

of the amount decreed and direct that the decree be drawn up in the terms of order XXXIV, rule 4, of the Code of Civil Procedure.

*Decree varied.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
AHMAD HUSAIN AND OTHERS (APPLICANTS) v. GOBIND KRISHNA  
NARAIN AND OTHERS (OPPOSITE PARTIES).\*

*Civil Procedure Code (1908), sections 105, 108, 109; order XXI, rule 23  
—Remand—Appeal—Privy Council.*

*Held that an order remanding a case to the lower appellate court passed by the High Court under order XXI, rule 23, of the Code of Civil Procedure, 1908, is not appealable to His Majesty in Council. Forbes v. Ameer-oon-nissa Begum (1), Mahant Ishwargar Budhgar v. Caudasama Amarsang, (2) Saiyid Muzhar Hossain v. Mussammi Bodha Bibi (3) and Radha Kishan v. The Collector of Jaunpur, (4) referred to.*

IN a suit for the recovery of possession of certain property the court of first instance held that the suit was barred by the provisions of section 43 of the Code of Civil Procedure, 1882, and dismissed it. There was then an appeal to the High Court. The High Court held that section 43 of the Code was not a bar to the suit, and accordingly remanded the case to the lower court for a decision on the merits. The present application was made for leave to appeal to the Privy Council against this order of remand.

*Dr. Tej Bahadur Sapru*, for the applicants.

The opposite parties were not represented.

STANLEY, C. J. and BANERJI J.:—This is an application for leave to appeal to His Majesty in Council. The suit out of which the case has arisen was brought by the plaintiffs for recovery of possession of certain property. It was held by the court of first instance that the suit was barred by the provisions of section 43 of the Code of Civil Procedure of 1882. But upon appeal to this Court the decree of the court below was set aside and the case was remanded to the court below on the ground that the suit was not concluded by section 43 of the former Code, and

\* Application for leave to appeal to the Privy Council, No. 35 of 1910.

(1) (1865) 10 Moo. I. A., 345. (3) (1894) I. L. R., 17 All., 112.  
(2) (1834) I. L. R., 8 Bom., 548. (4) (1900) I. L. R., 23 All., 220.

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GHULAM  
HAZRAT  
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GOBARDHAN  
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NARAIN.]

as the questions of fact had not been determined, the court below ought to re-admit the suit and decide it on the merits. From this order of remand the present application for leave to appeal to His Majesty in Council is made. We are of opinion that the application for leave to appeal is premature. The order of remand is not in our judgement a decree or final order within the meaning of section 109 of the present Code of Civil Procedure. In the case of *Forbes v. Amir-oon-nissa Begum* (1), their Lordships of the Privy Council treated an order of remand as an interlocutory order and held that no appeal lay on the ground that it did not purport to dispose of the cause. Again, in the case of *Mahant Ishwargur Budhgar v. Carulasama Amarsang* (2) the Bombay High Court also held that no appeal lay as a matter of right from an order of remand. Again, in the case of *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi* (3), their Lordships of the Privy Council in their judgement, in regard to the question whether or not it was the practice of this court to treat orders of remand as not final orders, observe that probably the practice referred to is quite correct. Again in the case of *Radha Kishan v. The Collector of Jaunpur* (4), in which this High Court passed an order under section 562 and remanded the case for disposal on the merits, on appeal their Lordships of the Privy Council observe of this order of remand that it is a purely interlocutory order directing procedure. In view of these decisions and of the language of section 109 of the Code of Civil Procedure, which refer to a decree or final order, we do not think that the present application is maintainable. The order which has been passed is an interlocutory order, and, as such, cannot be regarded as a decree or final order within the meaning of the section. It is contended on behalf of the proposed appellants by their learned advocate that section 105 of the Code gives the right of appeal in a case such as the present where an order of remand has been passed. That section, after providing for appeals in certain cases, prescribes in sub-section 2 that where any party aggrieved by an order of remand made after the commencement of the Code from which an appeal lies does not appeal therefrom, he shall thereafter

(1) (1865) 10 Moo. I. A., 545.

(3) (1894) I. L. R., 17 All., 112.

(2) (1884) I. L. R., 8 Bom., 548.

(4) (1900) I. L. R., 28 All., 220.

be precluded from disputing its correctness. This section would no doubt justify the application which has been made if it were applicable to Privy Council appeals, but in our judgement it is not applicable to Privy Council appeals. Such appeals are dealt with in section 109 and following sections. It is further, we think, manifest from the language of section 108 that section 105 does not apply to Privy Council appeals.

For these reasons we reject the application, but without costs as the respondents are not represented.

*Application rejected.*

1911

AHMAD  
HUSAIN  
v.  
GOBIND  
KRISHNA  
NARAIN.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
GANGA RAI AND OTHERS (DEFENDANTS) v. KIRTARATH RAI AND OTHERS  
(PLAINTIFFS).\*

1911  
January 20.

*Mortgage—Redemption—Right to redeem one of two properties separately mortgaged.*

Two persons mortgaged certain property in 1879. In 1883 one of the mortgagors executed a mortgage comprising in part property subject to the mortgage of 1879 and in part other property in favour of the same mortgagees. This latter mortgage contained a stipulation that the mortgagor would redeem it before redeeming the mortgage of 1879. Certain property comprised in the first mortgage, but not in the second, was sold, and the purchasers sued for redemption of that mortgage alone. *Held* that in the circumstances they were not precluded by the covenant in the second mortgage from redeeming the first.

On the 6th of May, 1879, two persons, Ram Lakhan and Ram Baran, executed a mortgage of certain property in favour of Bharose Rai, Ganga Rai and Mahpat Rai. This mortgage contained the usual covenant allowing the mortgagors to redeem on payment in the month of Jeth in any year. A portion of the property comprised in this mortgage was afterwards sold to Kirtarath Rai and others. In the year 1883 Ram Lakhan alone mortgaged certain property—partly property other than that comprised in the mortgage of 1879—to the same mortgagees. That mortgage contained the following covenant:—"First I (the mortgagor) shall pay this money, and then the money borrowed on the security of fields (i. e. the amount of the former mortgage)." The purchasers above referred to sued for redemption of

\*Second Appeal No. 797 of 14-10, from a decree of Sri Lal, District Judge of Ghazipur, dated the 20th of June, 1911, reversing a decree of Baij Nath Das, Subordinate Judge of Ghazipur, dated the 16th of December, 1909.