

Mushtaq Husaln Vs. Amba Prasad

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Court : Allahabad

Decided On : Nov-27-1919

Reported in : (1920)ILR42All200

Judge : Tudball and ;Ryves, JJ.

Appellant : Mushtaq Husain

Respondent : Amba Prasad

Judgement :

Tudball and Ryves, JJ.

1. A preliminary objection is raised in this appeal that no second appeal lies. The facts are briefly as follows: The plaintiff respondent and the defendant appellant with effect from the 1st of July, 1914, that is, the beginning of the year 1322 Fasli, were owners of two separate mahals in a village after a perfect partition had been effected. In the year 1322 Fasls the revenue of both these mahals fell into arrears. The plaintiff was forced to pay the revenue not only of his own mahal but also of the defendant's mahal to the extent of Rs. 127. He brought the present suit to recover this sum plus interest from the defendant in the court of the Munsif. The Munsif dismissed the suit on the ground that no suit lay to recover the , amount. The plaintiff appealed. The lower appellate court came to the opposite conclusion and remanded the suit for decision on the merits to the first court. The defendant has come up here on appeal from this order of remand. Under Order XLIII, Rule 1,

Clause (u), an order under Rule 23 of order. XLI remanding a case is appealable where an appeal 'would lie from the decree of the appellate court. It is contended and with force, that in the present suit no second appeal, would have lain from the decision of the appellate court because the suit is one of a small cause nature, the sum to be recovered being below Rs. 500. On behalf of the plaintiff it is urged that Article 39 or 40 of Schedule II to the Small Cause Court Act would cover the suit, But with this we cannot possibly agree. The plaintiff did not pay the money in a representative capacity on behalf of the defendant, therefore, Article 39 cannot apply. Article 40 is a suit for profits and does not apply. Article 41 refers to a suit by a sharer in joint property which is not the case here. It is clear that if any suit can lie it does not fall under any of these articles and is really a suit of a Small Cause Court nature being for a sum below Rs. 500. Therefore no second appeal would have lain from a decree of the appellate court and no appeal therefore lies from the order of remand. There are decisions on the point in the case of Nath Prasad v. Baij Nath (1880) I.L.R. 3 All. 66 and the case of Qutub Husain v. Abul Hasan (1881) I.L.R. 4 All. 134. The decision in the case of Tulsa Kunwar v. Jageshar Prasad (1006) I.L.R. 28 All. 563 contains remarks which apply to the facts of this case. We have been asked to treat this case as a revision but in view of the fact that the money was admittedly paid and has not been refunded, we decline to do so. We dismiss the appeal with costs.