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decree, in the event of his being driven to obtain one. Something more than this is required before it can fairly be said that the executant of the document, either expressly or impliedly, conferred on the mortgagee a right to cause this particular property to be sold. I would therefore also agree in dismissing the appeal.

BY THE COURT :—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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December, 11.

DHANDEI KUNWAR (PLAINTIFF) *v.* CHOTU LAL (DEFENDANT)*

Civil Procedure Code (1908), *section* 115—*Act* (*Local*) *No. II of* 1901 (*Agra Tenancy Act*), *section* 202—*Suit relating to an agricultural holding—Order adjourning suit indefinitely—Revision—Powers of High Court—Statute* 5 *and* 6 *Geo.* v. *Cap. LXI, section* 107.

Plaintiff brought a suit in a civil court alleging that the defendant's father had been a lessee of certain property for 7 years ; that after the expiry of the lease he became manager of the property, and after his death the defendant also became manager. He pleaded that the defendant had been dismissed from his position as manager, and asked for possession of the property, which comprised shares in 26 villages, a market and some collection houses. The defendant pleaded that he was a "thekadar" within the meaning of the Tenancy Act, and filed an application praying the court to exercise its jurisdiction under section 202 of that Act. The court acceded to this prayer and adjourned the suit to an indefinite period till the question was decided by the Revenue Court. The plaintiff applied in revision against the order.

Held, (*Per* PIGGOTT, J.) that the revision was incompetent as it was directed against an interlocutory order and a remedy by way of appeal was open to the plaintiff wherein all matters could be decided; (*Per* WALSH, J.) that a revision lay to the High Court.

THE property in suit was an estate comprising 26 villages, including agricultural land, a market and some collection houses. The plaintiff alleged that a lease of this property for seven years had at one time been granted by her deceased husband to the defendant's father; that after the expiry of the lease the defendant's father was appointed manager of the property ; that the defendant, after the death of his father, was appointed manager and remained as such for some time ; and that the defendant had now

* Civil Revision No. 72 of 1916.

been dismissed and his agency had ceased, but that he did not give up possession of the property. Upon these allegations the plaintiff brought a suit in the court of the Subordinate Judge of Jaunpur for possession by ejectment of the defendant and for accounts. The defence, *inter alia*, raised the plea that the defendant held the property as the "thekadar" or lessee of the plaintiff and that the relation between the parties was that of landlord and tenant. The defendant made an application to the court asking it to adopt the procedure laid down by section 202, clause (1), of the Tenancy Act and to postpone the further hearing of the suit pending a decision of the question by the Revenue Court. This application was strongly opposed by the plaintiff who filed a formal reply. The court passed an order granting the application and adjourned the hearing of the suit until the question of tenancy should be decided by the Revenue Court. The plaintiff thereupon made an application to the High Court, purporting to be under section 107 of 5 and 6 Geo. V, Ch. 61 (The Government of India Act, 1915), to revise the order of the lower court.

Dr. *S. M. Sulaiman*, (with him Mr. *M. L. Agarwala*), for the opposite party (defendant), raised a preliminary objection, that no revision lay against the order of the lower court, as it was only an interlocutory order, no "case" having yet been decided, and an appeal lying against the decree which might ultimately be passed by the court, in which appeal the correctness of the order now sought to be revised could be challenged; *Mul Chand* v. *Juggi Lal* (1), *Muhammad Ayub* v. *Muhammad Mahmud* (2), *Nand Ram* v. *Bhopal Singh* (3).

The Hon'ble Sir *Sundar Lal*, (with him Pandit *Radha Kant Malaviya*), for the applicant:—

Apart from section 115, Civil Procedure Code, to which the preliminary objection raised and the rulings cited relate, there is another provision of the law, namely, section 107 of 5 and 6 Geo. V, Ch. 61, The Government of India Act 1915, upon which this application is based; the applicant is entitled to claim relief under either of these provisions. The suit as brought was not one relating to an "agricultural holding." It was a suit for recovery

(1) (1914) 12 A. L. J., 406. (2) (1910) I. L. R., 32 All., 623.
(3) (1912) I. L. R., 34 All., 592.

