

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

1919.

*Novem-
ber 19.*

KACHU VALAD RAVJI MINDHE VANJARI (ORIGINAL DEFENDANT), APPELLANT *v.* TRIMBAK KHEMCHAND GUJARATI (ORIGINAL PLAINTIFF), RESPONDENT^o.

Civil Procedure Code (Act V of 1908), sections 47, 104 (2), Order XXI, rules 89, 92, Order XLIII, (1) (j)—Order—Appeal from Order—Second appeal—Practice and procedure.

A second appeal does not lie from an order passed under Order XXI, rule 89, of the Civil Procedure Code, 1908. The fact that the auction-purchaser is the decree-holder himself makes no difference.

APPEAL under the Letters Patent from an order passed by Heaton, J., summarily dismissing an appeal from the decision of F. K. Boyd, District Judge of Nasik, confirming an order passed by G. M. Phatak, Subordinate Judge at Yeola.

Execution proceedings.

The plaintiff obtained a decree against the defendant; and in execution of it, some property belonging to the defendant was sold and purchased by the plaintiff at the Court-sale.

The defendant applied to the Court to set aside the sale under Order XXI, rule 89; but the application was unsuccessful. The defendant appealed to the District Court; but his appeal was dismissed.

He appealed to the High Court; but his appeal was summarily rejected by Heaton J. He again appealed under the Letters Patent, when his appeal was admitted by Macleod C. J. and Shah J.

A. G. Desai, for the respondent, raised a preliminary objection that no second appeal lay and hence no appeal

^o Letters Patent Appeal No. 23 of 1918.

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under the Letters Patent was competent. Under the present Code of Civil Procedure no second appeal lies against a decision on appeal against an order. In order that a second appeal may lie there must be a decree. Under Order XXI, rule 89, it is an order that is made. The fact that the auction-purchaser is the decree-holder himself makes no difference. I rely upon the decision of Jenkins C. J. in *Asimaddi Sheikh v. Sundari Bibi*^(a).

P. V. Kane, for the appellant :—Here the question is one between the decree-holder and the judgment-debtor and relates to a sale held in execution of a decree. So it is a question falling under section 47 of the Civil Procedure Code. The definition of 'decree' in section 2 (2) includes the determination of any question within section 47. The facts of the Calcutta case appear to have been different. Therein it is not clear whether the decree-holder himself was the auction-purchaser. In decisions under the former Code a second appeal was held to lie.

SHAH, J. :—It is urged as a preliminary objection to this appeal that no second appeal lies to this Court. The original application out of which this appeal has arisen was made under rule 89 of Order XXI by the judgment-debtor. That application was rejected. There was an appeal from that order to the District Court of Nasik and that appeal was dismissed. From the order dismissing the appeal a second appeal was preferred to this Court; and the point now raised is that such a second appeal is not competent. It is clear that the appeal to the District Court was an appeal under Order XLIII, rule 1, clause (j), and that under section 104, sub-section 2 of the Code of Civil Procedure, no appeal can lie from any order passed in appeal under the section. The only ground upon which it is said that the present

(a) (1911) 38 Cal. 339.

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case falls outside the scope of section 101, sub-section 2, is that the auction-purchaser happens to be the decree-holder and that the order on the application of the judgment-debtor is an order relating to the execution of the decree between the parties under section 47. We do not think, however, that the accident of the auction-purchaser being the decree-holder makes any difference in the effect of the provisions of section 101, sub-section 2. Whether the auction-purchaser be the decree-holder or a third person, the result is the same so far as the appealability of the order is concerned.

The appeal must, therefore, be dismissed with costs on the ground that no second appeal lies to this Court.

Appeal dismissed.

R. R.

PRIVY COUNCIL.*

P. C.^o

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November
18.

HARIDAS RANCHORDAS (AND ANOTHER, DEFENDANT) v. MERCANTILE BANK OF INDIA (PLAINTIFFS).

[On appeal from the High Court of Judicature at Bombay.]

Bankers—Interest on overdrafts—Practice of paying interest in a different mode from that agreed on—Compound interest charged without any objection for long time—Implied contract to pay it—Evidence Act (1 of 1872), section 92—Refusal to honour cheques.

The appellants carried on business at Bombay as cotton merchants, and the respondents were their Bankers. From 1906, the Bank had allowed the appellants' firm to overdraw their accounts under an agreement between the parties consisting of a letter in a printed form signed and given by the appellants to the respondents on 1st December annually, and providing that interest should be charged at 7 per cent. per annum, and be calculated on the daily balance due in respect of the overdraft, pledging as security the cotton stored by them in the godowns of the Bank. The practice of the Bank

* *Present* :—Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.