having regard to the provisions of section 233(*k*) of Act III of 1901 this suit was not cognizable by the Civil Court and the appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

Before Sir George Knox, Knight, Acting Chief Justice and Mr. Justice Griffin.

BAIJ NATH DASS AND OTHERS (PETITIONERS) *v.* SOHAN BIBI (OPPOSITE PARTY.)*

Code of Civil Procedure (Act V. of 1908,*) sections* 2, 109, *rule* 1, *Order XIV —Practice—Appeal to the King in Council—Order of remand—Order —final and interlocutory.*

An order of remand which determines only a part of the case and leaves other matters still to be determined is not a 'final order,' within the meaning of section 109, Code of Civil Procedure. *Saiyid Muzhar Hossein* v. *Bodha Bibi*, (1), *Standard Discount Co.* v. *La Grange* (2), and *Salaman* v. *Warner* (3), referred to.

THE facts of this case are as follows :—

The plaintiff who is the daughter of one Parsottum Das alleged that her father had been adopted in 1860 by one Musammat Manki Bahu to her deceased husband, Babu Harish Chandar. Parsottam Das predeceased Manki Bahu who died in 1893. In 1895 there was litigation between Harish Chandra's daughters and Parsottam Das's widow which terminated in a compromise and decree on May 28, 1896. On January 15th, 1906, plaintiff instituted this suit on the ground that her mother was not competent to enter into a compromise which would bind the estate after her death. Twelve issues were fixed in the case out of which, with the consent of the parties, only five were tried by the court of first instance. That court found that Parsottam Das had been validly adopted by Manki Bahu, but that the compromise was neither fraudulent nor collusive, that it was executed with the plaintiff's knowledge for consideration and the plaintiff was bound by it, and that the claim was barred by time.

The suit was accordingly dismissed. The plaintiff appealed and the High Court held on the authority of *Gobind Krishna* v. *Khunni Lal* (4), that the compromise amounted to an alienation

* Application in Privy Council Appeal No. 9 of 1909.

(1) (1894) I. L. R., 17 All., 112.
(2) (1877) L. R., 3 C. P. D., 67.
(3) (1891) L. R., 1 Q. B. D., 734.
(4) (1909) I. L. R., 29 All., 487.

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by the widow of Parsottam Das and article 125, Limitation Act, 1877, schedule II, applied so far as the claim was in respect of immoveable property. The High Court upheld the finding of the court below on the question of adoption, but having reversed its finding on the question of limitation and of the plaintiff's right to sue the Hon'ble Court remanded the case to the court below for determination of other questions.

The defendants applied for leave to appeal to His Majesty in Council. The valuation of the claim was Rs. 1,04,784.

Mr. *B. E. O'Conor* (with him Dr. *Tej Bahadur Sapru* and Munshi *Gokul Prasad*), for the opposite party showed cause —There is no 'decree' or 'final order' appealable to the Privy Council. The decision so far has been on preliminary points and material points in the case remained yet to be decided. He cited *Radha Krishan* v. *The Collector* of *Jaunpur* (1), *Tirunarayana* v. *Gopalasami* (2), *Ishvargar* v. *Candasama* (3), *Habib-un-nissa* v. *Munawar-un-nissa* (4), *Palak Dhari* v. *Radha Prasad* (5).

Dr. *Satish Chandar Banerji*, (with him Pandit *Moti Lal Nehru*) for the applicants:—The order of remand sought to be appealed against was a 'decree' or 'final order' within the meaning of section 109 and O. 45, R. 1. sch. I, Code of Civil Procedure. It was an order one which decided the cardinal points of the suit and could not be questioned again in the suit, *Muzhar Hossein* v. *Bodha Bibi* (6). The fact that the decision of the other issues might ultimately be in the defendants' favour would not make this order an unappealable one, *Rahimbhoy Habibbhoy* v. *Turner* (7). It was not necessary to consider decisions of the Indian Courts of a previous date. The case in 25 All., it was submitted, was not correctly decided, inasmuch as it was in conflict with *Abdul Rahim Khan* v. *Hari Raj Singh* (8), and proceeded upon a misconception of what the Privy Council had ruled in *Forbes* v. *Ameeroonissa* (9). All that their Lordships ruled in that case was that the fact that the appellant had not appealed against

(1) (1900) I. L. R., 23 All., 220.
(2) (1889) I. L. R., 13 Mad., 349.
(3) (1884) I. L. R., 8 Bom., 548.
(4) (1903) I. L. R., 25 All., 629.
(5) (1878) I. L. R., 2 All., 65.
(6) (1894) I. L. R., 17 All., 112.
(7) (1890) I. L. R., 15 Bom., 155.
(8) 1900) I. L. R., 22 All., 405.
(9) (1865) 10 M. I. A., 340.

the order of remand did not preclude him from impeaching the correctness of the order in his appeal against the final decree. Besides, in the present case not only has a question of limitation been decided, but also the question regarding the plaintiff's *locus standi* to maintain the suit. In *Chandra Kunwar* v. *Narpat Singh* (1), only one out of several cardinal points was decided by the High Court, but leave was given and the Privy Council entertained an appeal from and upset the order of remand. Reference was also made to Civil Procedure Code, section 105 (2) and to Act XIV of 1882, section 594.

