

Before Mr. Justice Beverley and Mr. Justice Jenkins.

ANWAR ALI (DEFENDANT, APPELLANT) v. JAFFER ALI AND ANOTHER  
(RESPONDENTS.) \*

1896  
May 5.

*Appeal—Dismissal for Default—Decree, Definition of—Second appeal, Ground of—Civil Procedure Code (1882), sections 2, 550, 584.*

An order dismissing an appeal for default is not a "decree" within the definition in section 2 of the Civil Procedure Code (1882), and no appeal lies therefrom. *Jagarnath Singh v. Budhan* (1) followed; *Monsab Ali v. Nihal Chand* (2) referred to.

No appeal will lie under section 584 of the Code of Civil Procedure in a case of this sort, inasmuch as an appeal cannot be brought within any of the grounds therein mentioned.

THIS was an appeal against an order dismissing an appeal from the original decree in consequence of the default of the appellant. The order is cited in the judgment of the High Court.

The defendant against whom the original decree was passed preferred a second appeal to the High Court.

Babu *Harendra Nath Mitra*, for the respondents, raised a preliminary objection to the hearing of the appeal. He contended that the order was not one coming under section 588, as it was not a refusal to re-admit or re-hear an appeal. Nor can the order be brought within the definition of decree. The amendment made by section 54, Act VII of 1888, does not help the appellant, for it gives an appeal from an appellate decree passed *ex parte*. It excludes the cases dismissed for *default*, probably because there is a provision for re-hearing and an appeal thereafter. *Jagarnath Singh v. Budhan* (1), *Monsab Ali v. Nihal Chand* (2). [The *vakil* was here stopped by the Court and the other side called upon.]

Babu *Umakali Mukerji* for the appellant.—A decree has been drawn up in this case in the form prescribed by section 579 and there is an appeal. The section 119 in the old Code of 1859

\* Appeal from Appellate Decree No. 1548 of 1894, against the decree of W. H. Page, Esq., District Judge of Tirhoot, dated the 16th of May 1894, affirming the decree of Babu Ananda Kishore Dutt, Munsif of Muzafferpore, dated the 13th of September 1893.

(1) I. L. R., 23 Calc., 115.

(2) I. L. R., 15 All., 360.

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corresponding to the present section 102, expressly took away the appeal; but the present section omits the provision against appeal. *Ram Chandya Pandurang Naik v. Madhav Purushottam Naik* (1) is authority for the propositions that there is an appeal, and that the order should be held to be a decree. Parsons, J., in that case did not think an order like the present to be an order under section 556 at all. This case was followed in *Maharajadhiraj Maharanee Shri Mansingji v. Mehta Hariharram Narharram* (2). [BEVERLEY, J.--The dismissal in that case was very different from a dismissal under section 556.]

The case of *Chinnappa Chetti v. Nadaraja Pillai* (3), a ruling under the old section 346, fully supports my argument. In *Ablakh v. Bhagirathi* (4) it was held that an appeal lay from a decree under section 102; the same principles apply to a decree under section 556. Section 584 gives a general right of appeal, and the amendment does not affect the right in this case. The decision in this case that the appeal should be dismissed because appellants did not appear was an *adjudication* within the meaning of section 2, and the present appeal is one from a decree.

The judgment of the High Court (BEVERLEY and JENKINS, JJ.) was as follows:—

In this case a preliminary objection has been taken that no second appeal lies to this Court.

The appeal to the lower Appellate Court was dismissed for default of prosecution. The order is in these words: "The appellants does not appear, and the only pleader who can be found, says that he has no instructions; ordered that the appeal be dismissed with costs and the usual interest." It has been recently held by this Court in the case of *Jagarnath Singh v. Budhan* (5) that an order to this effect is not a "decree" within the definition in section 2 of the Code of Civil Procedure, and that no second appeal will lie therefrom. We have also been referred to *Monsab Ali v. Nihal Chand* (6), which is the most recent of several decisions of the Allahabad Court on this subject, and is to the same

(1) I. L. R., 16 Bom., 23.

(3) 6 Mad. H. C., 1.

(5) I. L. R., 23 Cal., 115.

(2) I. L. R., 19 Bom., 307.

(4) I. L. R., 9 All., 427.

(6) I. L. R., 15 All., 369.

effect as the case just referred to. Our attention has been drawn by the learned pleader for the appellant to the case of *Ram Chandra Pandurang Naik v. Madhav Purushottam Naik* (1) which was considered by this Court in the judgment in I. L. R., 23 Calcutta. The facts of that case were quite different from those of the present case, and the decision appears to have been merely that of one of the two Judges, who formed the Bench which disposed of the case. Without expressing any opinion as regards the correctness of the decision in that case, we are of opinion that the case in I. L. R., 23 Calcutta, was rightly decided, and we are bound to follow it.

We think, moreover, that it is clear that no appeal will lie under section 584 of the Civil Procedure Code in a case of this sort, inasmuch as such an appeal cannot be brought within any of the grounds therein mentioned. Section 585 distinctly says that no second appeal shall lie except on those grounds. And further we may point out that, although an appeal is specially given by section 584 against an appellate decree passed *ex parte*, the provisions of the Code appear to draw a marked distinction between appeals dismissed for default and appeals heard *ex parte*.

The proper remedy in a case like the present is provided by section 558, and an appeal is allowed by the Code against an order passed under that section.

For these reasons we think this appeal will not lie, and must be dismissed with costs.

S. C. C.

*Appeal dismissed.**Before Mr. Justice Macpherson and Mr. Justice Hill.*

BONOMALI RAI AND OTHERS (DEFENDANTS) v. PROSUNNO NARAIN  
CHOWDHRY (PLAINTIFF), AND MOZAFFAR HOSSEIN  
SHAH (DEFENDANT.) \*

1896  
May 1.

*Attc . . . F . . . R . . . S . . . decree establishing attaching  
 . . . Mortgage of attached property  
 . . . Code of Civil Procedure (Act XIV  
 of 1882), sections 276, 280, 283.*

A decree-holder attached the property of certain of the defendants, who

\* Appeal from Appellate Decree No. 1920 of 1894, against the decree of J. F. Bradbury, Esq., District Judge of Pubna and Bogra, dated the 28th of August 1894, affirming the decree of Babu Kristo Chunder Das, Subordinate Judge of that District, dated the 16th of December 1893.

(1) I. L. R., 16 Bom., 23.

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