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reasons set forth above, and also for the other reasons given in my judgment in the case of *Moti Begam v. Zorawar Singh*, I am of opinion that the lower Courts were right in holding, with reference to the language of Act No. IV of 1882, that there was no valid mortgage, and I would dismiss this appeal with costs.

Appeal decreed and cause remanded.

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 February 24.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

TEJ SINGH AND OTHERS (DEFENDANTS) v. CHABELI RAM
 (APPLICANT).*

Civil Procedure Code, sections 2, 372, 588(21)—Order allowing objection under section 372—Order or decree—Appeal.

A suit was brought by one Mewa Ram against Tej Singh and others. That suit was decreed *ex parte*. An application was, however, made by the defendants under section 108 of the Code of Civil Procedure, as the result of which the *ex parte* decree was set aside and the suit reinstated. Upon the restoration of the suit one Chabeli Ram, claiming to be an assignee of the rights of the original plaintiff, applied under section 372 of the Code that his own name might be substituted as plaintiff for that of Mewa Ram. The plaintiff did not oppose this application. But the defendants objected, and the application was rejected. Subsequently, on the same day, the suit was dismissed. Chabeli Ram appealed against the Court's order rejecting his application under section 372 of the Code. His appeal was allowed, and his name was brought on the record. This appeal seems to have been treated as also an appeal from the decree in the suit, and the Court made an order under section 562 of the Code remanding the suit for trial on the merits.

Held on appeal from this order that no appeal lay to the lower appellate Court from the order of the Court of first instance allowing the defendants' objections to Chabeli Ram's application under section 372 of the Code of Civil Procedure; neither was such order a decree within the meaning of section 2. *Moti Ram v. Kundan Lal* (1) and *Indo Mati v. Gaya Prasad* (2) distinguished. *Lalit Mohan Roy v. Shebock Chand Chowdhry* (3) referred to.

IN this case one Mewa Ram brought a suit for sale on a mortgage against Tej Singh and others. The suit was originally decreed *ex parte*, but upon an application being made under section 108 of the Code of Civil Procedure, the *ex parte* decree was

* First Appeal No. 3 of 1901 from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 17th of November, 1900.

(1) (1900) I. L. R., 22 All., 380. (2) (1896) I. L. R., 19 All., 142.

(3) (1900) 4 C. W. N., 403.

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set aside and the case reheard. On the suit being reinstated one Chabeli Ram applied to the Court asking that his name might be substituted for that of Mewa Ram, the original plaintiff, on the ground that Mewa Ram had assigned to him (the applicant) all his rights in the subject-matter of the suit. To this application the plaintiff made no objection, but it was opposed by the defendants, who alleged the transfer to be fictitious. In the end Chabeli Ram's application was disallowed, and on the same day, but after the above-mentioned order had been passed, the suit was dismissed. Chabeli Ram then appealed from the order rejecting his application under section 372 of the Code of Civil Procedure. Upon this appeal the District Judge of Aligarh brought Chabeli Ram upon the record, and then, apparently treating the appeal as if it was an appeal from the decree in the suit, made an order of remand under section 562 of the Code of Civil Procedure. Against this order of remand the defendants appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid* and *Munshi Gobind Prasad*, for the respondent.

KNOX and BLAIR, JJ.—To the suit out of which this appeal has arisen the original parties were Mewa Ram, plaintiff, and Tej Singh and others, defendants. The suit was decreed *ex parte*. An application, however, was made under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside, and the case reheard. This application was successful. Upon the suit being reinstated the present respondent, Chabeli Ram, prayed that his name might be brought on the record, alleging that an assignment had been made in his favour by the plaintiff of the plaintiff's right. The plaintiff consented to Chabeli Ram's name being substituted instead of his own. The defendants, on the other hand, objected, contending that the transfer was a fictitious one; the application under section 372 was accordingly disallowed, and on the same day, but after the order above-mentioned had been passed, the suit was dismissed. Chabeli Ram then appealed from the order rejecting the application made under section 372; this appeal was allowed, and his name was brought on the record. Apparently some confusion ensued which has

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not been explained, as the matter before the lower appellate Court was treated when the appeal went to hearing as an appeal from the decree. The result was that an order was passed under section 562, remanding the suit to the Court of first instance for decision on the merits; and it is at this stage and from this order that this first appeal from order has been brought.

A preliminary objection has been taken before us that an appeal does not lie, and that the order passed under section 372 was not open to appeal. On looking back, however, into the record of the case we find that the lower appellate Court has dealt with the decree which was passed in the suit, and from which an appeal undoubtedly did lie under section 540 of the Code of Civil Procedure; so that what we have to consider now is really whether the lower appellate Court could have entertained any appeal against the order refusing to substitute the respondent as plaintiff in the cause.

