for insolvency making this transfer in favour of Lachman Sonar and another transfer in favour of his brother.

[After further discussing the evidence their Lordships observed:]

We think, taking all these facts into consideration, we are bound to hold that the transfer was not *bonâ fide*, that it was without consideration and therefore void having regard to the provisions of section 36 of the Provincial Insolvency Act. We allow the appeal, set aside the order of the learned District Judge, and declare that the sale-deed in favour of Lachman Sonar is not *bonâ fide* and was made without consideration. The receiver will have his costs as part of the receiver's cost in the insolvency matter.

We would like to make a suggestion to learned Judges before whom a proceeding like the present may come in insolvency matters. We think that the receiver should file a written statement (similar to a plaint in ordinary suits) setting forth the grounds on which the transfer is challenged, that the transferee should put in a written reply and that then the proceeding should continue very much as in a suit. The matters should not and cannot properly be disposed of in a summary manner.

Appeal allowed.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

RIFAQAT HUSAIN (PLAINTIFF) *v.* BIBI TAWAIF (DEFENDANT) *

1917
February, 17.

Civil Procedure Code (1908), *section* 2—"*Decree*"—*Decree* ex parte—*Appeal —Dismissal of appeal for default—Application to court of first instance for re-hearing of case—Merger.*

An order dismissing an appeal for default does not amount to a decree within the meaning of section 2 of the Code of Civil Procedure, and consequently the decree of the lower court does not merge in the decree of the appellate court. Where a decree is passed *ex parte* and an appeal against the decree is dismissed for default it is still open to the judgement-debtor to apply to the court which passed the decree to set it aside. *Gajrajmati Tiwarin* v. *Swami Nath Rai* (1) and *Abdul Majid* v. *Jawahir Lal* (2) referred to.

THE facts of this case were as follows :—

The plaintiff applicant brought a suit against Musammat Bibi Tawaif and two other persons for restitution of conjugal rights.

* Civil Revision No. 185 of 1916.

(1) (1916) I.L.R., 39 All., 13. (2) (1914) I.L.R., 36 All., 350.

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On the 18th of December, 1915, the case was taken up for hearing. The other two defendants appeared and filed a written statement, but the plaintiff exempted them from the claim. Musammat Bibi Tawaif did not appear, and against her an *ex parte* decree was passed on that date. On the 3rd of January, 1916, she preferred an appeal to the District Judge from the decree passed against her, and on the 15th of that month she made an application to the Munsif in whose court the suit had been filed to have the *ex parte* decree set aside. On the 11th of May, 1916, the appeal preferred by the Musammat was dismissed for default, and an application to have the dismissal set aside was rejected on the 11th of June, 1916. After that the Munsif took up the application filed by Musammat Bibi Tawaif to have the *ex parte* decree set aside and on the 30th of June, 1916, he dismissed the application on the ground that as an appeal had been preferred from the decree the application could not be heard. He relied on the decision of this Court in *Mathura Prasad* v. *Ram Charan Lal* (1). An appeal was preferred from this order, and the learned District Judge allowed the appeal, set aside the decision of the court below, and holding that there were sufficient grounds for restoring the suit, sent back the case to the court of first instance for trial upon the merits. From this order of the District Judge the plaintiff applied in revision to the High Court.

Pandit *Kailas Nath Katju*, for the appellant.

The Hon'ble Munshi *Narayan Prasad Ashthana*, for the respondent.

