

Statute, but it should be borne in mind that the property was not sold in halves, and the purchaser has no right to draw an imaginary line of separation between them. The sale will be confirmed, and the auction-purchaser's application should be disallowed with costs."

1883
 RAM
 COOMAR DEY
 v.
 SHUSHRE
 BHOSHUN
 GHOSH.

The purchaser appealed to the High Court.

Baboo *Amarendro Nath Chatterjee* for the appellant.

Baboo *Rajendro Nath Bose* for the respondents.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—We think that the construction put by the Court below upon s. 313 of the Code of Civil Procedure was correct, and that the case of *Naharmul Marwari v. Sadut Ali* (1), does not bind us, because in that case the learned Judges considered that a state of things had come about in which the judgment-debtor had no saleable interest. In the present instance it is admitted that he has a saleable interest to the extent of eight annas. That being so we think we cannot hold that the case falls within the scope of s. 313. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice Field.

LUCKY CHURN CHOWDHRY (PLAINTIFF) v. BUDURRUNNISSA
 AND OTHERS (DEFENDANTS).*

1882
 August 15.

Appeal—Dismissal of Suit—Summons not served—Civil Procedure Code (Act X of 1877), ss. 97, 588.

An order under s. 97 of the Civil Procedure Code dismissing a suit on it being found that the summons has not been served on the defendant, in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, is not appealable.

* Appeal from Appellate Decree No. 682 of 1881, against the decree of Baboo Mothoora Nath Gupto, Subordinate Judge of Chittagong, dated the 27th January 1881, affirming the decree of Baboo Hurro Chunder Dass, Mansiff of South Boajan, dated the 30th April 1880.

1882

LUCKY
CHURN
CHOWDHRY
v.
BUDURRUN-
NISSA.

Baboo *Aukhil Chunder Sen* for the appellant.

Munshi *Serajul Islam* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (WILSON and FIELD, JJ.), which was delivered by

WILSON, J.—We are disposed to think that this appeal will not lie. The order that is sought to be appealed against is one under s. 97 of the Civil Procedure Code, which says: "If, on the day so fixed for the defendant to appear and answer, it be found that the summons has not been served upon him, in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, the Court may order that the case be dismissed." The question is whether there is an appeal against such dismissal when no appeal is expressly given either in s. 588 or elsewhere. Section 588 says that an appeal will lie against a decree. A decree is defined in the interpretation clause as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." A decree, therefore, must be an expression of opinion upon the rights of the parties; but this was a dismissal on a ground wholly apart from the merits of the case. We are, therefore, disposed to think that this is not a decree, but an order only. That view is confirmed by the latter part of the definition of a decree which expressly says that a certain class of orders, more or less analogous to those made under s. 97, shall be decrees, but says nothing of orders made under s. 97. Then again a large number of orders analogous to those made under s. 97 are expressly made appealable under s. 588, whereas orders under s. 97 are not mentioned. But however that may be, there are certainly no grounds on the merits of the case to lead us to interfere.

The decision of the Subordinate Judge was right, and the appeal is dismissed with costs.

Appeal dismissed.