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March, 17.

Before Mr. Justice Walsh and Mr. Justice Ryves.

KULSUM-UN-NISSA (PLAINTIFF) *v.* RAM PRASAD (DEFENDANT).*

Civil Procedure Code (1908), *sections* 104, 107, 151; *order XLI, rule* 23, *and order XLIII—Order of remand not showing under what provision it was made—Appeal.*

When a Court makes an order of remand but without specifying under which provision of the Code of Civil Procedure the order is passed, it may be assumed that the order is one under order XLI, rule 23, of the Code, and an appeal will lie therefrom. *Gokul Prasad Har Prasad* v. *Ram Kumar*, (1) referred to.

THE facts of this case are fully set forth in the judgment of RYVES, J.

Mr. *S. A. Haidar*, for the appellant.

Munshi *Panna Lal*, for the respondent.

RYVES, J.:—This is an appeal from an order of remand. Musammat Kulsum-un-nissa brought a suit in the court of the Munsif to eject the defendant on the allegation that the defendant was a tenant of the house in which he lived, under a registered lease executed by the predecessor-in-title of the defendant, in favour of the husband of the plaintiff, who was the zamindar of the village. The lease was executed in the year 1887, and the plaintiff stated that from that date down till some four years before the suit, the original lessee and his successors had been paying rent according to the lease; that some four years ago the defendant joined a general conspiracy in the village and refused to pay further rent. The suit was for ejectment and for arrears of rent for three years. The defence to the suit was that the defendant had never executed any lease; that the house had been constructed for the defendant, who is a Brahman, by his clients and that he and his ancestors had been in possession for 100 years; that no rent had ever been paid and that this possession had been adverse. Further, that the suit was barred because the notice required under section 106 of the Transfer of Property Act had not been duly given. On these pleadings, the learned Munsif fixed five issues:—

1. Whether the plaintiff is the owner of the house in dispute and is the plaintiff entitled to get possession?

* First Appeal No. 155 of 1921, from an order of Partap Singh, Second Additional Subordinate Judge of Aligarh, dated the 21st of June, 1921.

(1) (1921) I. L. R., 44 All., 176.

2. Whether the defendant is the tenant of the plaintiff, and is the plaintiff entitled to get rent and interest?

3. Whether the suit is barred by section 106 of the Transfer of Property Act?

4. Whether the defendant has acquired adverse possession? Who built the house in dispute?

5. Whether the suit is barred by limitation?

The plaintiff filed the original lease and a number of counterfoils and receipts of payment of rent. She also examined some five witnesses. The defendant summoned five witnesses, examined three of them and exempted the remaining two. The learned Munsif, in a short but clear enough judgment, came to the conclusion at which he arrived and decreed the suit. The defendant appealed. According to his memorandum of appeal, he contested the findings of fact come to by the trial court. He pleaded that the evidence given on his behalf established his own defence. Nowhere was it suggested that the court had not given him full opportunity of proving his case, or that it excluded any evidence which he wished to produce. The learned Judge has not tried the appeal himself, that is to say, he has come to no conclusion on any single issue raised in the case. He says:—"I think the issues do not clearly cover all the points raised." He objects to the learned Munsif having tried the issues together. He says:—"I think there ought to be a clear and separate finding on each and every issue raised as required by law. I would set aside the decree, frame the following issues and send the case back for decision of each and every issue separately on the evidence on the record as well as on such other evidence which the parties may deem proper to adduce, and for which an opportunity will be given to them." He then framed five issues. From this order of remand the plaintiff comes in appeal. On behalf of the respondent it is argued strenuously that no appeal lies. It is contended that this order of remand must be taken to have been made under section 107 read with section 99 of the Code of Civil Procedure and that under section 104, clause (1), an order under these sections is not appealable under order XLIII. The learned Judge, in making his remand, does not say under what

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section he is passing his order. The point was considered recently by a Division Bench of this Court in the case of *Gokul Prasad Har Prasad* v. *Ram Kumar* (1) and I think that the observations of Mr. Justice PIGGOTT from the bottom of page 975 to the top of page 976 should be followed. He says there: "I do not think there is any reason to hold that the learned Judge in this case thought he was exercising any inherent jurisdiction outside that given to him under order XLI." I think that in fact the Judge thought he was acting under order XLI, rule 23. As I have said before, he does not decide any single issue in the appeal. He has come to the conclusion that the first court had jumbled up the issues and apparently misconceived the real defence and has in fact misdirected itself *in limine* and that, therefore, there has never been any real trial of the case as the pleadings required. It seems to me this really is a finding on a preliminary point within the meaning of order XLI, rule 23. In my opinion, therefore, an appeal does lie. On the merits, it seems to me that the learned Judge should have tried the appeal, that the issues raised by the Munsif adequately represented the pleadings of the parties, that no other issues were necessary for the trial of the case. As both parties had had full opportunity and had availed themselves of that opportunity of producing all the evidence that they wished, further evidence should not have been admitted. In my opinion the order of the Judge remanding the case was wrong. I would set it aside and direct that the appeal be restored to its original number and disposed of according to law.

WALSH, J.:—I only wish to add this. With regard to the right of appeal, I was a party to the case referred to by my brother and I agree that this case is analogous. In my view, in the case of an order of remand, it must be presumed, unless the contrary is shown at the time when it is made, to be made under order XLI, rule 23. The litigant has to make up his mind whether he has a right of appeal, and, if so, what, and if he finds an order against him of remand that he objects to, like the order before us, and there is nothing to the contrary, the only inference that he can draw is that it is made under the statutory provisions contained in order XLI, rule 23. An order

(1) (1921) I. L. R., 44 All., 176.

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may be made under that section and yet be wrongly made, but it would nonetheless be appealable, and personally I am not prepared to adopt the view that once an appeal has been filed and admitted in this Court as an appeal against an order of remand under that provision and notice has gone, the respondent can improve his position by satisfying the Court that the order complained of is so bad or so unintelligible that it is impossible to bring it under any provision and, therefore, it is not appealable at all. I think that this is the substantial answer to what Mr. *Panna Lal* calls his preliminary objection. It is not a preliminary objection. The order was *primâ facie* appealable as a remand order. It does not make it less appealable to say that the order is an indefensible one. Costs must abide the result of the suit.

Appeal allowed.

PRIVY COUNCIL.

RAM GOPAL LAL (DEFENDANT) *v.* AIPNA KUNWAR (PLAINTIFF).

[On appeal from the High Court at Allahabad.]

*P.C.** 1922 *June*, 30.

Will—Proof of execution—Evidence—Attesting witnesses.

Upon an issue whether the signature to a will is genuine or a forgery, the best evidence procurable of signature of the document by the testator should be furnished; an attempt to support the signature by anything which falls short of that standard, though it may not be fatal, is a serious defect. The absence of any of the attesting witnesses who are not called should be satisfactorily accounted for. Evidence to the effect that the signature appears to be genuine is of little worth in the absence of reliable evidence by witnesses present when the will was signed.

Judgment of the High Court reversed.

APPEAL (No. 55 of 1921) from a judgment and decree of the High Court (28th April, 1919,) reversing a decree of the District Judge of Azamgarh.

The present appeal arose out of an application made by the respondent for a grant of probate of a document, dated the 25th of January, 1915, purporting to be the will of her deceased husband, Bijai Singh. The appellant, a reversioner in the event of an intestacy, pleaded that the document had not been executed by the deceased but was a forgery.

**Present:*—Lord BUCKMASTER, Lord ATKINSON, Lord SUMNER, Lord CARSON and Sir JOHN EDGE.