

a clear and distinct description of the animals must be given so as to enable the court which executes the decree to execute it properly.

1918

DEOKINAN-
DAN
v.
GAPUA.

Issue remitted.

Before Mr. Justice Tudball and Mr. Justice Abdul Raouf.

GAURI SAHAI (PLAINTIFF) v. A. C. BAHREE (DEFENDANT).*

1918
March, 19.

General Rules of the High Court (Civil), rules 21, 25—Pleader's fee—Order on objection as to jurisdiction raised by defendant returning plaint for presentation to proper court—Costs.

Held, that rule 21 of the General Rules (Civil), and not rule 25, applied to a case where a question as to the jurisdiction of the court, having been raised by the defendant, was decided against the plaintiff, and the plaint returned for presentation to the proper court.

ONE of the pleas in defence to a suit was that it was not within the jurisdiction of the court in which it was brought. At the request of the plaintiff's pleader the question of jurisdiction was taken up first, and it was decided against the plaintiff. The court ordered the plaint to be returned for presentation to the proper court, and awarded half the costs to the defendant. In the formal order pleader's fees were calculated at the usual rate of 5 per cent. The plaintiff objected that the calculation should be made at 1½ per cent. The court overruled this objection. The plaintiff then filed an appeal from the order returning the plaint, but the appeal was confined to the question of the correctness of the costs. At the hearing of the appeal—

Mr. *Nihal Chand*, for the respondent, raised a preliminary objection and submitted that although an appeal lay under order XLIII, rule 1 (a), Civil Procedure Code, from an order *returning a plaint* for presentation to the proper court, yet inasmuch as the present appeal was not at all directed against the correctness of that order, but related merely to an order for costs, it was really not an appeal under order XLIII, rule 1 (a), and could not be brought in that garb.

Munshi *Lakshmi Narayan*, for the appellant, was not called upon to reply to the preliminary objection, but he mentioned the case of *Vasudev Ramchandra v. Bhavan Jivraj* (1).

* First Appeal No. 148 of 1917 from an order of Gopal Das Mukerjee, Subordinate Judge of Budaun, dated the 24th of May, 1917.

(1) (1891) I. L. R., 16 Bom., 241.

1918

GAURI SAHAI
v.
A. C. BAREIL.

Proceeding with the appeal, he submitted that the suit not having been decided "on the merits after contest," as provided for in rule 21 of Chapter XXI of the Rules for the Civil Courts, pleader's fee should not have been calculated at the rate of 5 per cent. Rule 25 of that Chapter applied to the present case. A decision on a question of jurisdiction was not a decision on the merits. The suit had yet to be decided on its merits, although by a different court. The trial of the question of jurisdiction could not and did not affect the merits of the case. Moreover, the "contest" mentioned in rule 21 aforesaid clearly meant a contest on the merits, and there had been no contest on the merits as yet.

Mr. *Nihal Chand* was not heard in reply on the appeal.

TUDBALL and ABDUL RAOOF, JJ.:—The facts of this case are simple. The plaintiff appellant filed a suit against the defendant. Notice was issued, a written statement filed and issues were framed. One of the issues raised the question of the jurisdiction of the court. It was pleaded by the defendant that the learned Subordinate Judge had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the pleader's fee was calculated at 5 per cent, according to rule 21 of Chapter XXI of the General Rules (Civil) for the Subordinate Courts. The plaintiff objected on the ground that this rule did not apply but that rule 25 of that chapter did apply. The lower court has held that the case falls within rule 21. On behalf of the appellant it is urged that the case was not decided on the merits; but it was clearly decided after contest and on the merits of the contest so far as that contest went. We do not think that rule 25, which applies to appeals from orders and other cases, is intended to cover a case of the present kind. In our opinion rule 21 clearly applies in this case. There is therefore no force in the appeal. We accordingly dismiss it with costs.

Appeal dismissed.