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of possession from, and for rendition of accounts by, an agent who had been entrusted by the plaintiff with the management of an estate, but whose services had now been dispensed with and whose possession was that of a trespasser. *Primâ facie* the court having jurisdiction to try the suit was the Civil Court. The defendant pleaded that he held the villages as the thekadar of the plaintiff and sought the application of section 202 of the Tenancy Act. But the mere fact, if it be a fact, that he was a thekadar is not sufficient to make the provisions of section 202 applicable to the suit; for the first requirement of that section is that the suit must be one relating to an "agricultural holding," and the *onus* lay on the defendant of satisfying the Court that the suit was such. The question had to be determined whether the defendant's interest as a thekadar was that of the holder of an "agricultural holding" as the term is understood in the Tenancy Act. The defendant did not state that the villages had been let to him for agriculturul purposes, that is, for purposes of cultivation and raising of crops; on the other hand, his position was, *primâ facie*, that of a farmer or collector of rents; besides, there were certain items of property, namely houses and markets, comprised in the alleged holding which could not have been let for purposes of cultivation. The lower court, without taking this question into consideration or taking any evidence to determine the facts necessary for ascertaining that which formed the first requisite for the applicability of section 202, has virtually denied itself jurisdiction to try the suit and has adjourned the hearing thereof for an indefinitely long period. Hence the plaintiff seeks relief which may be granted either under the general powers of superintendence vested in this Court by section 107 of 5 and 6 Geo. V, Ch., 61, or under section 115 of the Code of Civil Procedure. Under the former, the powers of the High Court are not merely administrative; it is competent to interfere, and to order a subordinate court to do its duty, in cases where such court has refused to exercise jurisdiction vested in it by law, namely, to try and determine a suit cognizable by it; *Muhammad Suleman Khan* v. *Fatima* (1), which was a case under the corresponding section 15 of 24 and 25 Vic., Ch. 104, The

(1) (1886) I. L. R., 9 All., 104.

Indian High Courts Act of 1861. To take an illustrative case. A subordinate court may capriciously decline to try a suit and pass an order postponing it for a hundred years or other indefinitely long period; the remedy against such an order is furnished by section 107 aforesaid. The difference between such a case and what has practically resulted in the present case is a difference only in degree, and the present case is a fit one for the exercise of the powers under section 107. Either the order of the lower court should be cancelled, or that court be directed to make an inquiry and come to a conclusion as to whether the suit is or is not one relating to an agricultural holding. In the alternative, the court may interfere under section 115 of the Code of Civil Procedure. With regard to the objection that no 'case' has been decided, the word 'case' has not been defined by the Code. It is not synonymous with 'suit' and includes proceedings other than those which terminate in a decree. The Calcutta and Bombay Courts have put a wide and liberal construction upon the word so as to include interlocutory orders; *Charu Chunder Dutt* v. *Sarat Chunder Singh* (1), *Promotha Nath Mitra* v. *Rakhal Das Addy* (2), *Dwarka Nath Sen* v. *Kishori Lal Gosain* (3). In the present case the order complained of was passed upon a separate application by the defendant to which the plaintiff filed a separate reply; these proceedings were apart and distinct from the suit itself and constituted a 'case' within the meaning of section 115.

It has not been held that the High Court has no power to entertain a revision from an interlocutory order, but only that it is a matter of discretion. Interlocutory orders are not usually interfered with in revision for the reason that the party aggrieved has, in appeal from the decree which is ultimately passed, usually a prompt and adequate remedy. But the fact that the aggrieved party has another possible remedy open to him does not take away or limit the power of the Court to interfere in revision, although it may influence the discretion of the Court to do so or not. Revisions have been entertained in such cases; for example, in the case of *Debi Das* v. *Ejaz Husain* (4). It was there laid down that each such case must be judged upon the circumstances

(1) (1916) 12 C. L. J., 537.
(2) (1910) 11 C. L. J., 420.
(3) (1910) 11 C. L. J., 426.
(4) (1905) I. L. R., 28 All., 72.