BANERJI, J.—The circumstances out of which this application for revision arises are these. The plaintiff applicant brought a suit against Musammat Bibi Tawaif and two other persons for restitution of conjugal rights. On the 18th of December, 1915, the case was taken up for hearing. The other two defendants appeared and filed a written statement, but the plaintiff exempted them from the claim. Musammat Bibi Tawaif did not appear, and against her an *ex parte* decree was passed on that date. On the 3rd of January, 1916, she preferred an appeal to the District Judge from the decree passed against her, and on the 15th of that month she made an application to the Munsif in whose court the

(1) (1915) I.L.R., 37 All., 208.

suit had been filed to have the *ex parte* decree set aside. On the 11th of May, 1916, the appeal preferred by the Musammat was dismissed for default, and an application to have the dismissal set aside was rejected on the 11th of June, 1916. After that the Munsif took up the application filed by Musammat Bibi Tawaif to have the *ex parte* decree set aside, and on the 30th of June, 1916, he dismissed the application on the ground that as an appeal had been preferred from the decree the application could not be heard. He relied on the decision of this Court in *Mathura Parsad* v. *Ram Charan Lal* (1). An appeal was preferred from this order, and the learned District Judge allowed the appeal, set aside the decision of the court below and held that there were sufficient grounds for restoring the suit. He sent back the case to the court of first instance for trial upon the merits. From this order of the District Judge the present application has been preferred.

I doubt very much whether this application comes within the purview of section 115 of the Code of Civil Procedure, but, on the assumption that it does, I think the application must fail on the merits. The learned vakil who has appeared for the applicant has cited a number of rulings in support of his contention that where an appeal has been preferred from a decree and the appeal has been decided by an appellate court an application by one of the parties to the suit to have the decree set aside on the ground that it was passed *ex parte* against him and he had sufficient reasons for not appearing on the date of hearing could not be entertained. Those rulings, to which I need not refer for the purposes of this judgement, are based on the ground that when an appeal has been preferred and heard from the decree of the court of first instance the decree of that court becomes merged in the decree of the appellate court and consequently an application to set aside the decree cannot be maintained in the court of first instance, the decree of that court having been superseded by the decree of the appellate court. The point was fully discussed in an elaborate judgement by Mr. Justice SUNDAR LAL in *Gajrajmati Tiwarin* v. *Swami Nath Rai* (2). In my opinion, all these cases are inapplicable to the present case, inasmuch as

(1) (1915) I.L.R., 37 All., 208. (2) (1916) I. L. R., 39 All., 13.

1917

RIFAQAT HUSAIN v. BIBI TAWAIF.

the appeal to the lower appellate court was dismissed for default and the decision of that court did not amount to a decree. By the definition of the word 'decree' as given in section 2 of the Civil Procedure Code it does not include "an order of dismissal for default". As the appellate court ordered the appeal before it to be dismissed for default that order is not a decree and as it is not a decree the decree of the court of first instance was superseded by it and did not merge in it. This alone is sufficient for the disposal of this case. I may also add that in *Abdul Majid* v. *Jawahir Lal* (1) their Lordships of the Privy Council held that the dismissal of an appeal to the Judicial Committee for want of prosecution did not render the order of His Majesty in Council a decree in the cause. The principle of that ruling also applies to the present case. The lower appellate court was in my opinion right in holding that the Munsif ought to have entertained and decided the application made by Musammat Bibi Tawaif to have the *ex parte* decree passed against her set aside. It appears that in the court of first instance both parties gave evidence and therefore the learned Judge was competent in the appeal before him to consider that evidence. He came to the conclusion that there was sufficient ground for the non-appearance of Musammat Bibi Tawaif at the hearing of the suit. He was therefore justified in setting aside the order of the court of first instance and directing the case to be restored to the file.

I dismiss the application with costs.

Application dismissed.

MISCELLANEOUS CIVIL.

1917

February, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BENI PRASAD AND ANOTHER (PLAINTIFFS) *v.* HARNAM DAS AND OTHERS (DEFENDANTS)*

Civil Procedure Code (1908), *order XXXIV, rule* 8—*Suit for redemption—Decree modified in appeal—Application to postpone day fixed for payment.*

Held that the power given by the proviso to order XXXIV, rule 8, of the Code of Civil Procedure, 1908, is a power exercisable by the court which has

* Civil Miscellaneous No. 287 of 1916.

(1) (1914) I. L. R., 36 All., 350.