

In these circumstances we do not think that the sale should now be interfered with. We accept the appeal and dismiss the plaintiffs' suit with costs.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Abdul Raouf.

HONDA RAM AND OTHERS (DEFENDANTS)—Appellants,
versus

HOTU RAM AND OTHERS (PLAINTIFFS) } Respondents.
RAM KISHEN (DEFENDANT) }

Civil Appeal No. 1226 of 1919.

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Civil Procedure Code, Act V of 1908, Order XLIII, rule 1 (u)
—appeal from order of remand—whether findings of fact can be questioned.

Held, that an appellant coming to the High Court in appeal under Order XLIII, rule 1 (u) of the Code of Civil Procedure from an order of remand under Order XLI, rule 23, cannot question findings of fact arrived at by the Lower Appellate Court.

Sawan Singh v. Mothu (1), followed.

Miscellaneous appeal from the order of J. Coldstream, Esquire, District Judge, Multan, dated the 14th April 1919, reversing the decree of Lala Hari Chand, Senior Subordinate Judge, Multan, dated the 17th June 1918, and remanding the case to the lower Court for the decision of the remaining questions arising in the case.

SHEO NARAIN, for Appellants.

TEK CHAND, for Plaintiffs, Respondents,

The facts of the case are given in the judgment of the Court, delivered by—

ABDUL RAOUF, J.—This appeal arises out of a suit for the redemption of a mortgage, dated the 25th of June 1897. The suit was resisted upon various grounds, one of which being that the document though in appearance a mortgage deed, was really a sale deed and the transaction was that of a sale and not that of a mortgage. In support of this contention the terms of the mortgage deed were relied upon and oral evidence was called to prove the intention of the parties. The Court

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of first instance gave effect to this contention and dismissed the suit.

An appeal was preferred by the plaintiff to the Lower Appellate Court which after going into the evidence has come to a different conclusion and has set aside the decree of the Court of first instance on the preliminary point on which the judgment of the Court of first instance was based. The Lower Appellate Court has made an order of remand under Order XLI, rule 23, Civil Procedure Code, remanding the case to the original Court for the decision of the remaining questions arising in the case.

An appeal has been preferred to this Court under Order XLIII, rule 1 (*u*). Mr. Sheo Narain, Counsel for the appellant, has attacked the finding of fact arrived at by the Lower Appellate Court and has contended that this being a first appeal from an order, he is entitled to challenge the findings of fact of the Court below. He has also contended that the Lower Appellate Court has wrongly excluded oral evidence under section 92 of the Evidence Act.

This argument ignores the fact that in spite of holding that oral evidence was inadmissible the Court has actually considered the evidence and has held it to be insufficient and unreliable. The question whether on an appeal from an order of remand an appellant is entitled to question the findings of fact recorded by the Appellate Court was considered by a Bench of the Punjab Chief Court in *Sawan Singh v. Motu* (1) and was answered in the negative. The learned Judges of the Calcutta High Court also have expressed the same opinion. We ourselves feel not the slightest difficulty in coming to the same conclusion. The policy of the Legislature being not to allow a second appeal on facts, it is difficult to see how the appellant coming in appeal under Order XLIII, rule 1 (*u*), can question findings of fact in this Court.

We are clearly of opinion that the findings arrived at by the Lower Appellate Court are findings of fact and cannot be questioned. We accordingly dismiss the appeal with costs.

Appeal dismissed.