APPELLATE CIVIL.

Before Page and Graham JJ.

SHEIKH SALIM

v.

HAJIRA BIBI.*

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July 15.

Remand—Order of remand against preliminary decree, whether maintainable—Code of Civil Procedure (Act V of 1908), S. 105 (2).

The trial Court dismissed a suit on a preliminary issue. The plaintiffs appealed to the lower Appellate Court and obtained an order of remand for the re-hearing of the suit on the merits. The suit was contested by the parties at the re-hearing, and was decreed in favour of the plaintiffs The defendant subsequently appealed to the High Court against the order of remand within the time limited for appealing therefrom. Upon a preliminary objection being taken by the plaintiffs respondents :—

Held (*i*) that the appeal was not maintainable inasmuch as the defendant appellant did not raise any objection at the re-hearing of the suit on the merits and no appeal was preferred from the final decree to the lower Appellate Court.

Madhu Sudan Sen v. *Kamini Kanta Sen* (1) and other cases followed.

(*ii*) that the *ratio decidendi* of the above cases has not been affected by s. 105 (2) of the Code of Civil Procedure of 1908.

Janaki Nath Ray v. *Promotha Nath Roy* (2) followed.

MISCELLANEOUS APPEAL by Sheikh Salim, the defendant.

This miscellaneous appeal arose out of an order of remand for the re-hearing of a suit passed by the learned Subordinate Judge of Dacca against the preliminary decree of the learned Munsif of Dacca.

Babu Bhupendra Kishore Bose, for the respondents, raised a preliminary objection that, in the

*Appeal from Appellate order, No. 363 of 1926, against the order of Nata Behari Ghosh, officiating Subordinate Judge of Dacca, dated May 13, 1926, reversing the order of Probodh Chandra Roy, Munsif of that place, dated Nov. 6, 1925.

(1) (1905) I. L. R. 32 Calc. 1023. (2) (1911) 15 C. W. N. 830.

circumstances of the case, the appeal was not maintainable. The appellant could not appeal against the order of remand as he did not raise any objection at the re-hearing of the suit after remand. Besides, after having fought out the suit on the merits he did not prefer an appeal before the lower Appellate Court: *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1), and others cases.

Babu Prakash Chandra Pakrasi, for the appellant, contended that the previous cases decided by this Court were distinguishable. By s. 105 (*2*) of the Code of Civil Procedure of 1908, it has been provided that the only way in which to contest an order of remand is by a direct appeal against the order.

PAGE J. This is an appeal from an order of the 13th May 1926 passed by the learned officiating Subordinate Judge of Dacca, by which he remanded the case for re-hearing before the learned Munsif of Dacca. The suit was brought to recover damages upon the footing that the defendant had dispossessed the plaintiffs from the land of which the plaintiffs were entitled to possession. The trial Court held that the suit was not maintainable without the establishment of the plaintiffs' title to the property, and upon that preliminary issue passed a decree dismissing the suit on the 6th of November 1925. The plaintiffs appealed, and by the order under appeal of the 13th May 1926 the learned Subordinate Judge reversed the decree of the trial Court, and remitted the case to the trial Court to be re-heard upon the merits. The case having been returned to the trial Court was re-heard on the 7th August 1926. It appears that the defendant applied for an adjournment of the case, and that at the retrial the suit was contested by the parties on the merits.

(1) (1905) I. L. R. 32 Calc. 1023.

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On the 13th of August 1926 the learned Munsif passed a decree in favour of the plaintiffs. Thereafter, on the 24th August 1926, the defendant preferred an appeal to this Court from the order of remand which had been passed on the 13th May 1926.

A preliminary objection to the hearing of the appeal has been raised by the respondents which is to the following effect. The learned vakil for the respondents contends that, although the appeal to this Court which has been preferred from the order of remand is within the time limited for appealing from such an order, it is not open to the defendant in the circumstances that I have narrated to prefer an appeal against the order of remand. In my opinion the preliminary objection must prevail, for in this Court the point is concluded by authority against the appellant. See *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1), *Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur* (2), *Janaki Nath Ray* v. *Promotha Nath Roy* (3), *Mackenzie* v. *Narsingh Sahai* (4), *Ram Nath Singh* v. *Basanta Narain Singh* (5), *è contra*, *Uman Kunwari* v. *Jarbandhan* (6) *Lakshmi* v. *Maru Devi* (7).

"In all these cases except *Baikuntha Nath Dey* v. *Nawab Salimulla* "*Bahadur* (2), the appeal against the preliminary decree or the inter- "locutory order was presented after the final decree had been passed, and "the fact that a final decree had been passed having been brought to the "notice of the Appellate Court at the hearing of the appeal from the "preliminary decree or interlocutory order, it was held that, the final "decree having been passed, the appeal against the preliminary decree or "interlocutory order could not be maintained".

(1) (1905) I. L. R. 32 Calc. 1023.
(2) (1907) 12 C. W. N. 590.
(3) (1911) 15 C. W. N. 830.
(4) (1909) I. L. R. 36 Calc. 762.
(5) (1913) 17 C. W. N. 868.
(6) (1908) I. L. R 30 All. 479.
(7) (1911) I. L. R. 37 Mad. 29.

Per Chatterjea and Walmsley JJ. in *Ramnath Singh v. Basanta Narain Singh* (1).

