

APPELLATE CIVIL.

1916
March, 14.*Before Mr. Justice Piggott and Mr. Justice Walsh.*LACHMI NARAIN (DEFENDANT) v. DARBARI LAL AND ANOTHER
(PLAINTIFFS)**Civil Procedure Code, 1908, order IX, rule 2—Dismissal of suit—Appeal.*

Held that no appeal lies from an order dismissing a suit under order IX, rule 2, of the Code of Civil Procedure, on the ground that summons had not been served on the defendants in consequence of the failure of the plaintiff to deposit the requisite court fee for such service. *Lucky Ghurn Choudhry v. Budurr-un-nissa* (1), *Parbati v. Toolai Kapri* (2), followed.

THE facts of the case were as follows :—

The respondent Darbari Lal instituted a suit against the appellant Lachmi Narain and others in the court of the Munsif. One of the defendants dying during the pendency of the suit an application was made to bring his heirs and legal representatives on the record. The application was granted, and the heirs' names were brought on the record. The plaintiff, however, failed to pay the necessary process fees and the Munsif on the date of hearing, finding that the defendants had not been summoned, dismissed the suit under order IX, rule 2, of the Code of Civil Procedure. Plaintiff having appealed the District Judge holding that the order of the Munsif was a decree, allowed the appeal and remanded the case for trial on the merits. The defendants appealed.

Babu *Sailanath Mukerji*, and Babu *Yatis Chandra Ray* for the appellants.

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the respondent.—

PIGGOTT and WALSH, JJ. :—In this case the suit had been dismissed under the provisions of order IX, rule 2, of the Code of Civil Procedure. An appeal against this order of dismissal was entertained by the District Judge and resulted in an order directing the court of first instance to re-admit the suit on to its pending file and to dispose of it on the merits. Presumably the District Judge considered himself to be acting under order XLI, rule 23, of the Code of Civil Procedure. The matter has

* First Appeal No. 196 of 1915, from an order of J.A.G. P. Pullan, District Judge of Mainpuri, dated the 16th of September, 1915.

(1) (1882) I.L.R., 9 Cal., 1627. (2) (1913) 20 Indian Cases, 1.

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been brought before us on appeal from the District Judge's order of remand. We think that no appeal lay to the District Judge. Authority for this proposition is to be found in *Lucky Churn Chowdhry v. Budurr-un-nissa* (1), and in *Parbati v. Toolsi Kapri* (2). It seems to be clear that the dismissal of the suit by the first court was a form of dismissal for default, and therefore excluded from the definition of the word "decree" in the present Code of Civil Procedure. The plaintiff's remedy was under order IX, rule 4, of the present Code and presumably, to some extent at any rate, it is still open to him. This appeal must prevail. We set aside the order of the District Judge and restore that of the court of first instance. The appellant is entitled to his costs in this and in the lower appellate court.

Appeal allowed.

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Before Mr. Justice Piggott and Mr. Justice Walsh.

HARDWARI LAL (DECREE-HOLDER) v. SALAMAT-ULLAH KHAN,
(OBJECTOR) AND AMAN-ULLAH KHAN (JUDGEMENT-DEBTOR)*
*Civil Procedure Code (1908), order XXI, rule 90—Sale in execution of a
decree—Application to set aside a sale by person claiming to be
the real owner.*

Where immovable property has been sold in execution of a decree against the ostensible owner, a person claiming to be the real owner is not competent to ask the court to set aside the sale under order XXI, rule 90, of the Code of Civil Procedure. *Abdul Aziz v. Tafaj-uddin* (3), referred to.

THE facts of this case were as follows :—

A mortgage decree was passed against one Amanat-ullah and the property mortgaged was sold on the 20th of March, 1915. On the 9th of March, 1915, Salamat-ullah, the father of Amanat-ullah, brought a suit for a declaration that he was the real owner of the property sold. Whilst that suit was pending, Salamat-ullah also applied under order XXI, rule 90, of the Code of Civil Procedure to have the sale set aside. The court below allowed his application and set aside the sale. The decree-holder appealed to the High Court.

* First Appeal No. 275 of 1915, from a decree of Soti Raghuvansa Lal, Subordinate Judge of Shahjahanpur, dated the 24th of July, 1915.

(1) (1882), I.L.R., 9 Calc., 627. (2) (1913) 20 Indian Cases, 1.

(3) 23 Indian Cases, 1899.