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remaining villages." It may be added that he made no attempt to enhance the rent of the villages which were left to him, and that they constitute an ample security for the whole amount of his claim.

In the judgment of the Judicial Commissioner, it is inadvertently stated that the villages now in suit are six in number; but this is erroneous. As already pointed out, at the Settlements of 1858 and 1864, Indarjit Singh was confirmed in the proprietorship of five only, and the decree must be varied accordingly. Their Lordships will therefore humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh, so far as it relates to the five villages of Hargaon, Ahed, Macharia, Bahadurpur, and Poorab Pershad Badal, should be confirmed, and this appeal dismissed. The appellant must pay the respondent's costs of this appeal.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent—Messrs. *Barrow, Rogers, & Nevill.*

J. V. W.

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May 15.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji, and Mr. Justice Burkitt.

JAMNA BIBI (APPLICANT) v. SHEIKH JHAU AND ANOTHER
(OPPOSITE PARTIES).*

Civil Procedure Code, sections 2, 372, 588(21)—Application to be brought on to record of appeal as assignee of deceased appellant—Application rejected—No appeal from order rejecting application.

Held that no appeal would lie from an order rejecting the application of a person who claimed to be brought on to the record of an appeal as being the assignee of the deceased sole appellant. Lalit Mohan Roy v. Shebock Chand Chowdhry (1) followed. Moti Ram v. Kundan Lal (2) overruled. Indo Mati v. Gaya Prasad (3) explained and distinguished.

THE facts out of which this appeal arose were as follows:—

One Musammat Bholi Bibi brought a suit against Sheikh Jhau and Baijnath Prasad for a declaration that certain property

* First Appeal No. 124 from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 17th August, 1901.

(1) (1900) 4 C. W. N., 403. (2) (1900) I. L. R., 22 All., 380.
(3) (1896) I. L. R., 19 All., 142.

was not liable to be sold in execution of a decree obtained by Baijnath Prasad against Sheikh Jhau. The Court of first instance dismissed the suit. Musammat Bholi Bibi appealed. Whilst the appeal was pending she, by means of a parole gift, assigned all her rights in the subject-matter of the suit to one Musammat Jamna Bibi. After this alleged assignment Musammat Bholi Bibi died. Musammat Jamna Bibi thereupon applied that her name should be brought upon the record in place of that of Musammat Bholi Bibi as the latter's legal representative by virtue of the oral gift which she alleged Musammat Bholi Bibi had made in her favour. This application was refused by the District Judge, and against such order of refusal Musammat Jamna Bibi appealed to the High Court.

At the first hearing of this appeal before a Division Bench (Banerji and Aikman, JJ.) a preliminary objection was taken by the vakil for the respondents that no appeal lay. This objection was supported by the ruling of the Calcutta High Court in *Lalit Mohan Roy v. Shebock Chand Chowdhry* (1). The appellant relied upon the ruling in *Moti Ram v. Kundan Lal* (2). This latter ruling supported the appellant's position, but the Division Bench entertained doubts as to its correctness, and accordingly directed that the appeal should be laid before the Chief Justice in order that a larger Bench might be appointed to decide it. In accordance with this recommendation a Bench consisting of the Chief Justice and Banerji and Burkitt, JJ. was appointed, and the appeal was reheard.

On this hearing Munshi *Gobind Prasad*, for the respondents, raised a preliminary objection that no appeal lay, the order in question being neither a decree within the meaning of section 2 of the Code of Civil Procedure nor an order appealable under section 538 of the Code. Only orders under section 372 of the Code disallowing objection are appealable, and not orders rejecting applications under that section. The order in question is not an adjudication which, so far as the Court expressing it is concerned, decides the suit or appeal; hence no appeal lies. Reference was made to the case of *Lalit Mohan Roy v. Shebock Chand Chowdhry* (1).

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Maulvi *Muhammad Ishaq*, for the appellant, contended that the application made by Musammat Jamna Bibi to be brought upon the record in place of Musammat Bholi Bibi on the ground that she was the assignee of the latter was an application under section 365 of the Code of Civil Procedure, and the order of the Court disallowing such application was an order under section 367, from which an appeal would lie by virtue of section 588(18). The term "legal representative" was wide enough to include an assignee; and all orders deciding questions legitimately arising under section 367 are appealable under section 588(18). Section 365 does not specify, and therefore limit, the grounds upon which an application can be made by the legal representative: an assignment would be as good a ground as succession by right of inheritance. Even if the order falls under section 372, it must be deemed to be a decree and would be appealable as such. I rely on the ruling in *Moti Ram v. Kundan Lal* (1).

