

that a prior mortgagee has caused the zamindari property to be sold by auction. That such a sale has taken place is apparently due to the fault of the appellant himself. If he was a party to the suit in which the prior mortgagee obtained his decree, he ought to have redeemed the prior mortgage so as to make the mortgaged property available for the realization of the amount of his own mortgage. If, on the other hand, he was not made a party to the prior mortgagee's suit, it is still open to him to redeem that mortgage, and having done so, he would be entitled to bring the zamindari property to sale for the realization of his own money. In any case, as the appellant has not caused the whole of the property mortgaged to him to be sold, he cannot apply for a decree under section 90 of the Transfer of Property Act. This appeal must fail and is dismissed with costs.

1900

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 BADRI  
 DAS  
 v.  
 INAYAT  
 KHAN.

*Appeal dismissed.*

*Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Blair.*

HAFIZ ABDUL RAHIM KHAN (APPLICANT) v. RAJA HARI RAJ SINGH  
 (OPPOSITE PARTY).\*

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 1900  
 June 14.

*Scheduled Districts Act (No. XIV of 1874), section 6—Rule 17 of the Kumaon Rules, 1894—Code of Civil Procedure, sections 562, 564—Right of Appeal against order under section 562—Order of remand where decision of first Court was not confined to preliminary point.*

Where the Deputy Commissioner of Naini Tal decided that a suit was barred by limitation, but at the same time also came to a definite decision on each of the other issues, and the Commissioner in appeal, setting aside the finding as to limitation, remanded the case under section 562 of the Code of Civil Procedure.

*Held* that under Government Notification No.  $\frac{925}{VII-569B}$ , dated 27th June, 1894, Rule 17, an appeal lies from such an order of remand. *Sayid Muzhar Hossein v. Mussamat Bodha Bibi* (1) referred to.

*Held* further that the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point, it was not, under sections 562, 564, of the Code of Civil Procedure, open to the Commissioner to make an order under section 562.

THE facts appear sufficiently from the judgment of the Court.

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\* Miscellaneous Reference No. 302 of 1899.

(1) (1894) I. L. R., 17 All., 112.

1900

HAFIZ  
ABDUL  
RAHIM KHAN  
v.  
RAJA  
HARI RAJ  
SINGH.

Pandit *Sundar Lal*, for the applicant.

The Government Advocate (Mr. *E. Chamier*) *as amicus curiæ*.

KNOX, ACTING C. J., and BLAIR, J.—The Government on the application of Hafiz Abdul Rahim Khan, a party to the suit—*Raja Hari Raj Singh v. Hafiz Abdul Rahim Khan*—has referred to this Court for report and opinion an order passed by the Commissioner of Kumaun on the 25th October, 1897, on the ground that it seems open to objection. The objection is thus stated:—"The judgment of the Commissioner, dated the 25th October, 1897, after deciding various points in the plaintiff's favour, remanded the case under section 562 of the Code of Civil Procedure." "The Government is advised that this is a most material irregularity." Upon the reference coming up for hearing it was brought to our notice that Raja Hari Raj Singh, the opposite party, had long been dead and that no one had been substituted on the record of the case. Under these circumstances we directed the Registrar to ascertain from the Government whether they still require any report and opinion. As the Government still requires a report and opinion, we have no alternative but to furnish it: no doubt the legal advisers of the Government will certify to the Government how far our opinion and report under these circumstances can form the basis of any effective order. With that we are not concerned and we express no opinion. We have heard the counsel for Hafiz Abdul Rahim Khan; we have heard the learned Government Advocate who has kindly appeared *as amicus curiæ* in the case. The suit between the parties is described in the Court of first instance as a suit for cancellation of so much of a sale-deed as injuriously affected the plaintiff and for possession over one acre of land. In the Deputy Commissioner's judgment the pleadings are set out, and five issues are framed. One of those issues, namely, the third, raises the issue of law as to whether the suit was or was not time-barred. The decision of the Deputy Commissioner was to the effect that the suit was time-barred. The remaining issues in this case were, however, considered, and a definite decision pronounced upon each one of them. In appeal the learned Commissioner dealt with the case in what was certainly a rather extraordinary way. He called for further information, and

himself inspected the area in dispute. After this he remanded the case under section 562 of the Code of Civil Procedure, evidently setting aside the judgment of the lower Court upon the preliminary point as to whether the suit was or was not time-barred. It is from this order under section 562 of the Code of Civil Procedure that the present reference is made. Two questions arise for decision. The first as to whether it was the intention of the Government in the rules made by them in exercise of the provisions of section 6, Scheduled Districts Act, that an appeal should lie from an order of this description. Government Notification No. <sup>628</sup>VII-569B, dated 27th June, 1894, Rule 17, in its language is wide enough to include such an order as this. Any final decree which may seem open to objection may be referred, and we have the authority of the Privy Council in the case of *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi and another* (1) for holding that a remand order comprising the decision of a Court upon a cardinal issue of the suit, that issue being one which goes to the foundation of the case and which can never, while the decision stands, be disputed again, is a final decree. The next question is whether the decision of the Deputy Commissioner was one only upon a preliminary point, or whether it decided the other matters in issue. After reading the decision we have no doubt left. The suit between the parties was not confined by the Deputy Commissioner to the preliminary point of law, judgment was given on all the issues, and under these circumstances, looking to the language of section 562 and the imperative language of section 564, it was not open to the Commissioner to make the order he did under section 562 of the Code of Civil Procedure. Our opinion is that that order was a bad one, and under ordinary circumstances should have been set aside. If we had been dealing with the case as an appeal before us, it would have been so set aside, and the case would have been returned for disposal by the Court corresponding to that of the Commissioner for disposal according to law.

*Appeal decreed.*

(1) (1894) I. L. R., 17 All., 112.

1900

HAFIZ  
ABDUL  
RAHIM KHAN  
v.  
RAJA  
HARI RAJ  
SINGH.