
(1878) 01 AHC CK 0013

Allahabad High Court

Case No: None

Durga Prasad

APPELLANT

Vs

Khairati and Others

RESPONDENT

Date of Decision: Jan. 2, 1878

Citation: (1875) ILR (All) 545

Hon'ble Judges: Pearson, J; Oldfield, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Oldfield, J.

It appears that the defendants, respondents, executed a deed of mortgage in favour of plaintiff on the 9th June 1873, for a consideration of Rs. 1,000, which was payable in one year, and the purport of the deed is to give possession to the plaintiff. On the same date another deed was executed by which the defendants agreed to take a lease of the property on payment of rent, for the due payment of which the property was hypothecated in the deed. The rent not having been paid, the plaintiff sues to recover arrears of rent, principal and interest, Rs. 164-7-1, by enforcing the charge on the property, together with interest, subsequent to institution of the suit, and to obtain possession of the mortgaged property. The defendants appeared in the Court of First Instance by their pleader and asked for an adjournment to enable them to put in their defence; this was refused, and they failed to put in any reply to the claim, and the Court of First Instance decreed the claim for possession, and the principal amount of rent, and dismissed the claim for interest. The plaintiff then preferred an appeal to the Judge on the matter of interest. The defendants did not defend the appeal notwithstanding that the Judge summoned them to appear in person. The Judge has held that, u/s 37* of Act XXIII of 1861, he is at liberty to open the whole case on the appeal preferred by the plaintiff, and as he considered the Court of First Instance was not justified in refusing to allow time to the defendants to prepare their answer to the suit, and also that, looking into the deeds, there is

reason to think that the claim to be put in possession of the mortgaged property is not maintainable, and that the second deed is invalid for want of registration, he has reversed the decree of the first Court and remanded the suit for re-trial on the merits, u/s 351 of Act VIII of 1859. This decision is open to the objection taken on special appeal.

2. Section 37* of Act XXIII of 1861 gives the Appellate Court the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits. But the Judge's order cannot be supported under this section. He has held that there has been an improper consideration and admission of evidence affecting the merits of the claim, although these matters were never put in issue in the appeal before him. The Judge should have confined himself to deciding the matters put in issue by the parties. Section 337+ of Act VIII of 1859 shows the circumstances under which a Court may reverse or modify a decree in favour of plaintiffs or defendants who have not appealed, but this section does not apply to the case before us. The defendants might have appealed or preferred objections u/s 348, and in that case the Judge would have had to decide the questions raised, but they never appeared to defend the appeal, and, we may add, have not done so in this Court. The only question before the Judge was that raised by the appellant, the plaintiff, and he should have confined his decision to that question.

-----Foot Note-----

*[Appellate Court to have same powers as Courts of original jurisdiction.]

Section 97: Unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits.]

+ [One of several plaintiffs or defendants may appeal and obtain a reversal of the whole decree if it proceed on a ground common to all.]

Section 337: If there be two or more plaintiffs or two or more defendants in a suit, and the decision of the lower Court proceed on any ground common to all, any one of the plaintiffs or defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree in favour of all the plaintiff or defendants.]