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peculiar to it. In the present case it would be very inconvenient, expensive and wasteful of time if the wrong order is not corrected now and the plaintiff is left to appeal from the decree which will ultimately be passed by the lower court, for the purpose of attacking and getting set aside the order in pursuance of which a litigation will have been launched and fought out in vain in the Revenue Courts, possibly up to the Board.

Dr. *S. M. Sulaiman*, (with him Mr. *M. L. Agarwala*), for the opposite party :—

The order of the lower court, applying the provisions of section 202 of the Tenancy Act to the suit, is correct. Whatever the character in which a suit is made to appear and however it may be framed, if it relates to an agricultural holding, or, in other words, if the subject matter of the suit is an agricultural holding and the defendant pleads, rightly or wrongly, that he holds the land in dispute as the plaintiff's tenant, the Civil Court has no option but to adopt the procedure laid down by section 202. Even where the matter had already been once decided between the parties by the Revenue Court in a previous litigation it was held that the Civil Court was bound to follow section 202 ; *Kura Singh* v. *Chhallu* (1). Here, the defendant says that he is the thekadar of the plaintiff. A thekadar is expressly included in the term 'tenant' by section 4, clause (5), of the Tenancy Act ; and a thekadar includes a farmer : section 4, clause (6). Then the question is, whether the property in suit is an 'agricultural holding' within the meaning of the Tenancy Act. 'Agricultural holding' means nothing more than agricultural land held under one lease or engagement. The word 'agricultural' is really superfluous here ; for, the word 'holding,' as defined, itself means land let or held for agricultural purposes. The interest which a thekadar has in the agricultural lands comprised within his *theka* or lease is obviously a 'holding' within the meaning of the Tenancy Act. To hold the contrary would lead to absurdities ; for instance, it would lead to the result that a thekadar could never be ejected. For, as provided by section 56 of the Tenancy Act, he, being a tenant, can be ejected only under that Act ; and sections 57 and 58, which

(1) (1911) I. L. R., 33 All., 507.

enumerate the grounds upon which a tenant can be ejected speak of a tenant's ejectment *from his holding*; so that if a thekadar had no 'holding' he could not be ejected at all. That the interest of a tenant is his 'holding' is also apparent from the wording of section 21. There is no reason why the interest of a thekadar should not constitute a 'holding'; for, as implied by section 20, clause (2), and section 22, a thekadar is a non-occupancy tenant. He was expressly held to be such, and the word 'tenant' in section 24 which allows a tenant to sub-let his 'holding' was held to include a thekadar, in the case of *Natha* v. *Mian Khan* (1). It was pointed out in that case that section 23 dealt with leases granted by a thekadar to the actual cultivators, whereas section 24 allowed him to grant a sub-lease of his 'holding' or interest, for one year. Again, section 53, clause (*b*), speaks of the 'holding of a thekadar.' It follows from all these considerations that if the defendant is the plaintiff's thekadar, the suit is one relating to a 'holding' within the meaning of the Tenancy Act; and, as 'agricultural holding' connotes nothing more than a 'holding,' the suit is one relating to an agricultural holding within the meaning of section 202. It was not necessary for the lower court to take any evidence in order to enable it to arrive at this conclusion; and the court did listen to both parties and did consider the matter before passing its order. The order is quite correct. Then, as to the objection based on the fact that a market and some houses are comprised in the *theka* besides agricultural lands, the market is for the use of tenants in connection with their agricultural occupation and the houses are collection houses where the zamindar or thekadar makes collection of rents. These items of property are appurtenances of the agricultural villages comprised in the *theka*. They have from time to time been built upon what was agricultural land. It has been held that where land was originally let or held for agricultural purposes the mere fact that agriculture has ceased on a portion of it does not alter the character of the holding. It has been held that the village *abadi* can form part of an agricultural holding. And it is not essential for purposes of section 202, that all the properties comprised in a *theka* must be agricultural land as

(1) (1909) 6 A. L. J., 649.

