available to the creditors, and that half of whatever may be his earnings or income during the next three years will also be distributed among the creditors.

The application of the official receiver is dismissed with costs.

Appeal allowed.

MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge, and Mr. Justice R. L. Yorke

1939 *January*, 26

BRIJ MANOHAR AND OTHERS (APPELLANTS) *v.* RAMANAND AND ANOTHER (RESPONDENTS)*

Civil Procedure Code (Act V of 1908), Order 1, rule 10 and Order 43, rule 1—Order adding new party to a suit, whether appealable—Revision against an order adding new party, whether lies—Remand of case for re-trial—Appeal against order of remand made in exercise of inherent power of Court, whether lies.

An order adding a new party to a suit is not appealable as it could only be appealable as an order and an order under Order 1, rule 10 is not appealable as it does not find a place in Order XLIII, rule 1. It is also not one which can be assailed in revision because it is clearly an interlocutory order. *Tuan Man and another* v. *Che Som and others* (1), and *Banbihari Mukerji* v. *Bhejnath Singh Mahapatra* (2), referred to.

An order of remand made in the exercise of the inherent powers of the Court is not appealable under the provisions of Order XLIII, rule 1, Civil Procedure Code.

Messrs. *G. D. Khare* and *Karta Krishna*, for the appellants.

Mr. *B. P. Misra*, for the respondents.

THOMAS, C. J., and YORKE, J.:—This is a Miscellaneous appeal purporting to be an appeal under the provisions of Order XLIII, rule 1(*u*), C. P. C. from an order of remand.

The present plaintiffs appellants are the mortgagees of certain property which includes plots nos. 87 and 90

*Miscellaneous appeal No. 89 of 1936, against the order of Mr. Shiva Charan, Civil Judge of Unao, dated the 30th October, 1936.

(1) (1932) A.I.R., P. C., 146. (2) (1932) A.I.R., Cal., 448.

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Thomas, C. J. and Yorke, J.

said to have been mortgaged by the Mahant, Hari Saran Das, as proprietor. The plaintiffs alleged that the defendants being *riayas* in the village had built a house on these plots without their permission, and thereby their security had been diminished, and they sought to recover possession of the plots by demolition of the house. The main plea of the defendant no. 1 Ramanand was that the house in suit was built with the permission of the late Mahant Har Narain Das. The trial court accepted this plea of permission and dismissed the plaintiff's suit on the 31st October, 1935. The lower appellate Court added certain issues and remanded the case apparently under the provisions of Order XLI, rule 25. Under this order the trial court recorded a finding on the issues remitted and returned the case to the lower appellate court.

On this case coming up again for hearing on the 12th August, 1936, two applications were made to the court, one by the defendant no. 1, Ramanand to the effect that he wanted the mortgagor, Bhaiya Hari Saran Das, who he calls the real owner of the property, to be added as a party and the other by the same Bhaiya Hari Saran Das who applied to be made a party. In both these applications it was stated that Bhaiya Hari Saran Das did not desire the house to be demolished. The learned Civil Judge thereupon passed an order dated the 30th October, 1936, against which the present appeal is filed. In this order he did two things, first of all he made Bhaiya Hari Saran Das a party to the suit under the provisions of Order I, rule 10(2) read with section 107 of the Code of Civil Procedure, and secondly he remanded the suit to the trial Court for retrial with Bhaiya Hari Saran Das as defendant no. 2.

Learned counsel for the appellants argues that the order making Bhaiya Hari Saran Das a party was an improper order and should be got rid of by the setting aside of this order of remand. In the first place we are of opinion that the order making Bhaiya Hari

Saran Das is not appealable as it could only be appealable as an order and an order under Order I, rule 10 is not appealable as it does not find a place in Order XLIII, rule 1. It is also not one which can be assailed in revision because it is clearly an interlocutory order. Learned counsel for the appellants has referred us to the case of *Tuan Man and another* v. *Che Som and others* (1), but we do not consider that this case is of any help to him. The case of *Banbihari Mukerji* v. *Bhejnath Singh Mahapatra* (2) seems to be rather a support for the procedure adopted by the learned Civil Judge than to be a sound basis for attacking that procedure.

The second question which arises is whether the order of remand made by the learned Civil Judge is one which can be assailed in appeal. It is quite clear that it is not one to which the provisions of Order XLI, rule 23 are applicable because this is not a case in which the lower appellate court has reversed the order of the trial court. On the contrary he has sent the case back for retrial without coming to any decision on the soundness or otherwise of the trial court's decision. Similarly it is not an order of remand under the provisions of Order XLI, rule 25. In these circumstances it is impossible to hold that the remand has been made otherwise than in the exercise of the inherent powers of the Court, and it has been held by this Court as by other Courts, in a series of cases that an order of remand made in the exercise of the inherent powers of the Court is not appealable under the provisions of Order XLIII, rule 1.

It might also be remarked that the present order of remand may well be regarded as rather more favourable to the appellants than otherwise, since the case goes back for decision on the merits with all the parties to the matter in dispute present before the Court, and the decree of the trial Court which dismissed their

(1) (1932) A.I.R., P.C., 145. (2) (1932) A.I.R., Cal., 448.

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suit therefore no longer stands in their way although it has not been actually reversed.

We are clearly of opinion that the order under appeal is one against which no appeal lies. This appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice R. L. Yorke

1939 *January*, 31

PANDIT JAI DAYAL (OBJECTOR APPELLANT) *v.* PANDIT JAGDEO NARAIN AND OTHERS (OPPOSITE-PARTY RESPONDENTS)*

U. P. Temporary Postponement of Execution of Decree Act (X of 1937), sections 3 and 6—Money decree passed on compromise in a suit for damages for torts—Execution of decree —Judgment debtor, if can claim protection of the Act.

Where a money decree is passed in a suit founded on a plaint in which damages for tort were claimed, the decree is certainly to be construed as a decree for damages for tort, and the case comes within the mischief of section 6 of Act X of 1937, and the judgment-debtor cannot claim the protection of the Act.

Messrs. *Ram Bharose Lal* and *Murli Manohar Lal*, for the appellant.

Messrs. *Rajeshwari Prasad* and *Raj Bahadur Srivastava*, for the respondent no. 1.

THOMAS, C. J. and YORKE, J.:—This is an execution of decree appeal by one Pandit Jai Dayal Judgment-debtor objector. It arose originally out of a murder case. One Jai Deo, who had a full brother Jai Kishen and a step brother Jai Dayal, was murdered. Jai Dayal filed a first information report implicating Jai Kishen, Jado Nandan and others as responsible for the murder. Jai Kishen among others was prosecuted on a charge of murder. Jai Kishen was

*Execution of Decree Appeal No. 23 of 1938, against the order of Mr. Girja Shankar Misra, Additional Civil Judge of Unao, dated the 27th April, 1938.