

## APPELLATE CIVIL.

*Before Mr. Justice Stephen and Mr. Justice Holmwood.*

1907  
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 July 22.

AGILUL HOSAIN

v.

DINO NATH DUTT.\*

*Remand—Possession, suit for—Civil Procedure Code (Act XIV of 1882) ss. 561, 566—Lower Appellate Court, power of, on remand.*

The plaintiff's suit for possession of certain lands after determination of the boundary between two estates was partially decreed by the Munsif. The defendant appealed, but the plaintiff did not appeal nor file any objection under ~~sec. 561~~ of the Civil Procedure Code. The Subordinate Judge, on appeal, modified the decree in favour of the defendant. Plaintiff then appealed to the High Court, and the case was remanded for trial on a fresh investigation. The Subordinate Judge after a fresh enquiry passed a decree in favour of the plaintiff giving him more lands than what was given by the Court of first instance. On second appeal by the defendant :—

*Held*, that under the circumstances the Subordinate Judge had no power to award to the plaintiff more than what he recovered in the Munsif's Court.

*Bikramjit Singh v. Husaini Begam*(1) distinguished.

SECOND APPEAL by the defendant, Syed Agilul Hosain.

The facts of the case are briefly these. The plaintiff sued the defendants who are the proprietors of an adjoining estate for recovery of possession of certain lands after determination of the boundary between two estates. The Munsif partially decreed the suit. The defendant appealed, but the plaintiff neither appealed nor filed any objection against the decree of the Munsif.

The decree of the Munsif was modified by the lower Appellate Court, and thereupon the plaintiff appealed to the High Court which remanded the case and directed a fresh investigation to be made by the Civil Court Ameen by comparison of the maps of both the parties. After a fresh enquiry the Subordinate

\* Appeal from Appellate Decree, No. 2481 of 1905, against the decree of Aditya Chandra Chakravarti, Subordinate Judge of Sylhet, dated Sept. 1, 1905, modifying the decree of Jadab Chandra Bhattacharjee, Munsif of Habiganj, dated Dec. 19, 1899.

(1) (1881) I. L. R. 3 All. 643.

Judge passed a decree in favour of the plaintiff giving him more lands than he recovered in the first Court. Against this decree the defendant appealed to the High Court.

*Babu Sarat Chandra Roy Choudhury* (for *Moulvi Shamsul Huda*), for the appellant, submitted that the Subordinate Judge had no power to give a decree for more than what was given to the plaintiff by the Munsif when the plaintiff neither appealed nor submitted any objection under section 561 of the Civil Procedure Code.

*Babu Akhil Bandhu Guha* (for *Babu Gobinda Chandra Das*), for the respondent, submitted that it was not shown that anything more had been given, and even if anything more had been given that did not vitiate the decree, as the High Court by its order of remand directed a fresh enquiry to be made for the decision of the case, and the Subordinate Judge was, therefore, not restricted from giving more on remand, if it were required in the ends of justice; and s. 561 of the Civil Procedure Code had no application to the present case: see *Bikramjit Singh v. Husaini Begam*(1).

STEPHEN AND HOLMWOOD JJ. This is an ejectment suit in which the first Court decreed the suit in favour of the plaintiff. One of the defendants then appealed to the Subordinate Judge, who modified the decree of the first Court. The plaintiff then appealed to the High Court which ordered that the case should be remanded to the Court of the Subordinate Judge, and that an inquiry should be made by the Court Ameen to supplement the information which he had already derived from an inquiry based on the map produced by the plaintiff, by comparing the plaintiff's map with that of the defendant. This was accordingly done, and a decree has now been passed by the Subordinate Judge in favour of the plaintiff.

It is in the first place urged before us in second appeal from this decision, that the Judge has not come to a proper finding as to the irregularities alleged to exist in the Ameen's report. This

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is entirely a question of fact. The Judge had before him the final report of the Ameen and considered that it might safely be relied on. On this no question of law arises that can be taken in second appeal.

In the second place, it is argued that the result of the decree is to give to the plaintiff more than he recovered in the first Court. Whether this is so or not we cannot tell on the materials before us. It has been argued by the respondent that this is immaterial, because on the proceedings on remand the plaintiff may recover more than in fact he recovered from the first Court. Consequently, it follows that the amount that the plaintiff can recover in this suit is not restricted to the amount which he recovered in the first Court, and he has quoted the case of *Bikramajit Singh v. Husaini Begam*(1) in favour of his contention. The two cases are distinguishable. In that case the plaintiff appealed from the decision in the original suit; in this case he accepted the judgment of the Munsif without appealing from it in any way. We, accordingly, hold that the Subordinate Judge has no power to award to him more than he recovered in the Munsif's Court. The Subordinate Judge must consider whether his decree has this effect, and if it has, it must be amended.

The appeal is so far allowed, and the case is remanded to the Subordinate Judge to be disposed of in accordance with the directions given above.

As the plaintiff has succeeded in the main point, we allow him the costs of the investigation.

We make no order as to the costs of the appeal.

*Appeal allowed; case remanded.*

(1) (1881) I. L. R. 8 All. 643.