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service if he thereupon does no more than fix the summons to the outer door. He must make further efforts to effect personal service. The Subordinate Judge ought in our opinion, under the circumstances, to have set aside the *ex parte* decree, and allowed the defendant an opportunity of defending the suit. We accordingly must set aside his order, and direct that the decree passed *ex parte* be set aside, so far as the appellant is concerned, and the case re-heard upon the merits as against her. The appellant is entitled to her costs.

Appeal decreed.

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REVISIONAL CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.
AMIR BEGAM AND OTHERS (DEFENDANTS) v. PRAHLAD DAS (PLAINTIFF).
Civil Procedure Code, section 25—Transfer—Retransfer by District Judge to his own file of a case once transferred by him to the file of the Subordinate Judge.

Where a District Judge has once exercised the powers conferred by section 25 of the Code of Civil Procedure, and transferred a case to his own files from the files of the Subordinate Judge, he cannot afterwards re-transfer such case to the Subordinate Judge. *Sukharam v. Gangaram* (1) followed. *Sita Ram v. Nanni Dulaiya* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. R. K. Sorabji, for the applicants.

Pandit Moti Lal Nehru, for the opposite party.

STANLEY, C.J. and BURKITT, J.—This is an application under section 622 of the Code of Civil Procedure praying that an order of the District Judge of Allahabad transferring a suit from his file to the Court of the Subordinate Judge may be set aside, on the ground that the learned Judge had no power to retransfer the suit from his Court to the Court of the Subordinate Judge.

The suit was brought in the Court of the Subordinate Judge, and upon an application made by both parties to the District Judge, it was transferred by him to his own file. Several applications appear to have been made in the suit, one of which, namely, an

* Civil Revision No. 2 of 1902.

(1) (1899) I. L. R., 13 Bom., 654.

(2) (1889) I. L. R., 21 All., 230.

application for amendment of the plaint, had been disposed of by the Subordinate Judge. On the 16th of November the District Judge *suo motu* retransferred the case to the files of the Subordinate Judge for trial.

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It is now contended on the part of the appellants that this order of retransfer was made *ultra vires*, there being no power under section 25 of the Code of Civil Procedure, once a case has been transferred from a subordinate to a superior Court, to retransfer it back to the same subordinate Court. The language of the section appears to us to be explicit and clear. Under it the High Court or District Court is empowered to withdraw any suit, whether pending in the Court of first instance or in the Court of appeal, subject to the High Court or District Court, as the case may be, and try the case itself or else transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature, and the amount or value of the subject-matter. Now it appears to us that once the District Court withdrew the suit and transferred it to its own files for trial, it had exhausted all its powers under the section, and was not competent under the section to retransfer it again to the subordinate Court. It was open to the District Court to transfer the case for trial to any other subordinate Court competent to try it at the time of the withdrawal of the suit; but this the District Court did not do in the present case, but placed the case upon its own files for trial. We find that a question very similar to this came up before a Bench of this High Court of which one of us was a member, namely, the case of *Sita Ram v. Nauni Dulaiya* (1). In that case the District Judge had under the provisions of section 25 of the Code of Civil Procedure transferred a suit from the Court of the Subordinate Judge to his own Court for trial. The District Judge decided the suit, and from his decree there was an appeal to the High Court. Upon the appeal the High Court remanded the suit under section 562 of the Code to the Court of the District Judge. Thereupon the District Judge transferred the case to the Subordinate Judge for trial. It was held that the District Judge had no power so to transfer the suit, but was bound

(1) (1899) I. L. R., 21 All., 230.

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to try it himself. The facts are not altogether on all fours with the case before us, but the true principle which, in our opinion, governs the case was laid down by the learned Judges in the judgment in that case (at p. 231 of the Report) in the following terms:—"His (*i.e.* the District Judge's) power of transfer under section 25 had been exhausted when the suit was originally withdrawn from the Court of the Subordinate Judge, so even if section 25 were applicable to a case remanded under section 562 (we think it is not applicable,) that section does not empower the District Judge to retransfer the case to the subordinate Court from which it had been withdrawn." This decision by anticipation seems to govern the present case. We find, however, that the question has been expressly decided in a case in the Bombay High Court, in which the facts were on all fours with those of the present case, namely, in the case of *Sukharam v. Gangaram* (1), in which case it was held that when a District Judge made an order to retransfer a case to the original subordinate Court, "the order of retransfer was *ultra vires*, and should be discharged." We think, therefore, that upon the language of the section of the Act, and upon the authorities cited above, the order of retransfer in this case was clearly wrong. We therefore must allow this application, and cancel the order of the District Judge, and direct him to retain the case upon his own files for trial. Seeing that the order of retransfer was made by the learned Judge of his own motion, we make no order as to costs.

Application allowed.

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APPELLATE CRIMINAL.

Before Mr. Justice Know.

EMPEROR v. BIRCH.*

Criminal Procedure Code, section 562—First offender—Powers conferred by section 562 exercisable by a Court of appeal—Criminal Procedure Code, section 523(d).

Held that the powers conferred by section 562 of the Code of Criminal Procedure upon a Court by which a first offender is convicted, are by virtue of section 423(d) of the Code, exercisable by the High Court sitting as a Court of appeal.

* Criminal Appeal No. 109 of 1902.

(1) (1889) I. L. R., Bom., 654.