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defined in the Act. If a single indivisible lease comprises some agricultural lands, and some other property to which the Tenancy Act does not apply, for example a house in the city of Allahabad, and a suit in respect of the lease is instituted in the Civil Court, section 202 will apply to such a suit *qua* the portion of the property which consists of agricultural lands; and the lessee would be a 'tenant,' within the meaning of that Act, of that portion. Reliance was placed on the analogy of the ruling in *Antu* v. *Gulam Muhammad Khan* (1). Even if it were assumed that the lower court's order was wrong in law, it was not within the province of section 107 of the Government of India Act of 1915 to interfere with it. Nor can the order be revised under section 115 of the Code of Civil Procedure. The case of *Debi Das* v. *Ejaz Husain* (2) cited by the applicant is distinguishable. There, the other remedy was by way of a separate suit; here it is by way of an appeal from the decree which will be passed in the present suit. As directed by the lower court a suit has already been filed by the defendant in the Revenue Court and is pending there. Nothing will prevent that court from proceeding with it and the decision will be binding; so that if this Court were to cancel the lower court's order, further difficulties and complications would arise; *Shiam Lal* v. *Anant Ram*, (3).

The Hon'ble Sir *Sundar Lal*, in reply :—

To constitute a 'holding' the land comprised therein must be let or held for agricultural purpeses. That is the test. The term '*agricultural holding*' emphasizes this point, namely, that the land must be let to, or held by the 'holder' for agricutural purposes. 'Agricultural purpose' has not been defined by the Tenancy Act; it has been interpreted to mean the tilling and cultivation of land for the purposes of raising crops; *Mohib Ali* v. *Surat Singh*, (4) and purposes of grazing or of planting a grove have, accordingly, been held not to be agricultural purposes within the meaning of the Act; *Natha Mal* v. *Roshan Lall* (5), *Habibullah* v. *Kalyan Das* (6). In the case of a thekadar the land is not let to, or held by him for the object of tilling and

(1) (1883) I. L. R., 6 All. 110.
(2) (1905) I. L. R., 28 All., 72.
(3) (1912) 17 Indian Cases, 302.
(4) (1912) 15 Indian Cases, 743.
(5) (1915) 30 Indian Cases, 48.
(6) (1914) 12 A. L. J., 1080.

cultivating it; he merely collects the rents. The purpose of a *theka* is 'not an 'agricultural purpose' and his holding is not an 'agricultural holding.' Having regard to the definitions of the terms 'rent' and 'tenant,' a thekadar may be a 'tenant' and he may pay 'rent'; but it is a different matter altogether to say that he has an 'agricultural holding'. The letting of houses and markets is certainly not a letting for agricultural purposes. A 'holding' being the land held under a single lease or engagement, the 'purpose' of the lease must be a common purpose applicable to all the property comprised in the lease; the lease cannot be split up into portions; different kinds of property let for different purposes cannot be rolled together to form one 'agricultural holding'.

PIGGOTT, J.—I have arrived, though not without hesitation, at the conclusion that we ought not to interfere in this matter. The application is one moving this Court to interfere, in the exercise of its revisional jurisdiction, with an order passed by the Subordinate Judge of Jaunpur, who has applied the provisions of section 202 of the Tenancy Act (Local Act II of 1901), to the facts of a certain suit pending before him. The application, as drafted, purports to be under section 107 of the Government of India Act of 1915, which reproduces section 15 of the former High Courts Act. We allowed the applicant, nevertheless, to argue his case on the assumption that he was entitled to claim relief either under this section or, in the alternative, under section 115 of the Code of Civil Procedure (Act V of 1908). As I concurred in permitting the argument to proceed on these lines, I do not feel justified in pressing the point now; but it must be clearly understood that I am not committed to the view that it is desirable to allow an application to secure admission under one section in order that it may be argued under a different one.

