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KALKA DAS  
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in so far as it includes such particulars as are exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree, shall vest in the court or in the Receiver. The occupancy holding is not transferable in execution of a decree of the Civil or Revenue Court or otherwise than by voluntary transfer between certain persons. This is to be found in section 20 of the Tenancy Act. It is, therefore, clear, even on the face of the Insolvency Act itself, that the occupancy holding cannot be dealt with by an insolvency court. Section 193 of the Tenancy Act and section 56 of the Insolvency Act make the point quite clear and there is nothing further to be said in the matter.

In our opinion the decision of the courts below is incorrect. The suit having been dismissed on a preliminary point will have to go back for decision on the merits.

We, therefore, allow this appeal, set aside the decrees of the courts below and remand the case to the court of first instance through the lower appellate court with directions to restore the case to its original number on the file and to proceed to hear and determine it on the merits. All the costs incurred up to the present time will be costs in the cause and will abide the result.

*Appeal decreed and cause remanded.*

## APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

PURSHOTTAM SARAN (JUDGMENT-DEBTOR) v. HARGU LAL (DECREE-HOLDER) AND PAHLADI LAL (AUCTION-PURCHASER)\*

1921  
March, 24.

*Civil Procedure Code (1908), section 110, order XLI, rule 5—“Substantial question of law”—Stay of execution—Appellate court—Jurisdiction.*

*Held* (1) that an appellate court cannot order a stay of sale unless it has seisin of the case in which the sale was ordered to take place, and (2) that the question whether or not an appellate court could order a stay of sale without having seisin of the case in which the sale was ordered to take place, was not “a substantial question of law” within the meaning of section

\* Application No. 38 of 1920, for leave to appeal to His Majesty in Council.

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110 of the Code of Civil Procedure. *Purshottam Saran v. Hargu Lal* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Piari Lal Banerji*, for the applicant.

Dr. *S. M. Sulaiman*, *Munshi Kamla Kant Varma*, and *Babu Saila Nath Mukerji*, for the opposite party.

MEARS, C. J., and BANERJI, J.:—This is an application for leave to appeal to His Majesty in Council from an order of this Court dismissing an appeal preferred by the applicant under the following circumstances. A decree was passed upon a mortgage for the sale of the mortgaged property. The present applicant is the purchaser of a part of that property. He preferred objections to the execution of the decree, but those objections were overruled by the Subordinate Judge and he ordered the mortgaged property to be sold in pursuance of the decree. The 20th of September, 1920, was fixed for the sale. On the 19th of that month an application was made to this Court to stay the sale. At that time no appeal from the decision of the court below in regard to the objections preferred by the present applicant had been filed. It was during the long vacation of this Court, when ordinarily appeals are not received, that the application was made to the court below to set aside the sale. That application for stay of sale was made. The learned Judge who was the vacation Judge made an *ad interim* order for stay of sale, he having been informed that an appeal would be presented upon the re-opening of the Court. An appeal was as a matter of fact subsequently presented, but it was dismissed. Meanwhile, the property was sold, and an application having been refused by the Subordinate Judge, an appeal was preferred to this Court and it was contended that as this Court had already ordered the sale to be postponed, the court below ought not to have allowed the sale to take place and the sale was a nullity. The learned Judges who heard the appeal dismissed it on the ground that the order for stay of sale made by the vacation Judge was an order which he had no jurisdiction to pass. It is from this decision of a Divisional Bench of this Court (1) that the applicant seeks to

appeal to His Majesty in Council. In order to justify our granting him the certificate which he asks for, we must be satisfied that a substantial question of law is involved in the case. There is no doubt that a question of law is involved, but that question must be a substantial question of law and a question about which there may be a difference of opinion. We do not think that in the present instance there can be any doubt that an appellate court cannot order stay of sale unless it has seisin of the case in which the sale was ordered to take place. This is obvious from the terms of order XLI, rule 5. When the vacation Judge made his order no appeal had been preferred. It was an urgent matter, and if the present applicant intended to appeal and to have the sale, which was to take place the following day, stayed, he ought to have obtained the leave of the vacation Judge to present the appeal as an emergent matter and then file his application for stay of sale. We think the learned Judges of this Court have rightly held that the order of the vacation Judge was *ultra vires* and therefore the sale was not a nullity. We dismiss the application with costs. Two sets of costs will be allowed, one to the decree-holder and the other to the auction-purchaser.

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 PURSHOTTAM  
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 v.  
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*Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Walsh.*

GOBIND UPADHYA AND OTHERS (DEFENDANTS) v. LAKHRANI.

(PLAINTIFF)\*

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 1921  
 March, 18.

*Hindu law—Hindu widow—Gift by widow of property of her deceased husband for the spiritual benefit of the deceased.*

The question whether the gift of a portion of her husband's property made by a Hindu widow was made for the benefit of his soul is a question of fact in each case. *Khub Lal Singh v. Ajodhya Misser* (1) referred to.

It is not a necessary condition to the validity of such a gift that the donee should be expected to do something which might be supposed to confer some benefit on the soul of the deceased.

THE facts of the case briefly are these:—

One Jagai Kurmi was the owner of some property worth about Rs. 2,000 to Rs. 4,000. He died in 1903 leaving his widow, Musammat Bhagwanti, and daughter, Musammat Lakhrani. In 1905 Musammat Bhagwanti went to Gaya and on her return, made

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\*Appeal No. 116 of 1919 under section 10 of the Letters Patent.

(1) (1915) J. L. R., 48 Cal., 574.