not entitled by the decree to the particular relief claimed, and remarked that if the decree was not in conformity with the judgment, the proper course for him to take was to get it brought into conformity by an application under section 206 of the Code of Civil Procedure. The plaintiff who was the decree-holder then applied to the District Judge who had made the decree in question to bring it into conformity with the judgment. The District Judge held that as the decree of the District Court had been the subject of an appeal to this Court, he had no jurisdiction to deal with it. This rule was then obtained by the petitioner to show cause why the District Judge should not be directed to alter the decree under the provisions of section 206. The Judge was not right in saying that this Court altered the decree of the lower Appellate Court, as admittedly it did not do so. What happened was that this Court dismissed the appeal of the defendant under section 551 of the Code of Civil Procedure. It is argued that a dismissal under section 551 is not a decree or an adjudication of the rights of the parties, but amounts to nothing more than a refusal to entertain the appeal, and that the lower Appellate Court is

1897

UMA
SUNDARI
DEVI
v.
BINDU
BASINI
CHOW-
DHANL.

1897
 UMA
 SUNDARI
 DEVI
 v.
 BINDU
 BASHINI
 CROW-
 DURANI,

consequently not precluded by the order of dismissal from entertaining an application for the amendment of the decree which it had passed. It is true that the Court, acting under section 551, is not in a position to deal fully with the appeal or to make any alteration in the judgment or decree appealed against. Nevertheless, it is a determination and a final determination of the appeal and it adjudicates on the questions raised by the appellant so far as it is necessary to adjudicate upon them for the purposes of the appeal, and we can see no distinction between an appeal which is dismissed under section 551 and an appeal which is dismissed under any other section of the Code after full hearing. The case of *Royal Reddi v. Linga Reddi* (1) supports this view. Rightly or wrongly it is not the practice of this Court to draw up decrees in cases dismissed under section 551, or, in the case of a second appeal, when the decree is one of dismissal, to record anything in the decree more than that the appeal is dismissed. But the effect practically is to make the decree which is confirmed, the final decree to be executed in the suit, and there can be no question that this Court has power to amend the decree which has been in effect confirmed by it so as to bring it into conformity with the judgment which is also confirmed. The rule which has been issued in this case called upon the opposite side to show cause why the District Judge should not be directed to make the amendment. But this does not appear to be strictly in conformity with the order which the Court made when the rule was granted. All the parties are, however, now before the Court, and we are in a position fully to deal with the matter on its merits. It is an admitted fact that the decree of the District Judge is not in conformity with his judgment. The decree simply directs that the appeal be decreed without specifying in any way the relief given by it. In the judgment it was distinctly held that the plaintiff had proved her title to and possession of the land (plot *kha*) on which a privy had been built, and that the defendant must remove that privy and vacate the land. We, therefore, direct that the decree of the District Court, setting aside the decree of the first Court, be amended; and that it be declared that the plaintiff's title to the land (plot *kha*) on

(1) I. L. R., 3 Mad., 1.

which a privy has been built is established, and that she is entitled to possession thereof, and that the defendant must remove the privy and vacate the land. The defendant to pay the costs of the appeal and of the suit in the lower Courts with the usual interest. A copy of this order will be sent to the lower Court to be attached to the decree.

B. D. B.

Decree of the lower Court amended.

1897

UMA
SUNDARI
DEVI
v.
BINDU
BASHINI
CHOW-
DHANI.

ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

DEBENDRA NATH MULLICK v. PULIN BEHARY MULLICK
AND ANOTHER.*

1897

June 4.

Transfer of Property Act (IV of 1882), s. 135, clause (d)—Mortgage—Actionable Claim—Transfer of Property Act, section 84—Transfer of a claim for an amount less than its value—Recovery of amount actually paid with interest and incidental expenses.

A debtor claiming the benefit of section 135 of the Transfer of Property Act (IV of 1882) is discharged of his liability if he pays or offers to pay at any time before final judgment the amount actually paid with interest and incidental expenses.

Muchiram Barik v. Ishan Chunder Chakerbutti (1) followed.

The amount of interest is governed by section 84 of the Transfer of Property Act.

THE defendant Pulin Behary Mullick executed a mortgage and further charge, dated, respectively, 23rd September and 3rd November 1886, in favour of one Sowdaminy Dossee, who assigned the same to the plaintiff on the 26th January 1891. On hearing of the assignment the mortgagor offered to pay to the assignee, under section 135 of the Transfer of Property Act, the actual price paid by him for the assignment, together with interest and incidental expenses. There was a dispute as to the amount of these items, the price of the assignment, according to the plaintiff, being Rs. 6,000, and according to the defendant only Rs. 2,750, which latter sum was proved at the hearing to be correct. This offer was refused by

* Original Civil Suit No. 319 of 1891.

(1) I. L. R., 21 Calc., 568.