Section 588, clause (21) provides that an appeal shall lie from an order disallowing an objection under section 372; but as the section does not allow appeals from any orders except those specially set out in section 588, it follows and has been held that no appeal lies under section 588 of the Code from an order allowing an objection under section 372. The case before us is such an order. But we were referred to the case of *Moti Ram v. Kundan Lal* (1). The learned Judges who decided that case viewed the order which was before them as an order which adjudicated on the representative right claimed by the applicant under section 372, and therefore amounting to a decree, as that word is defined in section 2 of the Code. They appear in arriving at this decision to have been influenced by the case of *Indo Mati v. Gaya Prasad* (2). The case of *Indo Mati v. Gaya Prasad* has been considered by the Calcutta High Court in the case of *Lalit Mohan Roy v. Shebock Chand Chowdhry* (3). That Court held that the case before them was as to its facts widely different from the facts disclosed in *Indo Mati v. Gaya Prasad*. They had before them no question relating to the execution of a decree, inasmuch as no decree had at the time when the applica-

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

(2) (1896) I. L. R., All., 142.

(3) (1900) 4 C. W. N., 403.

tion was disallowed been passed, and no final decision in the suit had been given. The *ratio decidendi* therefore in *Indo Mati v. Gaya Prasad* did not apply to the case before them, and was, in their opinion, clearly distinguishable.

In the case before us, while it is true that there had been an *ex parte* decree, that *ex parte* decree had been set aside, and had therefore become non-existent. While it was so non-existent Chabeli Ram filed his application. The refusal to allow his name to be brought upon the record, while it may have been a formal expression of an adjudication of a right claimed by him, did not, so far as the Court expressing it, decide the suit. The decision of the suit resulted immediately from the order under which the suit was dismissed—an order passed after the order adjudicating upon Chabeli Ram's claim to be brought into the suit. The case of *Indo Mati v. Gaya Prasad* is really an authority which holds that no appeal lay from the order passed under section 372, and it is in this respect against the respondent Chabeli Ram. In the case reported at page 380 of the I. L. R., 22 All., 372, there was a decree extant, and the application under section 372 was made after that decree had been passed: no attempt moreover had been made by the applicants to have their names brought upon the record in the Court of first instance. In any case the facts in *Moti Ram v. Kundan Lal* are not the same as the facts before us. Chabeli Ram headed his petition of appeal as an appeal from the whole of the decree passed by the Subordinate Judge: in *Moti Ram v. Kundan Lal* the applicant had only asked to be allowed to appeal, and it was with the order disallowing that application that this Court then dealt. This is manifest from the terms of the final order which run thus:—"We direct that the applicants be now brought on the record, and we remand the record to the Court of the District Judge with orders to decide whether the memorandum of appeal, dated the 23rd August, 1897, should or should not be admitted; and if admitted, to hear and decide the appeal according to law."

It is enough for us to show that the facts in that case differ from the facts before us; they also differ from the facts in *Indo Mati v. Gaya Prasad*, and our decision is based upon these two points—(1) that no appeal is allowed by section 588, sub-section

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(21), from an order allowing an objection under section 372; and secondly, that the order passed in the present case was not a decree within the meaning of section 2, *viz.* an adjudication so far as regards the Court expressing it which decided the suit pending before the Court at the time when the order was passed.

We decree the appeal with costs, and set aside the judgment of the lower appellate Court.

Appeal decreed.

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March 18.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF SHEIKH AMIN-UD-DIN.*

Criminal Procedure Code, sections 435, 438, 439—Practice—Revision—Reference by District Magistrate recommending the reconsideration of an order of acquittal passed by a Subordinate Magistrate.

In the case of an acquittal by a Subordinate Magistrate, where the Local Government does not appeal, or where the District Magistrate does not move the Local Government to appeal, the High Court will not, as a general rule, entertain a reference direct from the District Magistrate under section 438 of the Code of Criminal Procedure.

THIS was a reference made by the District Magistrate of Aligarh under section 438 of the Code of Criminal Procedure. The circumstances out of which the reference arose are thus stated in the Magistrate's order:—

‘On the 16th of November, 1901, seven logs of wood—three of *siris* and four of *semal* wood—were imported by Sheikh Amin-ud-din. As they passed the Russelganj octroi barrier, the six carts which carried them were stopped by the octroi officials for payment of duty. A question arose as to whether the logs were to be charged as fire wood at the rate of three pies per rupee of their value or as building material at the rate of eight pies per rupee. The octroi muharrir and also the octroi superintendent, who happened to arrive on the spot, were of opinion that they were building material and should be charged accordingly. Amin-ud-din, accused, who had also turned up, wanted the duty to be levied as on fire wood. The dispute came to an end by the accused assuming a tone of authority, and ordering the octroi officials to charge the logs as fire wood, which he declared them to be. The octroi officials submitted against their own judgment, and allowed the logs to pass into the town on payment of the lower duty, although the prosecution alleged they were not fire wood, and were consequently liable to be charged as ‘building

* Criminal Reference No. 149 of 1902.