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 JAI RAM
 v.
 MAKUNDA.

reversed the decision on that point, we remand the record under section 562 of the Code of Civil Procedure, through the Court of the District Judge, to the Court of first instance to be replaced on the file of pending suits and decided according to law. The appellant is entitled to his costs in all three Courts.

Appeal dismissed and cause remanded.

1904
 February 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burditt.

KAMTA PRASAD AND ANOTHER (DEFENDANTS) v. SHEO GOPAL

LAL (PLAINTIFF).*

Act No. IX of 1872 (Indian Contract Act), sections 10, 11, 64 and 65—Minority—Contracts by infants—Void contract—Repayment of advance on contract made by an infant.

Held that a mortgage entered into by an infant is not merely voidable, but void *ab initio*.

Held also that sections 64 and 65 of the Indian Contract Act 1872, apply only to contracts between competent parties and are not applicable to a case where there is not and could not have been any contract at all. *Mohori Bibee v. Dharmodas Ghose* (1) followed.

The plaintiff in this case sued to have a mortgage-deed executed by him in favour of the defendant and registered on the 3rd of May, 1900, declared null and void, on the grounds that the plaintiff was a minor at the time of execution of the mortgage and that he had received no consideration. The defendant pleaded that the plaintiff was 22 years of age at the time of execution of the mortgage, and that in any case he represented himself as of full age and could not now plead that he was not, and that the mortgage-deed was executed in good faith and for valid consideration, out of which Rs. 566-6-0 was paid before the Sub-Registrar. The Court of first instance (Munsif of Bansi) dismissed the suit. On appeal by the defendant, the lower appellate Court (Additional Subordinate Judge of Gorakhpur) confirmed the decree of the first Court. That Court found as a fact that the plaintiff was a minor

* Second Appeal No. 1178 of 1901, from a decree of Babu Ramdhan Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 27th of June, 1901, confirming a decree of Babu Kalka Singh, Munsif of Bansi, dated the 9th of May, 1901.

when the mortgage was executed; that he never represented himself to be of full age; but that even if he had done so, he would not, having regard to the ruling in the case of *Brohmo Dutt v. Dharmodas Ghose* (I. L. R., 26 Cal., 381), be precluded from pleading infancy. The Court found that the sum of Rs. 566-6-0 had, as alleged by the defendant, been received by the plaintiff, but held that sections 64 and 65 of the Indian Contract Act, 1872, did not apply to the case of a contract entered into by an infant, and therefore that the plaintiff could not be directed to restore the money.

The representatives of the defendant thereupon appealed to the High Court.

Munshi *Haribans Sahai* and Dr. *Satish Chandra Banerji*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J., and BURKITT, J.—In view of the decision of their Lordships of the Privy Council in the case of *Mohori Bibi v. Dharmodas Ghose* (1) the main argument addressed to us in this appeal must be regarded as untenable. Their Lordships in that case held that a contract entered into by an infant is not only voidable but void, and that sections 64 and 65 of the Contract Act, which are based on there being a contract between competent parties, are not applicable to a case where there is not and could not have been any contract at all. The conclusions arrived at therefore by the Court of first instance and the lower appellate Court were in our opinion perfectly correct. It is argued, however, that the plaintiff respondent is not entitled to get the mortgage deed, entered into by him during his minority, cancelled without making good to the appellants the consideration which is proved to have been actually paid, by reason of the provisions of section 41 of the Specific Relief Act. As regards this contention, which is now pressed before us, we may observe that no materials were laid before the lower Courts, nor have any been laid before us, for coming to the conclusion that justice requires us to order a return of any money to the appellants. If materials had been laid before the lower Courts which would have enabled them to arrive at a conclusion upon

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this submission, they would no doubt have entertained and considered the matter. In the absence, however, of any such it is impossible for us in second appeal to entertain such a question. The appeal is therefore dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1904
February 9.

Before Mr. Justice Aikman.

EMPEROR v. THAKUR DAYAL AND OTHERS.*

Criminal Procedure Code, section 349—Case submitted with regard to sentence to District or Sub-Divisional Magistrate—Such Magistrate not competent to return the case to Magistrate who submitted it.

Where a Magistrate of the second or third class has submitted a case to the District or Sub-Divisional Magistrate under section 349 of the Code of Criminal Procedure, it is not competent to the District or Sub-Divisional Magistrate to return the case to the submitting Magistrate if in his opinion the reference was unnecessary. *Imperatrix v. Abdulla* (1), *Queen-Empress v. Firanna* (2), *Dula Faquar v. Bhagirji Sircar* (3) and *Queen-Empress v. Haria Tellapa* (4) followed.

In this case three men were charged before a Magistrate of the second class with the offence of theft. The Magistrate after hearing the evidence was of opinion that the accused were guilty; but, considering that they ought to receive a punishment more severe than he could himself inflict, he recorded his opinion to that effect and forwarded the accused with his proceedings to the Sub-Divisional Magistrate under the provisions of section 349(1) of the Code of Criminal Procedure. The Sub-Divisional Magistrate before whom the case came, being of opinion that the punishment which the second class Magistrate could inflict would be sufficient, instead of giving effect to that opinion and himself passing sentence on the accused, sent the case back to the second class Magistrate from whom it had come to him for disposal. The Sessions Judge, being of opinion that the Sub-Divisional Magistrate had no power to return the case to the second class Magistrate, made a report to the High

* Criminal Reference No. 49 of 1904.

(1) (1880) I. L. R., 4 Bom., 240. (3) (1880) 6 C. L. R., 276.
(2) (1886) I. L. R., 9 Mld., 377. (4) (1886) I. L. R., 10 Bom., 196.