I am considerably impressed by the ingenuity of the attempt to invoke the general powers of superintendence vested in this Court in connection with the present matter. Quite a plausible case can be made out for doing so. After all, the operative portion of the order complained of is simply that the suit pending in the court below do stand adjourned to some uncertain future date. It was put to us, with considerable force, that a capricious

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or perverse order of adjournment for an indefinite or very lengthy period might amount to a practical refusal to try the suit in which such order was made. If and when such a case arises, I have no doubt this Court will find appropriate means for dealing with it. The present is not such a case: the learned Subordinate Judge has passed his order of adjournment, because he holds himself bound to do so by the provisions of section 202 of the Tenancy Act. He has arrived at this conclusion after a fair and judicial consideration of the pleadings of the parties and of the arguments addressed to him. On the principles laid down by the Full Bench of this Court in *Muhammad Suleman Khan* v. *Fatima* (1), the powers of superintendence of this Court do not warrant interference in a case like this.

I find, however, even more difficulty about applying the provisions of section 115 of the Code of Civil Procedure to the facts before us. Before doing this I should have to hold that the order complained of was one which decided a case, and a case in which no appeal lies. I do not think either of these conditions is fulfilled. As I have alrady pointed out, the present effect of the order of the court below is simply that the hearing of the suit in question stands adjourned. At some future date the learned Subordinate Judge may proceed to determine one or more of the issues arising in the suit in accordance with the decision of the Revenue Courts in another suit between the same parties which, we are informed, has been instituted and is pending. When he does this, and if his decision is adverse to the plaintiff, the latter will have a prompt remedy available by way of appeal from the decree. To such an appeal the provisions of section 105 of the Code of Civil Procedure would apply, so as to enable the plaintiff to obtain from this Court an authoritative decision of the question of law involved. I do not deny the force of the arguments from convenience which have been addressed to us; but to my mind the hearing of this application has also illustrated the grave practical inconveniences involved in asking this Court to determine an intricate question of law otherwise than on a regular appeal. At any rate, it did not seem to me that a single argument was addressed to us in support of the

(1) (1886) I. L. R., 9 All., 104.

admissibility of this application which could not have been urged with greater force by the unsuccessful applicant in *Muhammad Ayab* v. *Muhammad Mahmud* (1). I find nothing to the contrary in the case of *Debi Das* v. *Ejaz Husain* (2), relied upon by the applicant. The question there was as to a possible remedy available by way of a separate suit; there seems a broad distinction between this and the question of an available remedy by way of appeal, for the objection to interference in the latter class of cases is based on the wording of section 115 of the Civil Procedure Code itself. Apart from the view which I am myself disposed to take of the provisions of this section in relation to the facts before us, I feel that we should be departing from the established practice of this Court and setting a new precedent if we allowed the present application.

Taking this view, I feel that it is not desirable that I should express a final opinion on the question of law involved in this application. On one or two points which were argued before us with great keenness I have formed clear and positive opinions, and these I think it on the whole desirable to place on record. The interest of a thekadar in any agricultural land included in his lease is a 'holding' and the thekadar is a non-occupancy 'tenant' of the same, within the meaning of these terms as employed in the Tenancy Act. I think this follows inevitably from the definitions themselves and from the wording of other sections of the Act, particularly section 53; it has also been affirmed by a Bench of this Court in *Natha* v. *Mian Khan* (3). Nor does it appear to me that the position of the thekadar would be affected if he obtained possession, under one and the same contract of lease, of some agricultural land and of other immovable property not falling within the definition of 'land' given in section 4 of the Tenancy Act. He would, to my thinking, become a 'tenant' of so much of the property concerned as was 'land' within the meaning of the Tenancy Act, and that 'land' would be his 'holding.' Again, it does not seem to me possible to read the opening words of section 202 of the Tenancy Act as if they were limited to suits instituted in a

(1) (1910) I L. R., 32 All., 623. (2) (1906) I. L. R., 28 All., 72.

