

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonall.

HIRDHAMUN JHA AND OTHERS (DEFENDANTS) v. JINGHOOR JHA
AND OTHERS (PLAINTIFFS).*

1880
Mar. 18.

Second Appeal — Appeal from order—Code of Civil Procedure (Act X of 1877), chap. xlii—Code of Civil Procedure (Act X of 1877), ss. 588 and 591.

An order made by a lower Court, directing a suit to be re-admitted and registered on the file of the Court, is not appealable.

Second appeals to the High Court must either come within chap. xlii or ss. 588 and 591 of Act X of 1877.

ON the 12th August 1878 the Munsif of Madhobanee passed the following order in a suit brought up before him: “The defendants in this suit have appeared by their pleader; but the plaintiffs have appeared by a pleader who has not been duly instructed. The suit has been pending for a long time, and there was sufficient time for the clients to instruct the pleader if they chose. As the pleader declines to proceed with the suit, and no reason has been shown why the suit should be postponed, it is ordered that the suit be dismissed, the plaintiffs paying defendants’ costs.”

The plaintiffs applied for a rehearing, but their application was refused. They then applied under s. 623 of Act X of 1877 for a review.

The Munsif found that the suit had been set down for settlement of issues on the 12th August 1878, and that, therefore, even supposing that the pleader for the plaintiffs had not been duly instructed, still there was no reason why the issues should not have been settled, and a further day fixed for the hearing of the suit; he, therefore, ordered the decision of the 12th August 1878 to be set aside, and the case to be registered, costs being borne by both parties.

* Miscellaneous Appeal, No. 263 of 1879, from an order of R. J. Richardson, Esq., Judge of Tirhoot, dated 12th September 1879, affirming an order of Baboo Tej Chunder Mookerjee, Munsif of Madhubani, dated 1st February 1879.

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The defendants appealed to the Judge of Tirhoot, who upheld the decision of the Munsif, dismissing the appeal with costs.

The defendants appealed to the High Court.

Baboo *Uma Kali Muherjee* for the appellants.—The decree of the 12th September 1878 should have been treated as made under s. 102 of the Code of Civil Procedure. The plaintiffs' remedy was to apply for an order to set aside the dismissal under s. 103, and not to have applied under s. 623. The order of the Munsif, admitting the application, is in contravention of ss. 624 and 626, and an appeal will lie against such an order. See s. 629.

Baboo *Aubinash Chunder Bannerjee* for the respondents.—The order appealed against is not a decree within the meaning of chap. xlii of the Code, and no appeal lies.

The judgment of the Court was delivered by

PONTIFEX, J. (MCDONELL, J., concurring).—On the preliminary objection taken by the respondents to the hearing of this appeal, we think that no appeal lies to this Court. Although s. 629 does give an appeal, yet second appeals to this Court must either come within chap. xlii, the sections relating to appeals, or they must come under ss. 588, 591.

We think that the order appealed against is not a decree within the meaning of chap. xlii, and it is certainly not an order under ss. 588 and 591. We observe that, in the Court of the Munsif, the parties were made to bear their own costs; we think that the plaintiffs, having been in default, should have been made to bear all the costs in the Court below, but as there is no second appeal, we have not the power to deal with the costs in the lower Court. But we give no costs in this Court.

Appeal dismissed.