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by the revenue court. It has been passed by the District Judge. Secondly, the order does not profess to dispose of a suit, or does not in effect dispose of a suit. It disposes of an appeal. The appeal no doubt is a continuation of a suit, but that is a different matter altogether. In a Code which deals with both "suits" and "appeals," it cannot be said that the word "suit" has been used in the same sense as the word "appeal." Probably what was meant was that the word decree would *include* the kind of order described. But we cannot take it that the present order passed by a District Judge comes within the definition.

We may further point out that if the appeal was a continuation of the suit, it had been disposed of effectually and finally by the order which dismissed the appeal for default. The further proceedings that took place were for restoration of the appeal and therefore the result cannot be said to have finally disposed of the suit or the appeal. We think that this argument has no force.

We hold therefore that the order is not appealable and accordingly we dismiss this appeal under order XLI, rule 11 of the Code of Civil Procedure.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

EJAZI BEGAM AND ANOTHER (PLAINTIFFS) *v.* LATIFAN AND ANOTHER (DEFENDANTS)*

1931 *January*, 5

Civil Procedure Code, order XLIII, rule 1, *clauses (d) and (u)—No appeal from appellate order setting aside* ex parte *decree—Such order not an order of remand.*

When an order dismissing an application to set aside an *ex parte* decree is reversed in appeal, and the court of first

*First Appeal No. 178 of 1929, from an order of Ganga Prasad Varma, Additional Subordinate Judge of Agra, dated the 2nd of August, 1929.

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instance is directed to proceed with the suit as from a particular stage, the order is not an order of "remand" within the meaning of clause (*u*) of order XLIII, rule 1, of the Civil Procedure Code, and no appeal lies from the appellate order.

Mr. *M. A. Aziz,* for the appellants.

Messrs. *Binod Behari Lal* and *Mukat Behari Lal,* for the respondents.

MUKERJI and BENNET, JJ. :—The facts relating to this appeal are as follows. One Ejazi Begam, who purchased a certain portion of the interest inherited in a house by one Ahmad Khan, brought a suit for partition against Ahmad Khan and his two sisters Latifan and Fatma. A preliminary decree was passed, and it was followed by a final decree. After the final decree had been made, the three defendants put in an application before the original court asking that the *ex parte* decrees might be set aside on the ground that the defendants had no notice of the suit. The learned Munsif dismissed the application. The defendants filed an appeal. The appeal was allowed on the ground that after the preliminary decree for partition and before the final decree for partition was made, a fresh notice ought to have been issued to the defendants. In so holding the learned Subordinate Judge professed to follow a ruling of this Court. In the result, the learned appellate Judge set aside the order dismissing the application of the defendants and directed the Munsif to issue a fresh notice to the defendants and to take up the case at the stage preceding the preliminary decree. It is against this order that this appeal has been directed.

A preliminary point is taken by Mr. *Binod Bihari,* the learned counsel for the respondents, that no appeal lies. We are of opinion that this contention is correct. The Civil Procedure Code does not allow a second appeal from an order passed when the appellate court makes an order under order XLIII, rule 1, clause (*d*), of the Code of Civil Procedure. It was, however, argued

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that the learned appellate Judge professed to "remand" the case to the lower court and therefore an appeal was permitted by clause (*u*) of order XLIII, rule 1. We are of opinion that this contention is not sound. Clause (*u*) was framed by this Court with a view to cover cases of remand which are not strictly covered by order XLI, rule 23, of the Code of Civil Procedure. But when an order dismissing an application to set aside the *ex parte* decree is set aside, and the court of first instance is directed to proceed with the suit, the order is not an order of "remand" within the meaning of clause (*u*) of order XLIII, rule 1. This was held by a Bench of this Court in *Moti Lal* v. *Nandan* (1).

Mr. *Aziz*, the learned counsel for the appellants, has asked us to take up the matter in revision. But supposing that the learned Subordinate Judge was not right in applying the ruling of this Court, all that he committed was an error of law. He was possessed of jurisdiction to hear the appeal and he did hear the appeal and passed an order which might or might not have been strictly correct. Even if the order was a wrong order, he had jurisdiction to decide the case rightly and also wrongly. We hold that revision is not maintainable.

In the result, the appeal is dismissed with costs.

MISCELLANEOUS CIVIL.

Before Mr. Justice Sen and Mr. Justice Niamat-ullah.

GOBIND RAI AND OTHERS (APPLICANTS) *v.* ANAR KUNWAR AND OTHERS (OPPOSITE PARTIES)*

1931 *January*, 7.

Civil Procedure Code, order XXII, rule 2 : order XLI, rule 4—Suit decreed against several defendants—Appeal by one defendant alone—Other defendants made pro forma *respondents—Death of sole appellant—Abatement of appeal—Whether the* pro forma *respondents could continue the appeal on the ground of identity of interests.*

A suit was decreed against several defendants. Only one of them appealed and arrayed the rest as *pro forma* res-

*Application for review in Second Appeal No. 1793 of 1929.

(1) [1930] A.L.J., 454.