(3) (1909) 6 A. L. J., 649.

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Civil Court 'relating to an agricultural holding' and to nothing else. The words used are wide and general, and I do not feel justified in limiting their application. I conceive that if a suit be instituted in a Civil Court, part of which relates to an agricultural holding and part to other matters, the provisions of section 202 of the Tenancy Act must be applied to so much of the suit as does relate to the agricultural holding. Otherwise an unscrupulous plaintiff would find it easy to nullify the provisions of the section altogether. Finally, I can see no good reasons for taking the words 'an agricultural holding', as used in this section, out of the general principle that words used in the singular number involve the plural. I think the section applies equally to suits 'relating to' a single agricultural holding and to a number of agricultural holdings. The case against the present applicant may therefore be stated thus :—"According to the plaintiff, the suit was one relating to a large number of agricultural holdings scattered over twenty-seven villages, and to a few items of property which were not agricultural holdings at all: according to the defendant, it was a suit relating to a single agricultural holding. The court below was therefore justified in assuming that the provisions of section 202 of the Tenancy Act did apply to the suit, provided only that the defendant's pleading satisfied the requirements of the latter part of the section. This it admittedly did." To this line of argument I can see only one answer, namely, that the 'holding' of a thekadar can never be an 'agricultural holding,' and that the word 'agricultural' was inserted in the section with the express object of excluding thekadars from its operation. On this point I prefer to reserve my opinion.

It is enough for me that the order complained of proceeds upon a fair judicial decision on a difficult question of law, that it does not seem to me to decide any case and that the decision itself is one which is open to re-consideration on a regular appeal. I would therefore dismiss this application. Although I think the plaintiff was wrong in making it, yet upon consideration of the pleadings in the suit and the circumstances of the case as a whole, I think it would be reasonable to leave the costs of this application to be costs in the cause, and I would order accordingly.

WALSH, J.—I regret my inability to agree with the order of my brother PIGGOTT in this case. As the differences between us are fundamental, I will state my chief reasons as shortly as I can. I find it impossible to hold after an examination of the plaint that this suit is one instituted 'relating to an agricultural holding.' It is an action against a discharged servant for the delivery of the property entrusted to him and for an account. The defence sets up a tenancy. That does not alter the nature of the suit. If the defence succeeds in its entirety, the suit fails. The suit does not change its character. It follows in my opinion that the suit is not within section 202 of the Agra Tenancy Act at all, and that the court had no jurisdiction to make the order complained of.

The next question is whether the order is one which this Court has jurisdiction to revise under section 115 of the Code of Civil Procedure. I think it is. It was an order made in response to a petition to which the plaintiff filed a formal answer, and which the court decided in a long and careful judgement. I think this was a 'case' as distinguished from a 'suit.' But it is admitted in any event to have been an 'interlocutory order.' Although there are cases where this High Court has refused to interfere in revision with an interlocutory order, it has never been decided that it has no jurisdiction to do so. On the contrary, there is a long series of authorities, cited in Mr. Agarwala's book, in the Calcutta High Court from 1907 down to 1916, that there is jurisdiction. I agree with that view which can not be better expressed than Mr. Justice MUKERJI puts it in the case roported in Indian Cases, Vol. VIII, page 87. The passage I am going to cite is to be found at page 90 of the Report and runs thus:—"The learned vakil has contended that the order now assailed is an interlocutory order and that, consequently, the Court is powerless to set matters right, though fully satisfied that the order is wholly unjust and erroneous. We do not feel pressed by this argument, which is invariably the last resort of a litigant when convinced that the order he has obtained from the court below is contrary to law and cannot be defended on the merits." He then cites several authorities and finally sums up by saying that "they show that it is within the

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powers of this Court to interfere with interlocutory orders if the Court is satisfied that such interference is needed in the interest of justice." This really in my view is sufficient to dispose of the respondent's argument.

