

Although we do not agree with the propositions of law of our brother Burkitt, we, for the above reasons, dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

GENDA MAL AND ANOTHER (DEFENDANTS) v. PIRBHU LAL (PLAINTIFF).*

Civil Procedure Code s. 373--"Order"--"Decree"--Appeal.

An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with liberty to bring a fresh suit on the same cause of action is not appealable, not being a decree within the meaning of s. 2 of the Code, nor one of the orders from which an appeal is allowed by s. 538. *Kalian Singh v. Lekhraj Singh*, (1), *Jagdish Chaudhri v. Tulshi Chaudhri* (2), *Zahuri v. Dina Nath* (3) and *Jogodindro Nath v. Sarut Sunduri Debi* (4) referred to. *Ganga Ram v. Data Ram* (5) not followed.

THE plaintiff sued in the Court of the Munsif of Pilibhit for the demolition of a wall which, he alleged, the defendants had wrongfully constructed upon land belonging to him. While the suit was pending in the Munsif's Court the plaintiff applied under s. 373 of the Code of Civil Procedure for leave to withdraw his suit with liberty to bring a fresh suit on the same cause of action, on the ground that since the filing of the plaint the defendants had made further erections upon land belonging to him. The Munsif rejected this application, and proceeding to try the suit on the merits, dismissed the plaintiff's claim.

The plaintiff appealed, and the lower appellate Court (Subordinate Judge of Bareilly) holding that the first court should have allowed the plaintiff to withdraw, made an order under s. 373 of the Code in his favor.

Against this order the defendants appealed to the High Court. The appeal coming on for hearing before a single Judge, the respondent (plaintiff) took a preliminary objection that no appeal lay from

* Letters Patent Appeal No. 28 of 1894.

(1) I. L. R., 6 All. 211.

(3) Weekly Notes 1893, p. 204.

(2) I. L. R., 16 All. 19.

(4) I. L. R., 18 Calc. 322.

(5) I. L. R., 8 All. 82.

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the order under s. 373. This objection was allowed and the appeal dismissed.

The defendants thereupon appealed under s. 10 of the Letters Patent.

Mr. *J. Simeon*, for the appellants.

Munshi *Gobind Prasad*, for the respondent.

EDGE, C. J. and BANERJI, J.—This is an appeal brought by the defendants in the suit under s. 10, of the Letters Patent. In the Court of the Munsif the plaintiff asked permission to withdraw from the suit with liberty to bring a fresh suit. The Munsif declined to give such permission, and finally made a decree dismissing the suit. The plaintiff appealed from that decree, and in the Court of first appeal he urged that there were sufficient grounds for the granting of permission to him to withdraw the suit with liberty to bring a fresh suit. The Judge of the Court of first appeal, holding that view, gave permission under s. 373 of Act No. XIV of 1882, to the plaintiff to withdraw the suit with liberty to bring a fresh suit, and stated that the result would be that the decree of the Munsif would be set aside. That order was within the power of the Court of first appeal by reason of s. 582 of the Code. From that order granting permission the defendants appealed to this Court. The appeal lay to a single Judge, and our brother Blair, holding that no appeal lay from an order under s. 373 of Act No. XIV of 1882, dismissed the appeal. From that decree of our brother Blair the defendants have brought this appeal. Mr. *Simeon* for the appellants has relied upon the decision of Mr. Justice Straight in *Ganga Ram v. Datt Ram*, (1) which case was very similar to the present, there having been there a decision by the first Court and permission granted under s. 373 by the first appellate Court. On the other hand Mr. *Vidya Charan Singh* relies upon the decision of Mr. Justice Oldfield and Mr. Justice Brodhurst in *Kalian Singh v. Lekhraj Singh*, (2), the decision of our brother Burkitt in *Jagdish Chaudhri v. Tulshi Chaudhri*, (3), the decision of our brother Aikman in *Zakuri v. Dina*

(1) I. L. R., 8 All 82.

(2) I. L. R., 6 All 211.

(3) I. L. R., 16 All 19.

Nath, (Weekly Notes for 1893, p. 204) and the decision of Mr. Justice Trevelyan and Mr. Justice G. Banerji, in the case of *Jogodindro Nath, v. Sarut Sunduri Debi* (1). In support of the appeal there is merely the decision of Mr. Justice Straight. In the case in which he expressed that opinion Mr. Justice Tyrrell, who was sitting with him, expressed no opinion on the point. There are thus in support of the contrary view the decisions of Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Trevelyan, Mr. Justice G. Banerji, Mr. Justice Burkitt, Mr. Justice Aikman and the decision at present under appeal of Mr. Justice Blair. The balance of authority is certainly in favor of the respondent. When permission is given under s. 373 there is no formal or other expression of an adjudication upon any right claimed or defence set up, and such a permission does not decide the suit, or, if the permission be given in the course of an appeal, the appeal or the suit. Consequently, the order giving permission is not a decree as defined in s. 2 of Act No. XIV of 1882. It is, however, an order granting permission, but it is not one of the orders which is appealable under s. 588 of the same Act. When an order is made under s. 373 in the course of an appeal permitting the plaintiff to withdraw the suit with liberty to bring a fresh suit, it decides nothing as to the merits of the decree of the first Court, but it merely wipes out that decree by reason of the suit being withdrawn. We dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

January 18.

JANKI KUAR (JUDGMENT-DEBTOR) v. SARUP RANI AND ANOTHER (DECREE-HOLDERS.)*

Execution of decrees—Civil Procedure Code, ss. 253, 582, 583—Security for performance of decrees of appellate Court—Method of enforcing such security.

Where in an appeal security has been given to the appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such

* Letters Patent Appeal No. 9 of 1894.

(1) I. L. R., 18 Calc 322.