Mr. *B. E. O'Conor*, was heard in reply.

KNOX, A. C. J. and GRIFFIN, J.—On the 12th of February 1909 a Division Bench of this Court, after hearing an appeal presented by Musammat Sohan Bibi against Musammat Hiran Bibi and others, allowed the appeal, set aside the decree of the court below and remanded the case to that court with directions to reinstate it under its original number in the register and dispose of it according to law. We are informed that the court below has fixed the 11th of July and intends to proceed to try the case remanded on that date. On the 8th of May the defendants who were respondents to the appeal in this Court put in a petition for leave to appeal to His Majesty the King in Council as an appeal from a judgment and decree of this Court. Upon notice going to the other side to show cause why leave should not be granted, Musammat Sohan Bibi has appeared to show cause. Her contention is that the order of this Court, dated the 12th February 1909, is an interlocutory order and that the application for leave to appeal is premature. Before going further, a brief statement of the case will be useful. The suit out of which the appeal to this Court arose was a suit brought by Musammat Sohan Bibi for a declaration that a transfer of certain property effected by a compromise and a decree be declared to be null and void so far as she herself is concerned, upon the death of Musammat Manki Bahu, the widow of one Babu Haris Chander.

(1) (1906) I. L. R., 29 All., 184.

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The court of first instance found, and this Court has confirmed the finding, that Babu Parsotam Das, father of Musammat Sohan Bibi, was adopted by Musammat Manki Bahu after the death of her husband Babu Haris Chander and in pursuance of an authority from him. Manki Bahu entered into a compromise with regard to a suit brought against her and by that compromise transferred certain property. A decree was passed upon the compromise and it is this compromise and decree and the transfer effected thereby that Musammat Sohan Bibi, as daughter of Babu Parsotam Das and as immediate reversioner, asked the court to declare null and void. The court of first instance, while holding the adoption proved, held that the suit was time-barred and that Musammat Sohan Bibi was bound by the compromise. This Court in appeal while affirming the adoption as already pointed out differed from the court below both on the question of limitation and the question of Musammat Sohan Bibi's right to maintain the suit. The value of the property is admittedly over ten thousand rupees. We agree with the learned Counsel for Musammat Sohan Bibi that the order of this Court, dated the 12th February 1909, cannot be held to be a decree in the strict sense of the term and that it is an order. The definition of "decree" given in section 2 of Act V of 1908 excludes in express terms from the category of decrees any adjudication from which an appeal lies as an appeal from an order, and Order 43, Rule 1, clause (*u*), provides that an appeal lies from orders under Rule 23 of Order 41 remanding a case where an appeal would lie from a decree of an appellate court. The order of the 12th of February 1909 is an order of this kind and there is no provision made for appeals to His Majesty in Council from any order (see section 109 and Order 45). On behalf of the petitioners it is contended that this order is a fin l order inasmuch as the judgment of this court which led up to the order decides the cardinal point in the case and the points now remaining for decision are all subsidiary points. In support of this contention the learned Advocate relied upon the case of *Saiyid Muzhar Hossein* v. *Musammat Bodha Bibi* (1).

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

That was a case in which this Court had refused leave to appeal and the petitioner applied to Her Majesty in Council and leave was granted. Their Lordships pointed out that the case before them as put by the plaintiff was that one Ibn Ali had given the property in suit to certain persons who conveyed it to the plaintiff. One of the defences raised was misjoinder, which was overruled, but the next went to the foundation of the plaintiff's claim being a denial that Ibn Ali made any valid gift to the grantors of the plaintiff. The other defences were all of a subordinate character. The court of first instance decided against the plaintiff on the question of Ibn Ali's will and did not give judgment on other issues. The plaintiff appealed from the decree and this Court decided that Ibn Ali made a valid gift and remanded the case to be disposed of on the other issues. Their Lordships of the Privy Council held that the will of Ibn Ali was the cardinal point in the suit and after the decision of the High Court that could not be disputed again and in consequence held the order to be a final order. In our opinion the present case is clearly distinguished from the one just cited. In the case before us the question of the adoption of Parsotam Das, whether it was valid or not, can hardly be called the cardinal point in the case. Other points have been taken which affect the eventual decision quite as much as the question of adoption. One of these points is the question whether or not after his adoption Parsotam Das relinquished all his rights under a receipt dated the 29th March, 1881. If it is found that he did relinquish his rights, then the suit brought by Musammat Sohan Bibi must fail quite as much as if the finding had been that Parsotam Das had never been legally adopted by Musammat Manki Bahu. The result is that the case as it now stands is still an open case and it can nowise be held that it has been so far decided that the matter cannot be made subject to further appeal. In the grounds maintained in the application for leave to appeal the order *quoad* order has not been attacked. It is nowhere said that this court should have passed an order of a different kind or that it had no jurisdiction for any reason to make the order as it did and so forth. It is not the formal order which is attacked. The object of the attack is the judgment

