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brought by the mortgagees of Munna Das. It is perfectly clear that the court had not the facts before it, and it also appears to us to be clear that the court was never called upon by the plaintiff, whose duty it was to see that a proper guardian was appointed guardian *ad litem*, to appoint such a guardian. The fact is that Hanuman Prasad was not properly represented as a party to that suit and, therefore, any decree which was passed against him was a mere nullity." For the reasons given above, having regard to the various decisions which have been cited, I think the decree of the court below was right and would dismiss the appeal with costs.

LINDSAY, J.—I agree.

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

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

SHANKAR LAL AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD AMIN AND ANOTHER (PLAINTIFFS)*

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March, 21.

Civil Procedure Code, (1908), *section* 105—*Interlocutory order—Appeal.*

Where there is some unappealable interlocutory order, its irregularity or any defect in it may, so far as it affects the decision of the case, be raised when the decree in the suit in which it was passed is appealed from, and this power is not affected by the fact of an appeal having been erroneously filed against the order itself and dismissed. *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh* (1) referred to.

THE facts of this case are fully stated in the judgment of WALSH, J.

Munshi *Kailash Chandra Mital*, for the appellants.

Mr. *Hamid Hasan*, for the respondents.

WALSH, J.—This is an appeal from an order of remand. The suit is brought by certain alleged minors through the guardianship of their mother in an effort to redeem property which has been already sold over their heads as the result of a decree for sale obtained in a suit by the mortgagee against their father, the original mortgagor. It has the aspects of being a proceeding of a some what suspicious character, but nonetheless these suspicions have to be confirmed and not inferred. In some respects the attempt which they have made resembles

*First Appeal No. 196 of 1921, from an order of Abdul Halim, Subordinate Judge of Meerut, dated the 5th of August, 1921.

(1) (1920) I. L. R., 47 Calc., 924

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the case referred to in the judgment of the court below, namely, *Ganpat Lal* v *Bindbasini Prashad Narayan Singh* (1), where the Privy Council pointed out that after the sale has taken place, (they are speaking of a mortgage), the owner holds as purchaser and is entitled to raise all the defences belonging to him as such, and unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in that action, the court cannot interfere with the possession given to him by his purchase. The plaintiffs, finding that the mortgagee had purchased, applied to the trial court, before the hearing, for liberty to amend their pleadings, so as to challenge the sale, very much on the lines of their Lordships' opinion which I have just quoted. The first court refused leave to amend. There was an appeal from that order, and, as the order was unappealable, the appeal was not unnaturally dismissed. One of the points urged upon us by the appellants is that the question of amendment has been concluded by that unsuccessful appeal. We do not agree with that. We think it is one of those cases which section 105 provides for, namely, where there is some unappealable interlocutory order, its irregularity or any defect in it may be raised when the decree is appealed from, so far as it affects the decision of the case. There is no doubt that the refusal to amend affected the decision of the plaintiffs' case by shutting them out from the alternative claim which the Privy Council has pointed out is really a condition precedent. We entirely agree with the general observations of the lower appellate court in reference to the refusal to amend. Whatever the merits of the case may be, which is sought to be made out, it is just one of those cases in which the court ought to allow amendment, if it is satisfied that the application is made *bonâ fide*. As the lower appellate court says, it would not alter the nature of the suit, to use a somewhat popular but vague expression, because the original prayer and the amended prayer stand together and one leads to the other and the new prayer would be a new and additional claim, but not an inconsistent one. The order for remand was, therefore, right. We would further point out that it still remains to be decided whether the sale ought