The judgment of the Full Bench was as follows:—

In this case one Musammat Bholi Bibi instituted a suit against Bindu Prasad and Sheikh Jhau, her son, for a declaration that certain shares in two villages were not liable to be sold in execution of a decree obtained by one Baijnath against her son, Sheikh Jhau. The lower Court dismissed the suit, and thereupon Bholi Bibi appealed, but died before the determination of the appeal. Musammat Jamna Bibi applied to the Court to be brought on the record in the place of Bholi Bibi, alleging that she was the assignee of the shares in the property in dispute under a parole gift made to her by Bholi Bibi prior to her death. The District Judge found that the alleged assignment was not proved, and refused the application. Hence the present appeal.

The appeal came before a Bench of this Court, when a preliminary objection was taken by the learned vakil for the respondents to the hearing of the appeal, on the ground that the order of the District Judge being one under section 372 of the Code of Civil Procedure, and not being one disallowing an objection made under that section, no appeal lay. There is a conflict in the rulings of a Bench of this High Court in the case of *Moti*

(1) (1900) L. L. R., 22 All., 380.

Ram v. Kundan Lal (1), and of a Bench of the High Court at Calcutta in the case of *Lalit Mohan Roy v. Shebock Chand Chowdhry* (2). The Bench before whom the present appeal came considered that the decision in the former case was open to grave doubt, and thought it desirable to have the appeal referred to a larger Bench for determination. Accordingly the appeal has come before us.

In the case of *Moti Ram v. Kundan Lal*, to which we have referred, the facts were as follows:—A defendant, pending suit, made an assignment of his interest therein. No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* unfavourably to the assignees. Thereupon the assignees filed a memorandum of appeal, claiming to be entitled to file an appeal under the circumstances set forth in their memorandum. Their application was supported by the assignor, who disclaimed all interest in the subject-matter of the suit. The District Judge treated the application for leave to appeal as if it were an application properly made under section 372 of the Code of Civil Procedure, but in his final order recorded that the applicants applied to be allowed to appeal under no section whatever; and because they had taken no steps to have their names entered apparently before the decree was passed, held that they had no *locus standi* then, and he accordingly rejected the application for leave to appeal. On appeal the matter came before a Division Bench of this Court, which held that the District Judge was wrong in refusing the application, and that section 372 clearly applied to such a case. In arriving at this conclusion they adopted the decision in the case of *Indo Mati v. Gaya Prasad* (3) as being an authority upon the question, and held that an appeal did lie from an order rejecting an application made under section 372.

In the case of *Indo Mati v. Gaya Prasad* the facts were shortly as follows:—Gaya Prasad and another had obtained a decree for sale on a mortgage against one Chaudhri Raj Kunwar, who was the husband of Rani Indo Mati. After the death

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of her husband Rani Indo Mati applied to the Court, stating that the property to which the decree applied had devolved upon her under the will of one Rani Lachmin Kuar, to whom it had been transferred on the 19th of September, 1895, and praying that she might be made a party to the execution proceedings, and that under section 87 of the Transfer of Property Act six months' time might be granted to her in which to make arrangements for satisfying the decree. Upon this application the Subordinate Judge passed the following order:—"This is not an application on behalf of a party to the suit, but on behalf of a third person. Time has been granted twice. It cannot be granted now. It is ordered that the application be rejected." On appeal from this order to the High Court, Edge, C.J. and Blair, J., set aside the order, holding that it was a decree within the meaning of section 2 of the Code, and that an appeal lay from it. In the course of their judgment the learned Judges observed:—"It appears to us that the dismissal of her, *i.e.* (Rani Indo Mati's) application was an adjudication on the representative right which she claimed, and as an order under section 372 dismissing an application is not an order specified in section 588, the order dismissing her application would be a decree, as that word is defined in section 2 of the Code of Civil Procedure, and in our opinion an appeal lay *the case coming within section 244 of the Code.*" It is to be observed in this case that a decree had already been obtained, and consequently the application of the appellant came within section 244, the question being one between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of the execution thereof. It appears to have escaped the notice of the Bench which decided the case of *Moti Ram v. Kundan Lal* that the case of *Indo Mati v. Gaya Prasad* was one coming within section 244 of the Code. The head-note to the case is misleading, as it contains no reference to the fact that a decree in the suit had already been passed, and that the case therefore fell under the provisions of section 244. It would appear from it that the Court decided that an appeal lay from an order dismissing an application under section 372 in all cases, but it did not

do so. Whether it properly treated the question as one coming within section 372 at all is open to doubt.

