

the nature mentioned in section 139, sub-section (5), but involved a question of title, so the provisions of section 139A would not apply. As a matter of fact the point whether the plaintiff had an occupancy right or not in this land was merely a point in the evidence. It was not necessary really to ask for that relief, for in order to recover possession the plaintiff would have to show that he was an occupancy raiyat. In my opinion the case is not excluded from the operation of section 139A by the mere fact that the declaration was asked for.

I would hold that this suit was in fact barred under the provisions of section 139A and section 139, sub-section (5), of the Chota Nagpur Tenancy Act and that the plaint should have been filed in the Court of the Deputy Commissioner. I would therefore allow the appeal with costs, and dismiss the plaintiff's suit, with costs in all the courts.

DAS, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

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

RAM PRASAD SAH

v.

MUSSAMMAT FULPATI KUER.*

1926.

May, 24.

Code of Civil Procedure, 1908 (Act V of 1908), section 109. (a)—order refusing leave to appeal in forma pauperis, whether a final order.

An order of the court refusing leave to appeal in forma pauperis is not a final order within the meaning of section 109 (a) of the Code of Civil Procedure, 1908.

Sakan Singh v. Gopal Chandra Neogi (1), followed.

*Privy Council Appeal no. 40 of 1925.

(1) (1903-04) 8 Cal. W. N. 296. F. B.

1926.

RAM PRASAD
SAH
v.
MUSSAMMAT
FULPATI
KUR.

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

S. N. Dutt, for the appellant.

H. Imam (with him *Ram Prasad*), for the respondent.

DAWSON MILLER, C. J.—This is an application for leave to appeal to His Majesty in Council from a decision of a Division Bench of this court refusing leave to the petitioner to appeal in formâ pauperis. The petitioner claims that the order of the court refusing leave to appeal in formâ pauperis was a final order which was appealable to His Majesty in Council under section 109 (a) of the Civil Procedure Code. The only question is whether the order passed on that occasion is a final order or not. In my opinion it is clearly not a final order which is appealable to His Majesty in Council. The order did not in any way finally determine the rights of the parties. It was merely an interlocutory order prescribing the procedure under which the plaintiff's appeal should be conducted. The court in fact having refused the application for leave to appeal in formâ pauperis granted the appellant time in which to pay the court fee; and had he been able or willing to pay the court fee then his appeal would have proceeded in the ordinary course. His rights as an appellant with regard to the subject matter in dispute in the appeal were therefore in no way determined by the order passed from which it is now sought to appeal. The case of *Sakan Singh v. Gopal Chandra Neogi*⁽¹⁾ has been referred to by Mr. Hasan Imam on behalf of the respondent in which it was decided by a full bench of the Calcutta High Court that in the converse case, where the court grants leave to appeal in formâ pauperis such an order is not appealable to His Majesty in Council, on the ground that it is not a final order, and that case appears to me to have been rightly decided. The only argument addressed to us

(1) (1903-04) 8 Cal. W. N. 296, F. B.

is that the decision does determine the right of the party to appeal in formâ pauperis and therefore it is a final adjudication of that right. That however is not the class of right with regard to which finality must exist in order to make it a final decree or order. Every order in one sense finally determines some right of the parties whether it be a right to appeal or whether it be a right to have an extension of time or whether it be any other kind of right; but before one can have a final decree or order there must be some final adjudication upon the subject matter of the suit, that is to say the rights claimed by one party in the suit itself and denied by the other. The rights claimed in the present suit are rights as to a partition of what is alleged to be joint property. The order passed by the Division Bench of this court in no way determined anything connected with those rights. For these reasons I think that this application must be rejected. The respondent is entitled to his costs of this application.

FOSTER, J.—I agree.

APPELLATE CIVIL.

Before Das and Adami, J.J.

MADHAB PODDAR

v.

LALL SINGH BHUMIJ.*

1926.

June, 2.

Chota Nagpur Tenancy Act, 1908 (Bengal Act VI of 1908), sections 46, 139A—suit for ejectment of under-tenant, maintainability of.

No suit for the ejectment of an under-tenant by his immediate landlord lies in the civil court under section 139A read with section 46(4), Chota Nagpur Tenancy Act, 1908.

Bholanath Mandal v. Chhota Gunaram Mighi (1), distinguished.

* Appeal from Appellate Decree no. 426 of 1923, from a decision of W. H. Boyce, Esq., I.C.S., District Judge of Manbhum, dated the 8th February 1923, affirming a decision of Babu Badri Narayan Rai, Additional Munsif of Purulia, dated the 27th November 1922.

(1) (1914) 23 Ind. Cas. 407.