

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

WAHID-UN-NISSA AND OTHERS (DEFENDANTS) v. KUNDAN LAL AND
ANOTHER (PLAINTIFFS).*

1913
May, 15.

Civil Procedure Code (1908), order XLI, rule 23; order XLIII, rule 1(u)—
Suit dismissed for default of appearance, but restored by appellate court—
Remand—Appeal.

Held that no appeal would lie from an appellate order directing that a suit, which had been dismissed because neither party had appeared, should be restored to the file of pending cases and heard.

In this case the plaintiffs' suit was dismissed because neither party appeared. The plaintiff, without applying for the restoration of the case, appealed against the decree to the District Judge. The District Judge allowed the appeal and remanded the case for decision on the merits. Against this order the defendants appealed to the High Court, and at the hearing a preliminary objection was taken that no appeal lay.

Pandit Baldeo Ram Dave (for The Hon'ble Dr. Sundar Lal), for the respondents, raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay from the order. The appeal purports to have been filed under clause (u) of order XLIII, rule 1, from an order supposed to have been made under order XLI, rule 23. The order appealed against has not been made under rule 23, order XLI. Rule 23 contemplates a case in which the court of first instance disposes of a suit upon a preliminary point and passes a "decree" and the "decree" is reversed on appeal. No "decree" has been made in this case by the court of first instance and the case has not been decided on a preliminary point. The "order" made by the court of first instance is not a "decree." In such cases there is no appeal from the appellate decree of the court. If the appeal had been dismissed by the District Judge, no second appeal would have lain to this Court. The law did not contemplate an appeal where the appeal was allowed by the District Judge.

Mr. Nihal Chand (for Dr. S. M. Suleman), for the appellant: An appeal is allowed from an order of remand. Here an order of remand was passed and an appeal can be entertained. The court below had no jurisdiction to pass the order that it did.

* First Appeal No. 28 of 1913, from an order of Austin Kendall, District Judge of Cawnpore, dated the 2nd of January, 1913.

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Even if no appeal lies, the court below having acted without jurisdiction, I submit, the case should be entertained under the provisions of section 115 of the Code of Civil Procedure.

TUDBALL and MUHAMMAD RAFIQ, JJ:—A preliminary objection is taken that no appeal lies. The suit was dismissed by the court of first instance as neither of the parties appeared. One party went up in appeal to the court below, which entertained the appeal, set aside the order of dismissal and directed that the first court should hear the case. The opposite party has come up in second appeal, and it is urged that no appeal lies. On behalf of the appellants it is urged that an appeal lies under order XLIII, rule 1, clause (u), of the Code of Civil Procedure. This order relates to orders passed by appellate courts under order XLI, rule 23. In the present case the order passed by the court below is clearly not an order under order XLI, rule 23, and therefore under order XLIII, rule 1, the appellants have no right of appeal. It is, therefore, clear that the preliminary objection must prevail. We are asked to treat this appeal as an application for revision. We decline to do so in the circumstances of the present case. The appellants, if they care to do so, must file an application for revision which will be decided on the merits. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Ryves and Mr. Justice Lyle.

RAM KUBER PANDE AND OTHERS (DEFENDANTS) v. RAM DAS (PLAINTIFF)*

Hindu law—Joint Hindu family—Mortgage—Suit for cancellation of mortgage executed by managing member—Compromise—Liability of sons.

One K, as head of a joint Hindu family, executed in 1905 a usufructuary mortgage of the family property, in which the widow of his deceased brother joined as a co-mortgagor. In 1907 the mortgagors sued for cancellation of this deed, but entered into a compromise with the mortgagee, upon which a decree was passed maintaining the mortgage, but in a modified form. The mortgagee thereafter instituted a suit for enforcement of the mortgage as settled by the compromise decree.

* Second Appeal No. 1151 of 1912, from a decree of E. F. P. Rose, Additional Judge of Gorakhpur, dated the 18th of July, 1912, reversing a decree of Hidayat Ali, Officiating Second Additional Subordinate Judge of Gorakhpur, dated the 11th of March, 1912.

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