

LETTERS PATENT APPEAL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Doss.

1908
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 Aug. 11.

GOPINATH PATI

v.

MOHESHWAR PRADHAN.\*

*Letters-Patent Appeal—Remand, order of—Letters Patent, 1865, s. 15—  
 “Judgment”—Transferability of occupancy holding.*

An order of remand passed by a single Judge of the High Court, under s. 562 of the Code of Civil Procedure, 1882, is a “judgment” within the meaning of s. 15 of the Letters Patent, and an appeal lies from such an order under the Charter.

LETTERS PATENT APPEAL by Chowdhry Gopinath Pati and others, the defendants, from a judgment of BRETT, J.

The suit, out of which this appeal arose, was brought by the plaintiff as a tenant to recover possession of a certain holding. It was alleged that the defendant No. 4 was the original tenant of the holding, and that he had a right of occupancy.

In 1894 the defendant No. 5 brought a suit for the recovery of rent of this holding against the defendant No. 4 and obtained a decree, in execution of which he brought the holding to sale, and purchased it on the 27th of September 1896. The defendant No. 5 then settled the land with the plaintiff as a tenant.

The defendants Nos. 1 to 3 contended that the defendant No. 4, the original tenant, had transferred the land to them by a private sale on the 11th August 1893, and that he had been allowed to hold the land as a sub-tenant under them. He defaulted in paying them rent, and they brought a suit against him and obtained a decree, and in execution thereof purchased the right of defendant No. 4 in the holding in December 1902. They obtained possession of the holding in May 1903.

\* Letters-Patent Appeal, No. 40 of 1907, in Appeal from Appellate Decree, No. 8 of 1908.

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The plaintiff alleged that when defendants Nos. 1 to 3 took possession of the holding, he put in an objection under s. 335 of the Code of Civil Procedure, but the objection was disallowed. He thereupon brought the suit to recover possession on declaration of his title.

The Court of first instance decreed the suit, but, on appeal, the Subordinate Judge set aside the judgment and decree of the first Court mainly on the grounds that the plaintiff had not been able to prove his title to the land, and that occupancy rights purchased by defendants 1 to 3 were transferable.

The plaintiff appealed to the High Court. The value of the subject-matter of the suit being below Rs. 1,000, the second appeal was heard by Brett, J. sitting alone. His Lordship set aside the judgment and decree of the lower Appellate Court, and remanded the case to that Court for a satisfactory finding on the question, whether the holding in suit was transferable by local usage.

Against that Order of remand the defendants appealed under s. 15 of the Letters Patent.

*Babu Joy Gopal Ghose*, for the respondent, took a preliminary objection that no appeal lay under the Letters Patent against an order of remand, though passed by a single Judge of this Court, such an order not being a "judgment" within the meaning of s. 15 of the Charter.

*Babu Amarendra Nath Bose*, for the appellant. The general question, whether there is or is not an appeal under the Letters Patent against an order of remand, does not arise in this case. In the present case the judgment and decree of the first Appellate Court have been set aside and the whole case has been directed to be sent back to be tried on the merits; and, further, a formal decree has been drawn up in this Court. It is submitted, therefore, that the order of remand is a "judgment" within the meaning of s. 15 of the Charter, and that there is an appeal against that order: see *Letters Patent Appeal No. 72 of 1907(1)*; decided by Rampini and Mitra, JJ., which supports my contention.

(1) (1907) Unreported, dated 19th July, 1907, in S. A. No. 2089 of 1905.



the admitted landlord made a settlement of it with his father. But the Subordinate Judge came to the conclusion that defendant No. 5 made no such settlement and that neither the plaintiff nor his father had ever been in possession of it. The learned Judge of this Court has said that this question, which does not arise between the plaintiff and the defendants 1, 2 and 3, arises between the plaintiff and defendants No. 5 alone. We cannot, however, agree with the learned Judge of this Court in this view. The defendants Nos. 1, 2 and 3 had good right to impugn the title of the plaintiff and to call upon him to prove his title before he can have any right to obtain possession from them. That being so, we think that the finding, at which the Subordinate Judge has arrived, whether it be right or not, is a finding of fact, which concludes this matter. Therefore, the learned Judge of this Court is not justified in overlooking that finding and remanding the case to the lower Appellate Court. He should have accepted that finding and dismissed the suit of the plaintiff.

We, therefore, set aside the judgment and decree of Mr. Justice Brett and restore that of the Subordinate Judge.

The appellants are entitled to the costs of this hearing and of the hearing before Mr. Justice Brett.

*Appeal allowed.*

B. D. B.

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