Now the order dismissing the application under section 372 now appealed against is, in our opinion, clearly not a decree within the meaning of section 2 of the Code of Civil Procedure; although it amounted to an adjudication upon the right claimed by the appellant to be made a party to the suit, it was in no sense an adjudication which decided the suit so far as regards the Court expressing it. The suit has not yet been decided. It may be, so far as we know, that some party who is in a position to establish his right as assignee may apply to the Court, and have his name added to the record and proceed with the disposal of the suit. The order clearly does not come within section 588 (sub-section 21), inasmuch as it was not an order disallowing an objection under section 372. But then it is contended that the application is in reality an application under section 365 of the Code which, in the case of the death of a sole plaintiff or sole surviving plaintiff, enables the legal representatives of the deceased, where the right to sue survives, to appeal to the Court to have his name entered on the record in place of the deceased plaintiff. This section is clearly, in our opinion, not applicable, inasmuch as the appellant here is not the legal representative of the deceased plaintiff, as she does not in law represent the estate of the deceased. Her claim is that of an assignee, and not that of a legal representative. This question recently came before a Bench of the High Court at Calcutta in the case to which we have referred of *Lalit Mohan Roy v. Shebock Chand Chowdhry*, in which the facts were in all respects similar to the facts of the present case, when it was held by a Bench consisting of Rampini and Wilkins, JJ., that an order disallowing an application of a person claiming under section 372 to be made a party defendant as assignee of the defendant was not a decree within the meaning of section 2 of the Code, and that no appeal lay against such an order. We concur in this ruling. It is difficult to understand why an appeal is not allowed in such a case when an appeal is expressly permitted when an order is passed disallowing objections under section 372. Great hardship may no doubt arise from the fact that there is no such appeal. This is, however, not a

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consideration which can weigh with us in interpreting the law. For the foregoing reasons we allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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July 4.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.
SHAM DAS AND ANOTHER (DEFENDANTS) v. BATUL BIBI (PLAINTIFF).
Mortgage—Usufructuary mortgage of zamindari and sir—Loss by mortgagor of proprietary rights—Mortgage to take effect against ex-proprietary rights of mortgagor—Mortgagor not entitled to relinquish ex-proprietary rights to the zamindar—Act No. XII of 1881 (N.-W. P. Rent Act), section 31.

A zamindar having mortgaged by way of usufructuary mortgage his zamindari together with his *sir* land, lost his zamindari rights and became an ex-proprietary tenant of the *sir*. *Held* that the usufructuary mortgage did not become ineffectual, but took effect as a mortgage of the ex-proprietary rights. *Moody v. Mathews* (1), *Hughes v. Howard* (2), *Trumper v. Trumper* (3), *Khiali Ram v. Nathu Lal* (4) and *Sukru v. Tafazzul Husain Khan* (5) referred to.

Held also that in such a case as above the mortgagor, ex-proprietary tenant, could not to the prejudice of the mortgagee, surrender to the zamindar his ex-proprietary interest. *Badri Prasad v. Sheo Dhian* (6) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. G. W. Dillon, for the appellants.

Maulvi Ghulam Muftaba, for the respondent.

STANLEY, C.J. and BANERJI, J.—One Rajab Ali was entitled to a share of zamindari property and *sir* lands appertaining to it. On the 25th of January, 1890, he mortgaged it to the plaintiff, and in the years 1893 and 1895 he also granted usufructuary mortgages in favour of the defendants of the same property. The defendants brought a suit for possession as mortgagees on foot of their earlier mortgage, and obtained a

* Second Appeal No. 462 of 1900 from a decree of Syed Muhammad Ali, District Judge of Jaunpur, dated the 7th February 1900, reversing a decree of Babu Shrish Chandar Bose, Subordinate Judge of Jaunpur, dated the 29th September 1899.

(1) (1801) 7 Ves., 174.

(2) (1858) 25 B., 575.

(3) (1873) L. R., 8 Ch., 870.

(4) (1893) I. L. R., 15 All., 219.

(5) (1894) I. L. R., 16 All., 398.

(6) (1896) I. L. R., 18 All., 354.