

set aside the conviction and sentence and acquit the appellant.

1922.

ADAMI, J.—I agree with the decision arrived at by my learned Brother. There is only circumstantial evidence to connect the accused with the crime, and in cases of this nature, especially in case of a charge of murder, it is most necessary that every link of the chain of evidence should be carefully tested; no link should be missing and every link should be fully proved. In the present case there are links which will not stand the test. In my opinion the test applied by the prosecution and the court was not sufficient. The examination of the witnesses has been somewhat perfunctory, and insufficient attempt has been made to verify the details of the case which was one in which caution was most necessary.

NIRU BHAGAT
v.
KING-
EMPEROR.
COUTTS, J.

I am of opinion that the appellant should be acquitted.

Conviction set aside.

REVISIONAL CIVIL.

Before Coutts and Das, J.J.

SHEIKH NAZIR HUSSAIN

v.

MUHAMMAD EJAZ HUSSAIN.*

1922.

May, 10.

Execution of Decree—objection by judgment-debtor that property is waqf property, nature of—Appeal whether lies from order upholding objection—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 58 and sections 47 and 151.

An objection by the judgment-debtor to the execution of a decree against certain property on the ground that such property is *waqf* property, falls within Order XXI, rule 58, of the Code of Civil Procedure, and, therefore, no appeal lies from an

* Civil Revision No. 20 of 1922.

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order upholding the objection even though the petition of objection was wrongly headed as being under sections 47 and 151.

SHEIKH
NAZIR
HUSSAIN.

Kartick Chandra Ghose v. Ashutosh Dhara(1) and
Upendra Nath Kalamuri v. Kusum Kumari Dasi(2), followed.

MUHAMMAD
EJAZ
HUSSAIN.

Application by the judgment-debtor.

The facts of the case material to this report are stated in the judgment of Coutts, J.

Sant Prasad, for the petitioners.

Syed Muhammad Tahir, for the opposite party.

COUTTS, J.—This is an application in revision arising out of an execution matter. It appears that Ejaz Hussain obtained a decree against Nazir Hussain. He filed an application to execute his decree against certain property in possession of the judgment-debtor, Nazir Hussain. Nazir objected that the property was *waqf* property. This objection was allowed by the Court of first instance but on appeal to the District Judge that order has been set aside and execution has been ordered to proceed against the property in respect of which the objection was made.

The application made by the judgment-debtor to the Munsif, that the property which had been attached was *waqf* property, was headed as being an application under sections 47 and 151 of the Civil Procedure Code. It is contended, however, that the application was not one under section 47, but was an application under Order XXI, rule 58, and that consequently no appeal lay to the District Judge and the order passed by him is without jurisdiction. The only question for consideration now is whether the application is one under section 47 or one under Order XXI, rule 58. To my mind there can be no doubt that the application was in fact one under Order XXI, rule 58; and, if authority be needed in support of this view it is afforded by the decisions in the cases of *Kartick Chandra*

(1) (1912) I. L. R. 39 Cal. 298, E. B. (2) (1915) I. L. R. 42 Cal. 440.

Ghose v. Ashutosh Dhara ⁽¹⁾ and *Upendra Nath Kalamuri v. Kusum Kumari Dasi* ⁽²⁾. The contention of the petitioner, that no appeal lay to the District Judge must therefore prevail. The order of the learned District Judge is without jurisdiction and must be set aside. I would accordingly allow this application and set aside his order. There will be no order as to costs.

1922.

SHEIKH
NAZIR
HUSSAIN.
v.
MUHAMMAD
EJAZ
HUSSAIN.
COUTTS, J.

DAS, J.—I agree.

Order set aside.

LETTERS PATENT.

Before Dawson Miller, C. J. and Mullick, J.

GANPAT RAO BANKA PURI

v.

RAJ KUMAR SINGH.*

1922.

May, 10.

Second Appeal—Remand of issue, High Court's power.

Where an issue has been raised in a manner sufficient to permit of a decision on the question to which it relates and evidence on the issue has been adduced and a distinct finding on it has been arrived at both by the trial court and the lower appellate court, the High Court has no power to remand the case for a re-hearing on the very point involved in the issue.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Appeal under the Letters Patent by the plaintiff.

Saroshi Charan Mitter, for the appellant.

Narendra Nath Sen, for the respondent.

DAWSON MILLER, C. J.—The question for decision in these appeals is whether the learned Judge of this Court in second appeal was justified in remanding the case to the trial court for the hearing and

* Letters Patent Appeals Nos. 73 and 76 of 1921.

(1) (1912) 1. L. R. 39 Cal. 298, F. B. (2) (1915) 1. L. R. 42 Cal. 440.