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section 23 of the Indian Penal Code that "gain by unlawful means" is gain to Harris and that we have not to consider gain to Mrs. Williamson or to anyone else. I am unable to hold that when Harris picked up the letter, he had any intention to cause wrongful gain within the meaning of section 23 of the Indian Penal Code, and I think it would be stretching the definition of wrongful loss if I were to hold that Harris, by picking up this letter and attaching it to his affidavit, which, according to him he was then preparing, and by keeping it afterwards until he produced it in a court at Bareilly, was causing wrongful loss within the meaning of section 23. I hold it to be no part of my judgement that I should go, as the court below did, into the moral aspect of this case. I have only to consider whether the offence of which Harris has been found guilty is established against him by the evidence. Holding that it is not, I set aside the conviction and sentence passed [by the City Magistrate of Lucknow, and direct that the fine or any part thereof, if realized, be returned to Harris.

Conviction set aside.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Chavan Banerji.

SHEO PRASAD SINGH (JUDGMENT-DEBTER) v. PREMNA KUNWAR
(DECREE-HOLDER).*

Civil Procedure Code (1908), section 104; order XXI, rules 90 and 92; order XLIII, rule 1 (j)—Execution of decree—Sale in execution—Application to set aside sale rejected—Appeal.

Under order XXI, rule 90, of the Code of Civil Procedure, 1908, an application may be made to set aside a sale held in execution of a decree, upon the ground, amongst others, of fraud in the publication or conduct of the sale, and if this application is refused under rule 92, an appeal lies under order XLIII, rule 1, clause (j); but no second appeal is allowed from the order of the appellate court.

THE facts, so far as they are material for the purpose of this report, were as follows:—The respondent held a decree for sale against the appellant and his son, and in execution thereof

* First Appeal No. 77 of 1917, from an order of G. C. Badhwar, District Judge of Ghazipur, dated the 30th of March, 1917.

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brought half of the mortgaged property to sale and purchased it herself. The present appellant, alleging fraud in the publication and conduct of the sale, applied under order XXI, rule 90, of the Code of Civil Procedure to have the sale set aside. The first court granted the application. On appeal by the decreeholder, the District Judge reversed the Munsif's order and dismissed the application. Against this order of the District Judge, the judgement-debtor filed the present appeal in the High Court and headed it as a "First Appeal from Order."

Babu *Kamala Kant Varma*, for the respondent, took a preliminary objection to the hearing of the appeal:—

No appeal lies from an order passed in appeal, setting aside or refusing to set aside a sale, on an application under order XXI, rule 90, of the present Code of Civil Procedure. An appeal against orders passed on such applications is allowed, as an appeal from an order, by clause (j) of order XLIII, rule 1, which is governed by section 104, sub-section (1), clause (i). Sub-section (2) of section 104, prohibits any second appeal. There having already been one appeal in this case, the present appeal does not lie.

The words "or fraud" did not occur in the corresponding section 311 of the old Code. So, under that Code, it was held that applications to set aside a sale, when they were based on the ground of "fraud," came under section 244 (now section 47), and as according to section 2 of the Code the determination of any question within section 244 amounted to a decree, as it does even now, a second appeal lay. The object and effect of adding the words "or fraud" to rule 90 of order XXI of the present Code are to take applications for setting aside a sale based on "fraud" out of the purview of the present section 47 and to bring such applications also within rule 90 of order XXI. That being so, no second appeal lies.

Pandit *Uma Shankar Bajpai*, for the appellant, submitted that in this particular instance the new Code of Civil Procedure had not effected any change in the law and referred to cases decided when the former Code of Civil Procedure was in force in which it was held that a second appeal lay in cases of the nature of the present case,

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Babu *Kamala Kanta Varma*, was not called upon to reply.

RICHARDS, C.J., BANERJI, J.:—A preliminary objection has been taken to the hearing of this appeal on the ground that an appeal does not lie. The facts are these. The property of the appellant, who was judgement-debtor to a decree, was sold by auction. He made an application under order XXI, rule 90, to have the sale set aside on the ground of irregularity and fraud in the publication and conduct of the sale. His application was allowed by the court of first instance; but on appeal to the lower appellate court that court allowed the appeal and dismissed the application. From the order of the appellate court the present appeal has been filed. Section 104 of the Code of Civil Procedure, sub-section (2), provides that no appeal shall lie from any order passed in appeal under the section. Clause (i) of sub-section (1) provides that an appeal shall lie from an order made under rules from which an appeal is expressly allowed by the rules. Order XLIII, rule (1), clause (j), expressly provides an appeal from an order under rule 92 of order XXI. That rule refers to an order confirming or setting aside a sale. The order passed in this case was an order refusing to set aside a sale. Therefore an appeal lay to the court below under order XLII, rule 1, clause (j); but, having regard to the provisions of section 104, sub-section (2), no further appeal from the order of the appellate court lies to this Court. The present appeal is consequently not maintainable. The learned vakil for the appellant refers to cases under the old Code of Civil Procedure in which it was held that an order made upon an application to set aside a sale on the ground of fraud, was an order under section 244 of the Code, and therefore a second appeal lay. But the present Code has made an important alteration in this respect, and it provides in order XXI, rule 90, that an application may be made to set aside a sale on the ground, amongst others, of fraud in the publication or conduct of the sale. Under the present Code therefore an application may be made on the ground of fraud, and, if this application is refused, under rule 92, an appeal lies under order XLIII, rule 1, clause (j); but no second appeal is allowed from the order passed by the appellate court. We

accordingly allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

AMTUL HABIB (DECREE-HOLDER) v. MUHAMMAD YUSUF
(JUDGMENT-DEBTOR).*

Civil Procedure Code (1908), order XXIV, rules 1, 2 and 3—Execution of decree—Payment of part of decretal amount into court—Effect of payment as regards running of interest on the decree.

Where money is paid into court by the judgment-debtor in satisfaction of a decree, interest on the decree will cease from the date of payment in proportion to the amount paid, although such amount may not in fact be the whole amount due under the decree.

THE facts of this case were as follows:—

A decree was obtained for dower for a sum of Rs. 5,000 with interest and costs, to be recovered from the estate of the plaintiff's deceased husband in the hands of the heirs. The decree-holder sought to execute her decree and was met with an objection that she herself being one of the heirs and entitled to one-fourth of the estate, the decree could only be executed for three-fourths of the amount. When making this objection the judgment-debtors deposited three-fourths of the amount of the decree, principal, interest and costs. This objection was allowed in the court of first instance. There was an appeal to the District Judge, who held that the decree being for Rs. 5,000, it must be executed for that amount. The High Court upheld this ruling. The execution proceedings then continued; but the decree-holder claimed interest on the full amount of the decree up to the 14th of August, 1915, that is, until three months after the decision of the High Court. The judgment-debtors claimed that interest should not be charged save on the difference between the amount which they had deposited in court and the full amount of the decree, that is to say, that they should be relieved from paying interest on so much as they had deposited from the date of the deposit. This contention

* Second Appeal No. 1433 of 1916, from a decree of J. H. Cuming, District Judge of Saharanpur, dated the 16th of August, 1916, confirming a decree of Kalka Singh, Subordinate Judge of Saharanpur, dated the 18th of December, 1915.

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