

1878

AFZAL-UN-
NISSA
v.
TEJ BAN.

Mr. Howard and Shah Asad Ali, for the respondent.

The judgment of the Court was delivered by

TURNER, O. C. J.—The document could not be received in evidence on payment of any penalty (1). It should not then have been received in evidence, but it having been admitted by the Court of first instance, the lower appellate Court was not justified in reversing the decree of the Court of first instance and dismissing the suit, for the irregularity did not affect the merits. The decree of the lower appellate Court cannot be supported on the ground on which it proceeds. The appeal to the Judge must then be tried on the merits, and if, as the appellant alleges, and as she proved to the satisfaction of the Court of first instance, the note was given to induce the appellant to consent to the mutation of names, the consideration is sufficient, and the appellant will be entitled to a decree. The costs of this appeal will abide and follow the result.

Cause remanded.

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June 14.

APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.
TETLEY (JUDGMENT-DEBTOR) v. JAI SHANKAR AND ANOTHER (DECREE-HOLDERS).*

Interlocutory Order—Appeal to Her Majesty in Council—Act VI of 1874—Act X of 1877 (Civil Procedure Code)—Letters Patent, cl. 31.

Held that the High Court has not any power, under Act X of 1877, or cl. 31 of the Letters Patent, to grant leave to appeal to Her Majesty in Council from an order of the Court remanding a suit for retrial.

The provisions of cl. 31 of the Letters Patent are repealed by the Code and Act VI of 1874 which preceded it.

THIS was an application to a Division Court of the High Court for leave to appeal to Her Majesty in Council against an order of such Division Court dated the 23rd January, 1878. This was an order, under s. 562 of Act X of 1877, remanding a case to the Court of first instance for a new trial. The order was made under these circumstances: The Court of first instance dismissed an

* Application No. 6 of 1878, for leave to appeal to Her Majesty in Council.

(1) See s. 28 of Act XVIII of 1869 and *Nandan Misser v. Chatterbati*, 13 B. L. R. Ap 33.

application for the execution of a decree made under the provisions of s. 53 of Act XX of 1866, on the preliminary point of limitation. On an appeal being preferred to the High Court by the decree-holders, the Division Court referred the point of limitation to the Full Bench. The Full Bench held that the application was not barred by limitation (1), and the case was accordingly remanded by the Division Court to the Court of first instance for disposal on its merits.

Mr. *Colvin*, for the applicant.

Munshi *Sukh Ram*, for the opposite parties.

The judgment of the Court was delivered by

TURNER, O. C. J.—It is clear that, under the provisions of the Procedure Code, X of 1877, we have no power to give leave to appeal from the order of this Court directing a hearing on the merits, that order not being a decree but an interlocutory order; but it is argued that we have discretion to allow an appeal under the 31st clause of the Letters Patent. The case appears to be one in which, if we possessed the power, we should be inclined to exercise it, but we are of opinion that the provisions of that clause were by implication repealed by the Code and Act VI of 1874, which preceded the Code. The petitioner must apply for special leave or wait until this Court pronounces final judgment if the proceedings are brought before it. Each party to bear his own costs of this application.

Application refused.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

MANIK SINGH (DEFENDANT) v. PARAS RAM (PLAINTIFF). *

Sale in Execution of Decree—Surplus Sale-proceeds—Lien—Act VIII of 1859 (Civil Procedure Code), s. 271.

Certain immoveable property was attached on the 13th April, 1876, in execution of two decrees, *viz.*, *M's*, dated the 15th January, 1876, which declared a lien created by a bond dated the 17th July, 1873, and *P's*, dated the 21st January, 1876,

* Second Appeal, No. 376 of 1878, from a decree of Maulvi Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 5th February, 1878, modifying a decree of Munshi Kishan Dyal, Munsif of Hathras, dated the 6th September, 1877.

(1) See *ante*, p. 538.

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TETLEY
v.
JAI SHAN-
KAR.

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June 3.