It was contended by the learned vakil for the appellant that the earlier cases were distinguishable because under the previous Code it was permissible to challenge the order of remand on appeal from the decree passed at the retrial, whereas under section 105, sub-section (*2*) of the Code of 1908 the only mode in which it is permissible to contest an order of remand is by a direct appeal against the order. It has been held, however, in *Janaki Nath Ray's case* (2) that the *ratio decidendi* of the earlier cases was not affected by the Code of 1908. I agree with the view which was expressed by Chitty and N. Chatterjea JJ. in that case. Now, in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (3) Maclean C. J. observed that

"If a party desire to avail himself of the privilege conferred by "section 588 in relation to an order of remand he ought to do so before "the final disposal of the suit. He cannot be permitted to wait until "after the final disposal of the suit and then to appeal against the interlo- "cutory order without appealing from the decree in the suit";

à fortiori he ought to prosecute an appeal against the order of remand if he knows that it is the only way in which he can contest the order of remand, and that it will not be open to him thereafter to challenge its validity at the retrial. In my opinion, the real ground upon which the view taken by the Calcutta High Court is founded is that expressed by Stephen J. in *Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur* (4).

"The basis of the decision in *Madhu Sudan Sen* v. *Kamini Kanta* "*Sen* (3) may be regarded as being the consent of the appellant to the "proceedings subsequent to remand, implied by his not appealing against "the order of remand during those proceedings."

(1) (1913) 17 C. W. N. 868, 869.
(2) (1911) 15 C. W. N. 830.
(3) (1905) I. L. R. 32 Calc. 1023, 1029.
(4) (1907) 12 C. W. N. 590, 593.

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It was open to the defendant in the present case to appeal against the order of remand, or to accept the order of remand and to take his chance of proving successful at the retrial as he had been when the case had for the first time been heard. The defendant did not protest against the validity of the new trial, nor did he refuse to take any part in that proceeding. On the contrary, it appears that he contested the suit at the rehearing on the merits, that in the event a decree was passed against him, and that he has not preferred an appeal therefrom. I do not think that it was open to him, after having taken his chance of succeeding upon the merits at the retrial and when the day had gone against him, to give the go-by to the proceedings which terminated in a decree against him at the retrial, and thereafter to prefer an appeal against the interlocutory order of remand which was the foundation of the jurisdiction of the learned Munsif to rehear the case. A litigant finding himself in a situation such as that in which the appellant was placed must elect whether he will accept or repudiate the validity of the remand order. In my opinion, in the circumstances obtaining in the present case the appellant must be treated as having accepted the order of remand, and was not at liberty to prefer the present appeal.

The result is that the appeal is dismissed with costs.

GRAHAM J. I agree. The question whether the appeal is competent or not appears *primâ facie* to be concluded by the decision of this Court in the case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1). That case was decided in the year 1905. But the learned vakil for the appellant has argued that section 105 sub-section (*2*) of the Code of Civil Procedure, which introduced a change in this section as it formerly

(1) (1905) I. L. R. 32 Calc. 1023.

stood (it was previously section 591), has altered the position, and that, though the decision referred to above was good law under the Code as it then stood, it no longer represents sound law under the existing Code. The point emphasised is that under the former Code the order of remand could be challenged either by way of appeal against the remand, or by appealing against the decree, whereas now under sub-section (*2*) of this section, if the order of remand is not challenged in an appeal therefrom, the appellant is precluded from subsequently disputing its correctness. It is further contended that the appellant has in the circumstances which obtained in this case a dual and not an alternative remedy, and that it is open to him to exercise both these rights. In my opinion, this contention is not well-founded and cannot be allowed to prevail. It is true that a change has been made in section 105 of the Code of Civil Procedure, but I do not think that the alteration has materially affected the merits of this question. The appellant having accepted the order of remand without exercising the right which he had of appealing against the same, and having submitted to the decision of the Court cannot, it seems to me, be allowed to turn round and say that despite his failure in the suit he is still entitled to challenge the order of remand. As regards sub-section (*2*) of section 105, which has been relied upon by the learned vakil for the appellant, that sub-section so far from helping the appellant seems rather to furnish an additional argument against him, since if it is not open to him under the present law to challenge the order of remand in an appeal against the decree unless he had appealed therefrom, it was all the more incumbent upon him to lose no time in challenging that order by appealing against it instead of remaining silent

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and allowing the suit to be tried out. Finally it may be observed that so far as this Court is concerned the matter is concluded by authority more recent than the year 1908, namely, the case of *Janaki Nath Ray* v. *Promotha Nath Roy* (1) and others, decided in 1911.

GRAHAM J.

For these reasons I agree with my learned brother that the preliminary objection succeeds and the appeal must be dismissed.

B. M. S. *Appeal dismissed.*

(1) (1911) 15 C. W. N. 830

APPELLATE CIVIL.

Before Page and Graham JJ.

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July 22.

MAHESH CHANDRA SADHU

v.

JOGENDRA LAL SARKAR.*

Limitation—Civil Procedure Code (Act V of 1908), O. XXI, r. 29, construction of.

On March 22, 1915 the appellants obtained a money decree against the respondents from the Subordinate Judge of Asansol, and on January 14, 1918, the decree was affirmed on appeal to the High Court. The appellants then executed the decree and obtained part satisfaction in 1919 and 1920. On April 14, 1920 on the application of one of the respondents to stay the further execution of the decree on the ground that he had instituted a suit against the appellants, the Subordinate Judge stayed the execution under O. XXI, r. 29. On June 16, 1920 the suit was decided, and an appeal preferred therefrom was decided on November 24, 1924. On April 18, 1925 the appellants again applied to the Subordinate Judge of Asansole for execution of the decree to the extent to which it had not already been satisfied. On August 29, 1925 the Subordinate Judge dismissed the application for execution, holding that the execution was not stayed during the pendency of the appeal of the

* Appeal from Original Order, No. 466 of 1925, against the order of J. K. Mukherjee, Subordinate Judge of Asansole, dated Aug. 29, 1925.