

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

NAUBAT SINGH (DEFENDANT) v. BALDEO SINGH AND ANOTHER
(PLAINTIFFS).*

1911
February 15.

*Civil Procedure Code (1908), section 104, clause 2 ; order XLIII, rule 1 (a)—
Order returning a plaint for presentation to proper court—Appeal—Case
remanded to court of first instance—Appeal from order of remand inadmissible.*

A Munsif returned for presentation to the proper Court a plaint filed before him. The plaintiff appealed against this order to the District Judge, who transferred the appeal to a Subordinate Judge, who in turn remanded the case to the Munsif for trial on the merits. Held that no appeal would lie from the appellate order of remand.

IN this case a plaint was presented to a Munsif, who, being of opinion that he had no jurisdiction to hear the case, returned the plaint to be presented to the Revenue Court. The plaintiffs appealed from the order returning the plaint to the District Judge. The District Judge transferred the appeal to the Subordinate Judge who remanded the case to the Munsif for trial on the merits. The defendant appealed.

Babu Sital Prasad Ghosh, for the respondent, raised a preliminary objection to the hearing of the appeal to the effect that the appeal did not lie under section 104, sub-section (2), read with order XLIII, rule 1, of Act V of 1908. He further submitted that the appeal was prohibited by section 197, clause (3), of Act II of 1901 (The Agra Tenancy Act). He relied on *Badam Singh v. Musammatt Sabta Kuar* (1).

Mr. Muhammad Ishaq Khan, for the appellant, submitted that the order of remand in the present case was appealable under order XLIII, rule 1. Section 197 of the Agra Tenancy Act did not apply. He relied on *Ram Charan Ram v. Sheoraj*, (2).

STANLEY, C. J., and BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that having regard to the provisions of section 104 (2) of the Code of Civil Procedure, no appeal lies to this Court. The suit out of which this appeal has arisen was brought in the court of the Munsif. He was of opinion that it was not cognizable by him and accordingly made an order under order VII, rule 10, returning the plaint to be presented to the proper court. From this

* First Appeal No. 114 of 1910 from an order of Srish Chandra Basu, Subordinate Judge of Bareilly, dated the 5th of September, 1910.

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order an appeal was preferred to the District Judge under order XLIII, rule 1 (a). The learned Subordinate Judge to whose court the appeal was transferred, and who heard it, was of opinion that the suit was cognizable by the Munsif, and accordingly set aside the order of the Munsif and remanded the case to his court for trial on the merits.

Section 104 (2) provides that no appeal shall lie from an order passed in appeal under that section. The order appealed against is an order passed in appeal under that section, because clause 1 of the section allows an appeal from an order made under rules from which an appeal is expressly allowed by rules, and order XLIII, rule 1 (a) allows an appeal from an order made under rule 10 of order VII. As the lower appellate court made an order in an appeal from an order, as allowed by order XLIII, no further appeal lies from the order of the appellate court.

The learned counsel for the appellants, however, relies on clause (a) of rule 1, order XLIII, which allows an appeal from "an order under rule 23, order XII, remanding a case where an appeal would lie from an order of the appellate court." That clause only contemplates an appeal from an order of remand under clause 23 of order XII, and only in those cases in which if the appellate court had made a decree an appeal could have been preferred from such a decree. That is not the case here. Clause (a) of rule 1 provides for cases which under the former Code of Civil Procedure would have come under section 502, with this further addition that no appeal would lie from an order of remand in cases in which a decree of the appellate court would have been final. In other respects the Legislature in enacting the provisions of section 104 (2) does not appear to have altered the provisions of the old law. It seems to us to contemplate only one appeal from an order, and not two appeals, as is contended for on behalf of the appellant. In this view this appeal does not lie and must be dismissed.

Further, we are of opinion that, having regard to the provisions of section 197 of the Agra Tenancy Act, the appellant is not entitled to take any objection or raise any plea in respect of the order of remand made by the court below. If the suit had been brought in the Revenue Court, the court to which an appeal

from the decision of that court could have been preferred was the court of the District Judge, inasmuch as a question of jurisdiction was raised and decided. (See section 177 (b) of the Tenancy Act.) As the suit was filed in the court of the Munsif, an appeal from his order lay to the District Judge. Therefore, even if the view adopted in *Ram Charan Ram v. Sheoraj* (1) is correct, as to which we express no opinion, section 197 would apply to the present case, and no objection can be taken to the order of remand. It was, however, held in the case of *Badam Singh v. Musammatt Sabta Kuar* (2) that the court of the District Judge* being the court to which an appeal lay from the decision of the Munsif, the section applied. In either view, therefore, the appeal is not sustainable. We accordingly dismiss it with costs.

Appeal dismissed.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
MUHAMMAD AHMAD-ULLAH KHAN, (AUCTION-PURCHASER) v. AHMAD SAID KHAN (DECREE-HOLDER) AND RAFAT KHAN (JUDGEMENT-DEBTOR). *
Civil Procedure Code (1908,) schedule 1; order XXI, rule 89—Execution of decree—Sale in execution of simple money decree, the decree-holder holding also a decree upon a mortgage of the property sold—Application by decree-holder to have sale set aside.

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A decree-holder held two decrees against the same judgement-debtor, the one being a decree for sale on two mortgages, and the other a simple money decree. In execution of the latter decree the decree-holder caused part of the mortgaged property to be sold by auction, and it was purchased by a stranger.

Hold that the decree-holder was not competent to apply under order XXI, rule 89, of the Code of Civil Procedure, 1908, to get this sale set aside.

THIS was an appeal from an order setting aside an auction sale upon an application made under order XXI, rule 89, of the Code of Civil Procedure. The facts out of which the appeal arose were, briefly, as follows. The respondent, Ahmad Said Khan, obtained a decree against the judgement-debtor, Rafat Khan, on the 8th of October, 1909, for sale upon two mortgages. Subsequently, in November, 1909, he obtained another decree against the same judgement-debtor, but this was a simple decree for money. In execution of this latter decree he caused mauza Neali, one of the villages comprised in the mortgages upon which he had obtained the earlier decree, to be sold by

* First Appeal No. 276 of 1910 from a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 7th of May, 1910.

(1) (1906) 3 A. L. J., 226. (2) (1905) 2 A. L. J., 119.