

APPELLATE CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Coxe.*

ASIMADDI SHEIKH

v.

SUNDARI BIBI.*

1911

May 1.

Appeal—Second Appeal, if it lies from an order passed under o. XXI, rr. 89 and 92 of the Code of Civil Procedure, 1908—Civil Procedure Code (Act V of 1908) ss. 2, 49, 104 (2); o. XXI, rr. 89-92; o. XLIII, r. 1 (j)—Civil Procedure Code (Act XIV of 1882), ss. 310A, 312, and 388.

No second appeal lies from an order passed in first appeal from an order under rule 89 or 92 of order XXI of the Code of Civil Procedure, 1908.

Section 104, sub-section (j) of the Code of 1908 takes away the right of second appeal where a second appeal could lie in cases under section 310A read with section 244 of the Code of 1882.

SECOND APPEAL by the judgment-debtor.

This appeal arose out of an application by the judgment debtor to set aside a mortgage sale upon deposit of the decretal amount and the purchaser's compensation. The sale sought to be set aside was held under the provisions of the Transfer of Property Act. The Court of first instance held that the applicant, though the judgment-debtor, had no *locus standi* to apply for setting aside the sale, as it was a mortgage-sale. It further held that if the mortgagor were allowed to have the sale set aside under rule 89 of order XXI of Act V of 1908, the provisions of s. 89 of the Transfer of Property Act would be nullified. On appeal, the Subordinate Judge upheld the decision of the lower Court and dismissed the appeal. Hence this second appeal.

Babu Mohinemoohan Chakrabarti, for the respondent, took a preliminary objection to the hearing of the appeal: No

* Appeal from Order No. 583 of 1909, against the order of Radha Nati Sen, Subordinate Judge of Jessore, dated Sept. 27, 1909, confirming the order of P. N. Bhattacharjee, Munsif of Jhenidah, dated March 1, 1909.

1911
 ASIMADDI
 SHEIKH
 v.
 SUNDARI
 BIBI.

appeal lies from any order passed in appeal from an order passed under rule 92 of order XXI of the new Code of Civil Procedure. A first appeal lies under the new Code against an order passed under rule 92 of order XXI: see order XLIII, rule 1 (i). The Code provides for no second appeal. In the case of *Amir Rai v. Basdeo Singh* (1), the facts of which are very similar to this case, where the contention was practically between the judgment-debtor and the auction-purchaser, as here, it was held that no second appeal lay.

Babu Harachandra Chakrabarti, in reply, cited several cases decided under the provisions of the old Code of 1882.

JENKINS C.J. This case comes before us by way of appeal from an appellate order, and a preliminary objection has been taken that no appeal lies. The application which has resulted in this appeal arises out of rule 89 of order XXI of the Civil Procedure Code of 1908. The application under rule 89 was disallowed, and the Court, as required by rule 92, made an order confirming the sale. Thereupon, the sale became absolute. From such an order an appeal lies under order XLIII, rule 1, clause (j), which provides that an appeal shall lie from an order under rule 92 of order XXI setting aside or refusing to set aside a sale. Section 104, sub-section (2) provides that no appeal shall lie from any order passed in appeal under this section, and among the orders that came within the operation of that sub-section is an order made under rules from which an appeal is expressly allowed by rules. An endeavour has been made to escape from this clear provision of the law by the help of decisions under the Code of 1882 in relation to section 310A. But they are of no assistance. To begin with section 310A (which corresponds with rule 89 of order XXI) did not come within the operation of section 312, whereas rule 89 comes within the operation of rule 92, and so the basis on which the decisions of the Court under the old Code proceeded no longer exists. The decisions as to the appealability of

(1) (1906) 5 C. L. J. 204.

orders under section 310A rested on the view that orders under that section were in the majority of cases orders determining a question mentioned or referred to in section 244, and therefore were decrees, from which there would be an appeal and second appeal in appropriate conditions. But this view was dependent on the circumstance that an order under section 310A was not specified in section 588 as an order from which an appeal would lie as an appeal from order. This has been changed under the Code of 1908, for though it is provided by section 2 (2) that a decree shall be deemed to include the determination of any question within section 47 (corresponding with section 244 of the Code of 1882) the definition goes on to provide that it shall not include any adjudication for which an appeal lies as an appeal from an order. But an appeal does now lie as an appeal from order from an order made on an application under rule 89 of order XXI.

In this view, it is unnecessary to consider the further ground urged against this appeal, for I hold, for the reasons I have stated, that the preliminary objection taken on behalf of the respondents must prevail, and that this appeal must be dismissed with costs.

Coxe J. concurred.

S. M.

Appeal dismissed.

1911
 ASIMADDI
 SHEIKH
 v.
 SUNDARI
 BIBI.
 JENKINS
 C.J.