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any notice of the charge, or that there was anything to lead him to suspect that the flag was being sold subject to a continuing charge for an annuity. On the contrary Babu Ram's own action in allowing the *birt* and the books to be sold separately from the flag suggests that he intended that the flag, the *birt* and the books should all be sold free of the charge for the annuity, for the flag without the *birt* and the books will produce no income. For these reasons we are of opinion that the flag held by the appellant was sold to him free of the charge for the annuity and that the respondent Babu Ram is estopped from contending the contrary. We allow the appeal and dismiss the suit as against the appellant with costs throughout.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

SHEO HARAKH (PLAINTIFF) v. RAM CHANDRA (DEFENDANT). *

Act No XII of 1887 (Bengal, N.-W. P. and Assam Civil Courts Act), sections 21 and 22—Notification by the High Court authorizing appeals from Munsifs to be "preferred to" Subordinate Judges—Jurisdiction.

Held that where the High Court in the exercise of powers conferred upon it by section 21 (4) of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887, issued a notification that appeals from the decrees of any particular Munsif should be "preferred to" the court of Subordinate Judge named or designated therein, the Subordinate Judge in question had power not merely to receive such appeals but also to hear and decide them. *Sohan Lal v. Baldeo Pershad* (1) approved.

The facts of this case appear from the following order of reference to a Division Bench :—

"SUNDAR LAL, J.—This application for revision raises a very important question of law. The plaintiff in this case filed a suit in the court of the Munsif of Mirzapur who on the 21st of July, 1913, decreed the claim. The defendant preferred an appeal against the said decree to the court of the Subordinate Judge of Mirzapur on the 30th of August, 1913. The learned Subordinate Judge proceeded to hear the case and on the 21st of November, 1913, decreed the appeal, dismissing the plaintiff's claim. Mr. *Shiva Dayal Singh* has filed this application for revision against the said decree, and the point that he has taken and pressed in revision is that the learned Subordinate Judge, in the absence of an order of the District Judge transferring the appeal to him for disposal, had no jurisdiction to hear the appeal. Under section 21 of the Bengal Civil Courts Act, appeals from decrees

* Civil Revision No. 84 of 1914.

(1) (1903) 7 O. C., 321.

of Munsifs lie to the District Judge. Under clause (4) of that section the High Court may, with the previous sanction of the Local Government, direct by notification in the Official Gazette, that appeals lying to the District Judge under sub-section 2 from all or any of the decrees or orders of any Munsif shall be preferred to the court of such Subordinate Judge as may be mentioned in the notification, and the appeals shall thereupon be preferred accordingly." In this case, on the 25th of April, 1913, the High Court, with the sanction of Local Government, had notified that appeals from decrees of the Munsif of Mirzapur were to be preferred to the Subordinate Judge of that district. Mr. *Shiva Dayal Singh* has argued that that notification only enabled the Subordinate Judge to receive the appeals and did not give him any authority to hear the appeals in the absence of an order under section 22 of the same Act. The question, no doubt, is not free from difficulty. But in my opinion when right to prefer an appeal to the Subordinate Judge is given, and the Subordinate Judge is thus made the appellate court : it is to him that the appeal is to be preferred, and he is invested with full powers to hear and dispose of the appeals. In these provinces many years ago the District of Jaunpur, as it is now, was part of the Benares district, and a Subordinate Judge used to be posted to hear cases at Jaunpur. Under a similar section which existed in Act VI of 1871, the Subordinate Judge of Mirzapur, being similarly empowered, used to hear and dispose of all appeals without any order of transfer. On the creation of a District Judgeship at Jaunpur there was no further occasion in the N.-W. Provinces to use the provisions of this section. Similar provisions exist in the Punjab Civil Courts Act and in the Oudh Civil Courts Act as well, and I am informed that without orders of transfer under section 22 or the corresponding sections, cases are heard and disposed of by Subordinate Judges empowered under clause (4) of section 21 of the Act. The question is, however, one of considerable importance in view of the fact that in many districts in these provinces there are now Subordinate Judges empowered to receive appeals preferred to them. I, therefore, refer this case to a Bench of two Judges."