But there is in my view another fatal objection to the order of the court below. It is admitted that the property in the schedule to the plaint is not wholly held for agricultural purposes. I have already pointed out that, according to my reading of the plaint, the suit does not relate to an agricultural holding as such, and that it was a mere accident that the property claimed is largely agricultural. But I am unable to accept the contention that the court, on a plaint which includes non-agricultural property, should, by a sort of legal fiction, treat a part of the holding as a holding in itself, in order to apply a section which is otherwise inapplicable. In my view, the defendant, having regard to the plaint, had to show that this was a suit which related to a holding of land held for agricultural purposes only, and he has entirely failed to do so.

Whether this Court will interfere in revision with an interlocutory matter appears to me, as Mr. Justice KNOX has said, to be merely a matter of discretion to be decided on the facts peculiar to the case. It is said that it ought not to do so, where there is a remedy available by way of an appeal. There are at least two instances, namely, in I. L. R., 18 All., page 163, and in I. L. R., 28 All., page 72, where this Court has done so, although another remedy was available. The case reported in I. L. R., 34 All., page 592, was much relied upon by Dr. *Sulaiman*, who argued this case extremely well, as an authority to the contrary. It is not, in my opinion, an authority for any thing. The head-note sets out only the opinion of Mr. Justice KARAMAT HUSAIN. Mr. Justice KNOX merely agreed with the order in that case because he said that "sufficient ground had not been shown for interference." But that case, in my opinion, has no bearing on the present application. In that case there was an order setting aside an *ex parte* decree and ordering a re-trial. The applicant in revision, after a second trial and after a decree had been passed against him in the second trial from which he did not appeal, applied for revision of the earlier order setting aside the

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first decree. That is to say, he waited until he lost the case, and then applied for the revision of the order which ordered the case to be tried over again. He clearly had no merits of any kind. The Court rightly refused his application, and the reasons given by Mr. Justice KARAMAT HUSAIN are, in my opinion, mere *obiter dicta* and were unnecessary for the decision of the case.

Whether this case is one in which the Court ought to exercise its discretion in favour of the applicant is a question which necessarily raises various considerations. Taking the view I do that the court below has exceeded its jurisdiction by requiring the defendent to institute a suit in a court which has no jurisdiction over the plaintiff's suit, I cannot treat it as a mere order for an adjournment. The plaintiff appears to me to have a serious grievance. But it is not necessary for me to give my reasons for exercising a discretion which will never be exercised, as it is my duty to withdraw this judgement, which is no part of the order of the Court.

BY THE COURT.—As we have failed to agree, the application for revision must stand dismissed. We are agreed that the costs of this application will be costs in the cause.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

CHEDA LAL (OPPOSITE PARTY), *v.* LACHMAN PRASAD AND OTHERS.*

1916, *December*, 12.

Act No. III of 1907 (Provincial Insolvency Act), section 47—Civil Procedure Code (1908), order XXI, rule 71—Sale of property of insolvent by receiver—Default of purchaser—Re-sale—Order by Court on purchaser to make good deficiency—"Proceeding."

Section 47 of the Provincial Insolvency Act, 1907, has not the effect of making the provisions of order XXI of the Code of Civil Procedure, 1908, applicable to a sale of the property of an insolvent held by a receiver under the orders of the District Judge.

If, therefore, the purchaser at such a sale defaults and the property is resold for a sum less than the original bid, the first purchaser cannot be called upon under order XXI, rule 71, to make good the deficiency. *Mul Chand* v. *Murari Lal* (1) referred to.

* First Appeal No. 111 of 1916, from an order of H. N. Wright, District Judge of Bareilly, dated the 25th of February, 1916.

(1) (1913) I. L. R., 36 All., 8.