

MISCELLANEOUS CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Broadway.

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MEHR CHAND, ETC. (DEFENDANTS)—*Appellants,*
versus

Jan. 21.

LABHU RAM, ETC. (PLAINTIFFS)—*Respondents.*

CIVIL MISCELLANEOUS No. 345 OF 1920

(Civil Appeal No. 1007 of 1915.)

Civil Procedure Code, Act V of 1908, section 109—application for leave to appeal to His Majesty in Council from an order of remand.

Plaintiff sued for a declaration that he was the sole owner of the property in suit. Defendant objected that, he being in possession of the property, a suit for a declaration was not maintainable. The trial Court decided that this objection must prevail and dismissed the suit. On appeal to the Chief Court it was decided that as plaintiff was in possession of part of the property and was a co-sharer with one N. in the portions of the property in N's possession, the suit as framed was competent. The case was accordingly remanded to the trial Court for decision on the merits. The defendant then applied for leave to appeal to His Majesty in Council against this order of remand.

Held, that an order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council and as the order in the present case decided nothing which could be regarded as a cardinal point in the suit it was not a *final* order within the meaning of clause (a) of section 109 of the Code of Civil Procedure.

Radha Kishan v. The Collector of Jaunpur (1), followed. *Saiyid Muzhar Hossain v. Mt. Bodha Bibi* (2), *Drigpal Singh v. Pahludi Lal* (3), and *Hyder Mehdi v. Mt. Badshah Khanam* (4), distinguished and followed in part.

Held also, that there is no ground for granting a certificate under clause (c) of the section.

Application for permission to appeal to His Majesty in Council against the judgment, passed by Mr. Justice Broadway and Mr. Justice Martineau, on the 19th January 1920.

(1) (1900) I. L. R. 23 All. 220 (P. C.).

(3) (1919) I. L. R. 42 All. 178.

(2) (1894) I. L. R. 17 All. 112 (P. C.).

(4) (1918) 49 Indian Cases 520.

SHEO NARAIN and BALWANT RAI, for Petitioners.

MOTI SAGAR for LABHU RAM, Respondent (others absent).

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The order of the Court was delivered by—

BROADWAY, J.—This is an application under section 110, Civil Procedure Code, for leave to appeal to His Majesty in Council. The suit was instituted by *Lala Labhu Ram* asking for a declaration to the effect that he was the sole owner of the property in suit free from encumbrances and was in possession thereof as such owner. The present petitioner *Lala Ram Saran Das* objected that the suit was not maintainable as framed. He alleged that he himself was in possession of the whole property and contended that *Lala Labhu Ram* should bring a suit for possession and not for a mere declaration. The trial Court decided that *Lala Ram Saran Das's* contention should prevail and dismissed the suit.

Against this order of dismissal *Lala Labhu Ram* preferred an appeal to this Court which was decided on the 19th of January 1920. It was held that inasmuch as *Lala Labhu Ram* had been in possession of some portion of the property and was a co-sharer with one *Nathu* in those portions of the property which were in *Nathu's* actual possession, the suit as framed was competent. The case was accordingly remanded to the trial Court for decision on the merits and of the other issues arising on the pleadings.

Lala Ram Saran Das now asks for leave to appeal to His Majesty in Council against this order of remand. On behalf of *Lala Labhu Ram* Mr. Moti Sagar contended that inasmuch as the order sought to be appealed against was not a final order within the meaning of section 109 (a), leave should not be granted. He also contended that the case was not one such as contemplated by section 109 (c).

Mr. Sheo Narain, for *Lala Ram Saran Das*, while admitting that an order of remand by itself was not a final order such as contemplated by section 109 (a), contended that inasmuch as it has been held by this Court that *Lala Labhu Ram* was in possession of a part of the property, the case was one in which a

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certificate should be granted. He also contended that the case fell within the purview of section 109 (c). He drew our attention to *Saiyid Muzhar Hossein v. Mst. Bodha Bibi* (1), *Drigpal Singh v. Pahladi Lal* (2), and *Hyder Mehdi v. Mst. Badshah Khanam* (3).

The decision in *Saiyid Muzhar Hossein v. Mst. Bodha Bibi* (1) does not appear to assist Mr. Sheo Narain, for there it was held that although the order sought to be appealed against purported to be made under section 562, Civil Procedure Code, that section was not applicable and that section 565 appeared to be more appropriate. In that case the appellate Court had reversed, once for all, the decision of the first Court upon an issue as to the making and validity of the will which issue governed the whole case. In the present case the decision on the question of the competency of the suit as framed by no means disposes of the whole suit.

In *Drigpal Singh v. Pahladi Lal* (2) leave to appeal was granted under section 109 (c), it being distinctly held that the order as an order of remand was not a final order entitling an appeal to His Majesty in Council. That case too is clearly distinguishable.

In the case of *Hyder Mehdi v. Mst. Badshah Khanam* (3) it was held that a decision on a plea of limitation should be regarded as a final order within the meaning of section 109, Civil Procedure Code, inasmuch as that decision went to the foundation of the case.

In our opinion an order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council, being interlocutory and not final within the meaning of the section. It could only be regarded as a final order and capable of appeal if it had the effect of finally deciding some cardinal point in the suit. In this view we are supported by *Radha Kishan v. The Collector of Jaunpur* (4) as well as by the authorities cited by Mr. Sheo Narain.

(1) (1894) I. L. R. 17 All. 112 (P. C.). (3) (1918) 49 Indian Cases 520.

(2) (1919) I. L. R. 42 All. 176.

(4) (1900) I. L. R. 28 All. 220 (P. C.)

The order in the present case decides nothing which can be regarded as a cardinal point in the suit. As an order of remand, pure and simple, it is of an interlocutory nature and therefore not liable to appeal. So far as the applicability of clause (c) of section 109, Civil Procedure Code, is concerned, we are unable to see any ground for granting a certificate; and we therefore dismiss this petition with costs.

Petition dismissed.

CIVIL REFERENCE.

Before Mr. Justice Martineau.

THE UNITED SERVICE CLUB, SIMLA—*Petitioner,*

versus

THE CROWN—*Respondent.*

Civil Reference No. 34 of 1920.

Indian Income Tax Act, VII of 1918, sections 3, 5, 8, 51—
income of the United Service Club of Simla, a registered Com-
pany—whether liable to income tax.

Held, that the income of the United Service Club of Simla, a Company registered under the Indian Companies Act, is not liable to be assessed to income tax under the Indian Income Tax Act except in respect of its house property.

The New York Life Insurance Company v. Styles (1), and *The Carlisle and Silloth Golf Club v. Smith* (2), followed.

MACKAY, for Petitioner.

JAI LAL, for Respondent.

Case referred by the Financial Commissioners, Punjab, Lahore, under their order No. I. T. Review-20-3, dated 3rd August 1920.

MARTINEAU, J.—This is a reference from the Financial Commissioner under section 51 of the Income Tax Act, VII of 1918, made on the application of the United Service Club of Simla, Limited, which is a Company registered under the Indian Companies Act, the question referred being whether the Club is liable to be

(1) (1889) L. R. 14 Ap. Cases 381.

(2) (1913) 3 K. B. 75.