Munshi *Sheo Dayal Sinha* for the applicant :—

Under clause (2) of section 21 of the Bengal Civil Courts Act, appeals from decrees of Munsifs lie to the District Judge. By virtue of the notification issued under section 21 (4) the appeal could only be preferred or filed in the court of the Subordinate Judge. There is no provision by virtue of which it could be disposed of by the Subordinate Judge. From clause (3) of the section it would appear that "preferred to" means nothing more than "be received by." It does not necessarily connote the power to decide the appeal. In the absence of any express provision conferring jurisdiction upon the Subordinate Judge to decide the appeal it must be taken that he had no such jurisdiction.

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Pandit *Uma Shankar Bajpai* (for *Munshi Newal Kishore*),
for the opposite party:—

If the applicant's interpretation of the word "preferred" be correct, then the result will be that an appeal which is preferred to a Subordinate Judge will rest undecided in his court for ever; for it can neither be disposed of by him nor can it be transferred to another court. Because under section 22 a District Judge can transfer to a Subordinate Judge only those appeals which are pending before the former. If the very limited interpretation which is sought to be put by the applicant be held correct then it can equally well be said that section 21 does nowhere distinctly say that the District Judge is to decide the appeals filed in his court. The obvious intention is that the appeals are to be decided by the courts to which they are preferred. The similar section 18 (3) of the Oudh Civil Courts Act has been so interpreted.

CHAMIER J.—This application for revision raises a curious question upon which, so far as we are aware, there has not been any decision of this Court. The plaintiff in this case filed a suit in the court of the Munsif of Mirzapur who in July, 1913, decreed the claim. The defendant preferred an appeal against the Munsif's decree to the court of the Subordinate Judge of Mirzapur. The Subordinate Judge proceeded to hear the appeal and in November, 1913, allowed it and dismissed the plaintiff's suit. This is an application for revision of the order of the Subordinate Judge on the ground that the Subordinate Judge, in the absence of an order of District Judge transferring the appeal to him for disposal, had no jurisdiction to hear it.

Under section 21 of the Bengal Civil Courts Act appeals from decrees of Munsifs lie to the District Judge; but under sub-section (4) of that section the High Court may, with the previous sanction of the Local Government, direct by notification in the Official Gazette that appeals lying to the District Judge under sub-section (2) from all or any of the decrees or orders of any Munsif shall be preferred to the court of such Subordinate Judge as may be mentioned in the notification and the appeals shall thereupon be preferred accordingly. It appears that on the 25th of April, 1913, the High Court with the sanction of the Local Government directed by notification in the Official Gazette that appeals

from the decrees of the Munsif of Mirzapur should be preferred to the Subordinate Judge of that district. On behalf of the applicant it is contended that the notification enabled the Subordinate Judge to receive such appeals, but did not give him any authority to hear them in the absence of an order under section 22 of the same Act. Section 22 is the section which empowers a District Judge to transfer to any Subordinate Judge under his administrative control any appeals pending before him from decrees or orders of a Munsif. According to the argument presented on behalf of the applicant, an appeal, which has been preferred under a notification issued under sub-section (4) of section 21 of the Act, is pending before the District Judge and therefore, may be transferred by him to any Subordinate Judge under section 22 of the Act. Speaking for myself I cannot accept this contention. It appears to me that after an appeal has been preferred to the court of the Subordinate Judge it is pending in that court, and I find much greater difficulty in holding that section 22 enables the District Judge to transfer such an appeal pending before himself, than in holding that the Legislature intended that an appeal preferred to a Subordinate Judge under such notification should be disposed of by him. An exactly similar question arose in Oudh in 1903. In the Oudh Civil Courts Act, (XIII of 1879) there is a provision similar to section 21, sub-section (4) of the Bengal Civil Courts Act. Under section 18, sub-section (3), of the Oudh Act, the Judicial Commissioner may from time to time with the previous sanction of the Local Government direct by notification in the Official Gazette that appeals from all or any of the decrees or orders of any Munsif shall be preferred to such Subordinate Judge as may be mentioned in the notification and the appeals shall thereupon be preferred accordingly. It will be noticed, that there is a slight difference between the language of the Oudh section and the language of section 21 of the Bengal Civil Courts Act, and it has long been the practice in Oudh to insert in the notification under section 18, sub-section (3), the name of the Subordinate Judge to whom the appeals are to be preferred. Whether this was necessary or not may be open to doubt; but the difference between the language of the two sections does not affect the question which we have to decide in

