1931

SRI SHEOJI MAHARAJ v. BENI MADHO LAL.

MUKERJI and BENNET, JJ. :— This purports to be a first appeal from an order passed in appeal by the learned District Judge of Azamgarh. The case was a case in a revenue court, being a suit for profits under section 227 of the Agra Tenancy Act, Act III of 1926. The appellant before us is the defendant. The lower appellate court set aside the decree of the Assistant Collector and remanded the case to the Assistant Collector for assessing profits, under order XLI, rule 23 of the Code of Civil Procedure. Under section 249 of the Agra Tenancy Act of 1926, "no appeal shall lie from any order passed in appeal." Accordingly no appeal lies to this Court. We may point out that appeals which lie to this Court under the Agra Tenancy Act of 1926 are either appeals from original decrees under section 242 or appeals from appellate decrees under section 246. The Act definitely states in section 249 that there shall be no appeal from orders passed in appeal. An order of remand is an order passed in appeal. Accordingly, the present appeal does not lie to this Court. We have also examined the merits of the case for the appellant and consider that the decision of the lower appellate court was correct. Accordingly we dismiss this appeal under order XLI, rule 11 of the Code of Civil Procedure.

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*Before Mr. Justice Mukerji and Mr. Justice Bennet.*

1930
*December*, 23.

SATYA NIDHAN BANERJI (DEFENDANT) *v.* MUHAMMAD HAZABBUR ALI KHAN (PLAINTIFF.)*

*Agra Tenancy Act (Local Act III of 1926), sections 3(14) and 249—Appeal from order—Order of District Judge refusing to restore an appeal dismissed for default—"Decree."*

No appeal lies against an order of a District Judge refusing to restore a revenue appeal which was dismissed for default, inasmuch as the order of dismissal for default is an order passed in appeal, and section 249 of the Agra Tenancy Act,

*First Appeal No. 219 of 1930, from an order of L. V. Ardagh, District Judge of Shahjahanpur, dated the 22nd of August, 1930.

1926, provides that no appeal shall lie from any order passed in appeal.

The order in question can not come within the meaning of the word "decree" as defined in section 3(14) of the Act, inasmuch as the order was not passed by a revenue court, and did not dispose of a suit; and even in the view that a "suit" includes an "appeal" as being a continuation of the suit, the order did not dispose of an appeal but of an application to restore an appeal which had been disposed of already.

Messrs. *A. P. Pandey* and *N. C. Ganguli*, for the appellant.

Appeal heard under order XLI, rule 11 of the Code of Civil Procedure.

MUKERJI and BENNET, JJ. :—This appeal is against an order passed by the learned District Judge of Shahjahanpur by which he refused to restore an appeal which had been dismissed by him for default. The preliminary point that arises is whether the appeal is competent. It appears to us that section 249 of the Agra Tenancy Act, being Act III of 1926, is conclusive on the point. Section 249 runs as follows: "No appeal shall lie from any order passed in appeal." There can be no doubt that the order which is complained of is an order passed in appeal. When an appeal is pending before a Judge, any order that is passed with reference to that appeal must be an "order passed in appeal." In this particular case the learned Judge was not seised of any original suit or proceeding. He was exercising his appellate jurisdiction and the order complained of must necessarily, therefore, be an "order passed in appeal."

If we look to the entire scheme of the Tenancy Act of 1926 we find that it starts with the heading, "Appeals from original decrees." Under it come the sections 241 and 242. Next comes the heading, "Appeals from appellate decrees." Under this heading come the sections 243 to 246. Then comes the heading, "Appeals

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from orders." Under this head come the sections 247 and 248. The case under our consideration must come under the heading, "Appeals from orders." It has not been contended and it cannot be contended that the order which has been complained of is a decree; it being an order which must come under the heading, "Appeals from orders." Now sections 247 and 248 deal with particular orders under which the present order does not come. Section 247 deals with orders passed by an Assistant Collector of the second class. Evidently these are orders passed in the exercise of original jurisdiction. In section 248, sub-section (1), the orders dealt with are clearly mentioned as original orders. Besides, they are orders passed by an Assistant Collector or a Collector. Sub-section (2) of section 248 deals with the orders passed by an Assistant Collector in charge of a sub-division under particular sections of the Act. Sub-section (3) deals with orders passed by an Assistant Collector of the first class or a Collector. These are orders passed in execution of a decree or orders which are not appealable as a decree but are appealable as orders. Sub-section (4) of the same section deals with orders in which an appeal would lie to the Board of Revenue. Apparently the order under consideration does not come under section 248 at all. Then comes section 249 and with that section the heading ends. We have already quoted that section. We see no reason why the particular order under consideration should escape from the operation of the general words used in that section.

The learned counsel for the appellant has drawn our attention to the definition of the word "decree" to be found in clause (14) of section 3 of the Tenancy Act of 1926. There, "decree" is defined as this, "decree means any order which, so far as the revenue court is concerned, finally disposes of a suit." Now, the order under appeal is, to start with, not an order passed

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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.

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*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.