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to be set aside. That depends on two questions. First, whether the minors are really the persons who ought to have been impleaded at all. Their claim to have been impleaded arises out of a deed of *waqf*, subsequent in date to the mortgage-deed, of which the mortgagees apparently were not in the least aware. As is pointed out in Mr. Agarwala's notes to the Code, it is by no means clear that, although the final provision which used to be contained in section 85 of the Transfer of Property Act has been removed, rule 1 of order XXXIV which has taken the place of section 85 means anything more than that the defendant ought to raise the question whether all the parties have been properly impleaded. If the plaintiff omits to do so, and the plaintiff can hardly do so if he has no knowledge of the existence of the persons alleged to be interested, it does not necessarily follow that the decree is not binding where the defendant, in the interest of the person who subsequently complains, (in this case it is merely the case of a father and his minor children), abstains from raising the objection. Secondly, there is the further question, whether on the form of the deed, the present minor plaintiffs had any interest in the equity of redemption. The deed does not, in my opinion, purport to be a transfer of the property to them. It is a declaration of trust vesting in them a contingent future interest subject to their father's life, and, as a matter of strict interpretation, it is to my mind doubtful whether they were persons who had an interest in the equity of redemption at the time of the suit, so as to make them persons contemplated by this rule. Thirdly, the question will have to be decided whether the suit, including the application for amendment, is honestly brought. The deed of *waqf* is subsequent in date to the mortgage. The existence of the decree and the sale of the property were ignored. It is possible that the *parda-nashin* guardian of the two minors knew nothing about them, and that their pleader only learnt of the existence of the sale and the decree from the written statement. That opens up the question whether they knew anything about the mortgage either. If they knew nothing of the decree and the sale, it is probable that they knew nothing about the mortgage, and therefore, the question will have to be considered

whether this suit is really a suit brought by the minors through their guardian in the honest assertion of their natural rights and in order to test this question, or whether it is a sham suit brought in their names by the father in order further to re-open the litigation which has already taken place and has been decided against him. Upon this question it is to be borne in mind that the deed of *waqf*, which has been read to us, recognizes the existence of the mortgage. That is a point which might possibly, when the matter comes to be fully considered, cut both ways, and shows that the existence of the mortgage was not concealed. On the other hand, it rather indicates that the security for the mortgage debt was excluded from the operation of the trust. I have said this much because I think it possible that the order of remand will not result in anything substantial to the plaintiffs, although I recognize that it is still an open question; but it is obvious that when the amendment is allowed, the nature of the suit is altered to this extent that it will require a re-settlement of a large number of issues, some of which I have already indicated in the observations I have made in the course of this judgment. I would accordingly dismiss the appeal and would modify the order of the court below as regards costs to this extent that I direct the costs in the lower appellate court and in this Court to abide the result of the amended suit.

RYVES, J.—I agree with the order proposed, but the suit must be tried out on the merits. I express no opinion as to the interpretation, validity or effect of the *waqf* deed or as to the *bonâ fides* of the plaintiffs or anybody else connected with this litigation. These are all matters which have to be decided on evidence which has not yet been produced on either side.

BY THE COURT:—The order of the Court is that the appeal is dismissed, the order of remand confirmed, and the amendment as directed by the lower appellate court must be allowed by the trial court. But this involves, and we direct, that the defendant must be allowed to make such amendments in his written statement as are rendered necessary by the amendment in the plaint, and both parties must be allowed to produce any material evidence with regard to the amended claim. The costs in the

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lower court and in this Court up to date, will abide the result of the suit.

Appeal dismissed.

REVISIONAL CRIMINAL.

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

EMPEROR *v.* BADRI PRASAD.*

1922 *March*, 24.

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 390 *and* 392—*Robbery—Sentence of fine only not legal—Principles guiding the infliction of a sentence of whipping.*

For an offence under section 390 of the Indian Penal Code it is not permissible to award a sentence of fine only without imprisonment.

Remarks on the principles which should guide the infliction of a sentence of whipping.

THIS was an application in revision, admitted on the question of sentence only, from a conviction under section 330 of the Indian Penal Code. The facts of the case sufficiently appear from the judgment of the Chief Justice.

Mr. *N. C. Vaish*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

MEARS, C. J.:- In this case one Badri Prasad was convicted by a Magistrate of the first class of Aligarh. The prosecution case against him was that he with two other companions, on the evening of the 21st of January, followed three servants who were going to the house of their master, Jarao Lal, and who had at the time with them some money and a considerable quantity of valuables, said to be worth about Rs. 700. When two of the servants had entered the shop of their master, Badri Prasad was proved to the satisfaction of the Magistrate to have struck the third and rearmost man, Jwala Prasad, with a stout *danda* on the head; and, in the confusion which resulted, either Badri Prasad or one of his associates got hold of the box containing the valuables and got away with it. The blow struck was not a severe one. After that Badri Prasad ran away. The man who had been struck was apparently able to follow him and

* Criminal Revision No. 80 of 1922, from an order of K. A. H. Sams, Sessions Judge of Aligarh, dated the 13th of February, 1922