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this case. In the case of *Sohan Lal v. Baldeo Pershad* (1) the late Mr. Scott and I held that a Subordinate Judge to whom appeals are preferred under a notification issued under section 18, sub-section (3), of the Oudh Act has jurisdiction to dispose of them. I am of the same opinion still. Hundreds, if not thousands, of appeals have been disposed of by Subordinate Judges in Oudh from the year 1878 up to the year 1903 on the assumption that they had jurisdiction to dispose of them, and since 1903 on the strength of the ruling to which I have referred. I have no doubt that the appeal in the present case was rightly disposed of by the Subordinate Judge and I would dismiss this application with costs.

PIGGOTT, J.—I concur both in the order proposed by my learned colleague and generally in the reasoning on which it is based. The only substantial argument in support of this application seems to be that there is nothing in section 21 of the Bengal Civil Courts Act which expressly lays it down that a Subordinate Judge to whom an appeal has been preferred under sub-section 4 of that section is to hear and to dispose of the same. To this it seems to me almost sufficient to reply that neither does the Act in question contain any provision that a District Judge, to whom an appeal from a decree or order of a Munsif lies, under sub-section (2), of section 21, shall proceed to hear and dispose of the same. I turn to the Code of Civil Procedure to ascertain what a Court has to do to which an appeal has been preferred, and I find under rule 9 of order XLI that certain endorsements are to be made on the memorandum of appeal and the appeal is to be registered. Then power is conferred on the appellate court to dismiss the appeal, if it thinks proper to do so, without sending notice to the court from whose decree the appeal was preferred and without serving notice on the respondent. After this follow rules laying down the procedure to be followed when a day is fixed to hear the appeal and notice of the same is issued to the respondent. It is presumed throughout that the court to which an appeal has been preferred shall do each and all of these things. The question before us in the present case, narrowed down to its ultimate limits, is, what should the Subordinate Judge of Mirzapur

(1) (1908) 7 O. C., 321.

have done when this appeal was preferred to him? What he has actually done, is to follow the procedure laid down in order XLI of the Code of Civil Procedure and eventually to dispose of the appeal. The applicant's contention is that he should either have submitted the memorandum of appeal to the District Judge of Allahabad for an order of transfer, or have referred the matter to the said District Judge for the same purpose. There is certainly nothing in Act No. XII of 1887 which authorizes a Subordinate Judge to do anything of this sort, and I concur without hesitation in the opinion expressed by my learned colleague that it would be a severe straining of the language used to say that this appeal, when it had been preferred to the court of the Subordinate Judge of Mirzapur, was *ipso facto* pending before the District Judge of Allahabad. It seems to me altogether simpler to hold that the Legislature in drawing up the Civil Courts Act presumed that a court to which an appeal was lawfully preferred would, in the absence of any order of transfer from a superior court, proceed to hear and dispose of the same.

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Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Chamber and Mr. Justice Piggott.

RUPAN SINGH (DEFENDANT) v. CHAMPA LAL (PLAINTIFF) AND
MUSAMMAT BAGESRA AND OTHERS (DEFENDANTS).*

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November, 19.

Act No. IV of 1882 (Transfer of Property Act), section 72—Mortgage—Right of mortgagee in possession to charge for repairs and additions to the mortgaged property.

During the subsistence of a mortgage of a house, the mortgagee being in possession, a portion of the house, consisting of a *kachcha* room, fell down. The mortgagee replaced this at a cost of Rs. 147-6, making it *pacca*. But he then proceeded to add without the consent of the mortgagor an upper storey at a cost of Rs. 113 and a stair-case costing Rs. 46-8-6, and, on suit by the mortgagor for redemption, he claimed a right to add the various sums so spent to the principal mortgage money, which was Rs. 400.

Held, that the mortgagee's claim could only be allowed in so far as it fell within the terms of section 72 of the Transfer of Property Act, 1882, and it was allowed as to the first item, but not as to the upper storey or the stair-case.

* Second Appeal No. 1022 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 6th of May, 1913, modifying a decree of Kali Das Banerji, Munsif of Benares, dated the 3rd of July, 1912.