

(1911) 05 CAL CK 0016
In the Calcutta High Court
Case No : Appeal from Order No. 91 of 1910

Janaki Nath Ray Chowdhury and Others	APPELLANT
Vs	
Promotha Nath Roy Chowdhury and Another	RESPONDENT

Date of Decision : 11-05-1911

Acts Referred:

Citation : (1911) 05 CAL CK 0016

Final Decision : Dismissed

Judgement

1. This is an appeal from an order of remand. It appears that the Plaintiffs brought a suit against the Defendants for a declaration of title to and for khas possession of certain lands. The judgment of the first Court was passed on the 10th March 1909 in favour of the Plaintiffs. Against that decree Defendants Nos. 1 to 3 appealed. On the 25th November 1909, the lower Appellate Court remanded the case purporting to do so under Or. 41, r. 23, but in form remanding it under Or. 41, r. 25. The suit was taken up by the Court of first instance and again decreed on the 10th January 1910, the decision again being in favour of the Plaintiffs. Defendants Nos. 1 to 3 filed an appeal against that decision. We are not given the precise date of the filing of that appeal; but on the 13th July 1910 the lower Appellate Court decided the case by dismissing that appeal. On the 28th February 1910, that is, between the date of the second decree of the Court of first instance and the date of the decree of the lower Appellate Court the present Appellant preferred this appeal to this Court.

2. A preliminary objection has been taken that this appeal cannot proceed. The Respondents rely upon the case of Madhu Sudan Sen v. Kamini Kanta Sen I. L. R. 32 Cal. 1023 : s. c. 9 C. W. N. 895(1905). That suit was decided under the CPC of 1882, but in this respect there seems to be no difference between the old Code and the new. There, the late Chief Justice remarked "If a party desire to avail himself of the privilege conferred by sec. 588 in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until the final disposal of the suit and then to appeal against

the interlocutory order without appealing from the decree in the suit." This decision was followed by Mr. Justice Stephen and Mr. Justice Mookerjee in the case of Baikantha Nath Dey v. Nawab Salimullah 12 C. W. N. 590 (1907). Mr. Justice Mookerjee remarked that " when a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute. That is the principle upon which this Court has acted in disallowing such appeals as the present. It is true that the Allahabad High Court has taken a different view in the case of Uman Kunwari v. Jarbandhan I. L. R. 30 All. 479 (1908). But the decisions of this Court are binding on us in preference to those of the Allahabad High Court. Since the decision of the case Uman Kunwari v. Jarbandhan I. L. R. 30 All. 479 (1908), this Court has again taken the same view in the case of Mackenzie v. Narsingh Sahai I. L. R. 36 Cal. 762 (1909). It is true, however, that that case is not precisely in point, as the question there was of an appeal from a preliminary decree in a partition suit after the final decree had been passed. The case of Patent Chetty v. Rangiadoss Naidu (5), which has been cited to us is not in point, and it may be remarked that the decision at which the learned Judges in that case arrived, has been disposed of by the enactment of sec. 105 of the CPC of 1908. The second clause to that section does not meet the present case but applies rather to the converse case. Following those decisions of this Court to which we have referred, we allow the preliminary objection and dismiss this appeal with costs, the hearing fee being assessed at two gold mohurs.