

**LETTERS PATENT.***Before Courtney Terrell, C. J. and Kulwant Sahay, J.***SUKHARI KHALIFA.***v.***RAJAB ALI.\***

*Code of Civil Procedure, 1908 (Act V of 1908), section 144 and Order XXI, rule 97—restitution, application for—order made—resistance by third person—application under Order XXI, rule 97, complaining against such resistance—application dismissed—Order, whether one under section 144—appeal, whether lies—suit to enforce restitution, whether barred—section 144(2).*

The respondent no. 2 obtained a decree against the appellant in a suit for ejection and in execution of the decree got delivery of possession during the pendency of the appeal which the appellant had in the meantime preferred. The appeal succeeded and the suit of the respondent no. 2 was dismissed. Thereupon the appellant applied for restitution of the property under section 144, Code of Civil Procedure, 1908, and the Munsif made an order in his favour and deputed his nazir to effect the delivery of possession. When the nazir went with the writ he was resisted by the respondent no. 1 who claimed possession and set up an independent title in himself. Thereupon the nazir reported the matter to the court and the appellant also made an application under Order XXI, rule 97, of the Code. The Munsif upheld the contention of the respondent no. 1 and refused restitution. The appellant appealed to the District Judge who set aside the order of the Munsif holding that the claim of title of respondent no. 1 was unsound. Against this decision the respondent no. 1 appealed to the High Court which held that the proceedings before the Munsif and his order being under Order XXI, rule 97, no appeal lay to the District Judge against that order. The appeal was, therefore, allowed on the ground that the order of the District Judge was without jurisdiction. The appellant thereupon appealed under clause 10 of the Letters Patent.

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\* Letters Patent Appeal no. 26 of 1933, against a decision of the Hon'ble Mr. Justice Wort, dated the 23rd January, 1933, in M. A. no. 87 of 1932.

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*Held*, that the Munsif's order, although purporting to be on an application under Order XXI, rule 97, Code of Civil Procedure, 1908, was in effect an order refusing restitution under section 144, and that such an order having the force of a decree was appealable.

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*Held, further*, that the appellant's remedy to obtain restitution by way of suit was barred under sub-section (2) of section 144.

Appeal by the petitioner.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

*Syed Ali Khan*, for the appellant.

*Hasan Jan* and *Amir Ali Khan Warsi*, for respondent, no. 1.

COURTNEY TERRELL, C. J.—This Letters Patent Appeal arises out of a suit by one Abdul Mian the present respondent no. 2 for ejection against Sukhari Khalifa the present appellant from a certain house. He obtained a decree and got delivery of possession. Sukhari Khalifa appealed and it was held that the person from whom Abdul Mian had bought the property had no title which could be conveyed to Abdul Mian and the appeal was allowed. Sukhari Khalifa applied under section 144 of the Civil Procedure Code for restitution of the property of which Abdul Mian had obtained possession under the decree of the trial court. The decree for restitution was granted but the nazir was resisted by a third person Rajab Ali who is the present respondent no. 1 and is the father-in-law of Abdul Mian. Sukhari Khalifa accordingly applied for a summons against Rajab Ali under Order XXI, rule 97, of the Civil Procedure Code who showed cause and set up an independent title to the western portion of the house but said he had no objection to delivery of possession of the eastern portion. The Munsif in his judgment held that Rajab Ali had a *prima facie* case in his

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favour but having regard to the fact that he was in possession of the western half only of the house and did not claim the eastern portion, ordered a fresh writ of possession to issue in favour of Sukhari Khalifa for the eastern portion only. Sukhari Khalifa appealed to the District Judge who held that Rajab Ali's claim of title was unsound and that Sukhari Khalifa was entitled to possession of the western portion of the house and that Rajab Ali could establish his title if any by a regular suit.

The learned Judge of this Court to whom Rajab Ali appealed held that the proceedings and order being under Order XXI, rule 97, no appeal lay to the District Judge and that the order of the Munsif was not, as contended by Sukhari Khalifa, one under section 144 of the Code. He allowed the appeal and restored the order of the Munsif. Mr. Syed Ali Khan on behalf of the appellant before us, Sukhari Khalifa, contends that if Rajab Ali is allowed to remain in possession without appeal then Sukhari Khalifa will be deprived of all remedy because under sub-section (2) of section 144 :

" No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1) "

and contends that the Munsif's order while purporting to be on an application under Order XXI, rule 97, is in effect an order refusing restitution under section 144 and that such an order having the force of a decree is appealable. Moreover it cannot be denied that although Sukhari Khalifa would be precluded from bringing a suit no such bar exists against a suit by Rajab Ali to enforce his rights if any. On the other hand the learned Judge refers to Order XXI, rule 99, which entitles the Munsif where the obstructor acted in good faith to dismiss the application complaining of such obstruction. But the fact that the application under Order XXI, rule 97, is dismissed and is unappealable does not in my opinion make the

order of the Munsif the less a refusal of the restitution under section 144 and as such it is appealable. Otherwise an appeal against an order refusing to grant restitution against obstruction would always be barred whereas a refusal but without obstruction would be appealable and I do not think this was the intention of the legislature. In my opinion notwithstanding that Sukhari Khalifa cannot bring a suit to enforce his right to restitution he may appeal against a refusal to give him that remedy under section 144 against an obstruction just as he could if the proceedings had been begun by suit and the order of the District Judge was on appeal, therefore, made with jurisdiction. From this order no appeal lies on the facts and it must stand. The learned Judge in agreement with the District Judge on the facts expressed his regret at the conclusion at which he had arrived on the law. I would allow this appeal and direct that the respondents do pay the appellant costs throughout.

KULWANT SAHAY, J.—I agree.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Wort and Fazl Ali, JJ.*

JAGDEO SAHU

v.

MAHABIR PRASAD.\*

*Transfer of Property Act, 1882 (Act IV of 1882), sections 83 and 92—right of subrogation, whether belongs to a person who under an agreement has paid off the mortgage—sale by Hindu widow—prior mortgage—vendee depositing mortgage money under the terms of the sale-deed—sale set aside—vendee, whether entitled to equitable relief of getting credit for*

\* Appeal from Original Decree no. 191 of 1980, from a decision of Babu Radha Krishna Prasad, Subordinate Judge of Gaya, dated the 23rd December, 1929.

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