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leading up to the order and the matters contained in that judgment, if open to appeal now, will still be open to appeal when this Court, again called upon to do so, hears an appeal from the case as it will eventually stand decided by the court below in obedience to its order of remand. It is worth noting in connection with this matter that, while Act XIV of 1882 defined the word "decree" as used in chapter XLV as including judgment and order, no such definition is to be found either in sections 109 to 112 or in Order 45 of Act V of 1908. There is no definition given of the term "final order" in the Code and it is evident from what their Lordships said in I. L. R., 17 All., 112 that it is not always an easy matter to distinguish between what is a final and what is an interlocutory order. In *Standard Discount Co.* v. *La Grange* (1), BRETT, L. J., pointed out that, "no order, judgment or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given, so that if it is given for the plaintiff it is conclusive against the defendant and if it is given for the defendant it is conclusive against the plaintiff." Similarly in *Salaman* v. *Warner* (2), FRY, L. J. observed: "I conceive that an order is final only where it is made upon an application or other proceeding which must, whether such or application other proceedings fail or succeed, determine the action. Conversely I think that an order is interlocutory where it cannot be affirmed that in either event the action will be determined." So far as the present case is gone the order of this Court determines only a part of the case and leaves other matters still to be determined. Over and above that if we could sanction the present application we think it will be very inexpedient. The case is now ready for hearing and in the ordinary course of things will in a few days be heard and determined by the court below. The appeal to this Court would follow after a short lapse of time and the whole case will be determined either for the plaintiff or the defendant, so far as the courts in this country can determine it. The probability is that the litigation, if it must go further, can proceed to His Majesty in Council ready and ripe for a hearing on every point at no very distant date. On the other hand, if we

(1) (1877) L. R., 3 C. P. D., 67. (2) (1891) 1 Q. B. D. 734.

grant this application it may well be that the litigation will be prolonged over a series of years. On every ground therefore we dismiss this application with costs.

Application rejected.

PRIVY COUNCIL.

P. C.
June 30,
July 20.

PRAG NARAIN (DECREE-HOLDER) *v.* KAMAKHIA SINGH AND OTHERS (JUDGMENT-DEBTORS).*

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

Sale in execution of decree—Possession given to purchaser who was the decree-holder—Setting aside sale for irregularity—Satisfaction of decree and restoration of property to mortgagor—Remedy for recovery of mesne profits and interest—Application in execution proceedings—Separate suit—Civil Procedure Code (Act XIV of 1882), sections 244, 583—Right of purchaser to interest on purchase money.

Under a mortgage decree obtained by the appellant against the respondents the mortgaged property was in February 1901 put up for sale in default of payment and purchased by the decree-holder who had obtained leave to bid. The purchase money was not paid but was set off by the appellant against the amount due under the decree, which gave no future interest. Possession was given to the appellant in December 1901. In September 1903 the sale was set aside for irregularity, and in March 1904 the respondents paid to the appellant the amount due under the decree and possession of the property was restored to them.

Held (affirming the decisions of the Courts in India) that the respondents were entitled by sections 583 and 244 of the Code of Civil Procedure to recover mesne profits and interest thereon in the execution proceedings, and were not obliged to have recourse to a separate suit for the purpose, the delay and expense of which their Lordships would not at this stage of the proceedings have been disposed to permit.

Held also that the appellant was not entitled to interest on his purchase money which had not been actually paid, but was set off against what was due on the decree. The sale was set aside for his fault and it was out of the question that he should be allowed to make a profit at the expense of the respondents out of his own error, and so in effect recover interest not allowed him by the decree.

APPEAL from a decree (22nd May 1906) of the court of the Judicial Commissioner of Oudh, which affirmed an order (12th February 1906) of the court of the Subordinate Judge of Bara Banki.

Present:—Lord MACNAGHTEN, Lord DUNEDIN, Lord COLLINS, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.