

APPELLATE CIVIL.

Before Mookerjee and Buckland JJ.

RAMESH CHANDRA DAS

v.

SARADA KRIPA LALA.*

1921

June 7.

*Appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 10, sub-r. (2)—
Security for costs—Non-compliance with order—Rejection of appeal—
Appeal from order of rejection.*

An order rejecting an appeal under O. XLI, r. 10, sub-r. (2), is not appealable either as an order or as a decree.

SECOND APPEAL by Ramesh Chandra Das, the plaintiff.

This appeal arose out of a suit for the possession of land upon partition. The Court of first instance dismissed the suit after trial on the merits and the plaintiff thereupon appealed to the District Judge. The District Judge directed him to furnish security for costs under the provisions of O. XLI, rule 10, sub-rule (1). The security was not furnished within time and the appeal was rejected under O. XLI, rule 10, sub-rule (2). The appellant then appealed to the High Court.

Babu Kanaidhan Dutt, for the appellant.

Babu Chandra Sekhar Sen, for the respondent.

MOOKERJEE J. This is an appeal by the plaintiff in a suit for recovery of possession of land upon partition. The Court of first instance dismissed the suit after trial on the merits. The plaintiff then appealed to the District Judge. The lower Appellate

*Appeal from Appellate Decree, No. 2387 of 1919, against the decree of W. A. Seaton, District Judge of Chittagong, dated June 25, 1919, affirming the decree of Kunja Behari Biswas, Additional Subordinate Judge of that district, dated June 15, 1918.

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Court called upon him to furnish security for the costs of the appeal and the original suit under sub-rule (i) of rule 10 of Order XLI of the Code of Civil Procedure. The plaintiff did not comply with this order. Thereupon the Court proceeded to make the order contemplated by sub-rule (ii) of rule 10 which provides that where such security is not furnished, the Court shall reject the appeal. The order of the District Judge is not accurately expressed, because it states that the appeal is dismissed and not that the appeal is rejected. This inaccuracy in expression, however, does not alter the nature of the order. The plaintiff has now appealed to this Court.

On behalf of the respondents, a preliminary objection has been taken that the appeal is incompetent. This raises the question whether an order under Order XLI, rule 10, sub-rule (ii), is or is not appealable. If it is treated as an order it is clearly not appealable because it is not included in the list of appealable orders set out in Order XLIII, rule 1 nor is it covered by the provisions of section 104. Consequently, if an appeal is to be entertained, the appellant must satisfy us that the order of rejection is in essence, a decree. We are of opinion that the order does not fall within the definition of a decree contained in section 2 which provides that "decree" means the formal "expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." The order in this case does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit, in as much the Court rejected the appeal and did not deal with the merits of the controversy between the parties. This view was adopted by a Full Bench in the case

of *Lekha v. Bhauna* (1), which was mentioned with approval in *Secretary of State for India in Council v. Jillo* (2), and *Firozi Begam v. Abdul Latif Khan* (3). We observe that in the case last mentioned, it was remarked that it would be well if the Legislature would consider whether it would not be advisable to embody in the Code of Civil Procedure some provision analogous to that contained in the second paragraph of section 381 of the Code of 1882 and thus to give a right of appeal from orders passed under section 541 of that Code. The Legislature, however, does not appear to have taken notice of the suggestion. It may be pointed out further that section 2 includes in the term "decree" an order of rejection of a plaint but not an order of rejection of an appeal. It is also worthy of note that Order XXV, rule 2 which deals with the dismissal of a suit on failure to furnish security describes the order, not as that of rejection of a suit but as that of dismissal of a suit, and such order of dismissal is made expressly appealable under Order XLIII, rule 1, clause (n). We are consequently of opinion that an order of rejection of an appeal under Order XLI, rule 10, is not appealable, either as a decree or as an order. This appeal is plainly incompetent and is accordingly dismissed with costs.

The application, filed in Court today with a view to have the order set aside in the exercise of our revisional jurisdiction or of our power of superintendence, is refused.

BUCKLAND J. I agree.

(1) (1895) I. L. R. 18 All. 101.

(2) (1898) I. L. R. 21 All. 133.

(3) (1908) I. L. R. 30 All. 143.

A. S. M. A.

Appeal dismissed.

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