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Court : Allahabad

Decided On : Sep-07-1936

Reported in : AIR1936All868; 166Ind.Cas.229

Appellant : Mt. Gulab Devi

Respondent : Kunwar Abdul Ghafur Khan and ors.

Judgement :

Bennet, J.

1. This is an execution second appeal by Mt. Gulab Devi, judgment-debtor, whose objection has been dismissed by the two Courts below. The opposite party are the decree-holders. The opposite party had obtained a decree in the revenue Court on 9th November 1921, against Mt. Gulab Devi. Various proceedings in execution followed and the question before the Court below in first appeal was whether a certain application for execution, dated 31st July 1933, was or was not time barred. The decision on this point involved the decision as to whether a certain application for restoration of 4th March 1927 was a step in aid of execution and as to whether a certain application for execution of 28th January 1927 was a valid application in execution although it was not signed by all the heirs of the original decree-holder. The Court below has come to a decision contrary to Mt. Gulab Devi on these points and therefore she has brought a second appeal. A preliminary objection is taken that no second appeal lies. The original decree was under the

Agra Tenancy Act, and therefore that Act governs the procedure. Under Section 249 of that Act no appeal shall lie from any order passed in appeal, and clearly the order of the lower Court was one passed in appeal. For the appellant it was contended that the order of the lower Court would amount to a decree. It is true that in the Civil Procedure Code, Section 2(2), 'decree' is defined to include the determination of any question within Section 47, Civil P.C. But the section proceeds:

But it shall not include (a) any adjudication from which an appeal lies as an appeal from an order.

2. Now Section 248(3), Tenancy Act, states that an appeal shall lie from an order mentioned in Section 47, Civil P.C. Accordingly therefore the appeal lay to the lower appellate Court as an appeal from an order and not as an appeal from a decree. Therefore under Section 249 no second appeal can lie from the order of the Court below. This view has been held twice by learned Judges of this Court in *Nand Kishore v. L. Makhan Lal* 1934 All 192 and *Mubarik Hasan v. Ishri Prasad* 1936 ALJ 678. I hold therefore that no second appeal lies. Some argument was made that I should examine this order of the Court below in revision. One distinction between a second appeal and a revision is that an error of law can form a ground for a second appeal, but in general an error of law cannot form a ground for a revision. Section 115, Civil P. O., lays down that a revision lies where the Court below has exercised jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. There was nothing illegal or materially irregular done or alleged to have been done in the exercise of jurisdiction by the Court below. All that is alleged is that it made an error of law and also an error of fact in its decision; that is, that it decided that certain applications saved limitation because they were validly made, and it is contended that they were not validly made. Jurisdiction to decide the appeal which the lower Court had before it included the jurisdiction to decide wrongly as well as jurisdiction to decide rightly. The fact that the Court below may have decided wrongly is not any ground for interference in revision and accordingly there is no ground in the grounds of second appeal which would afford a ground for interference in revision. I dismiss

this second appeal with costs.

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