1939

GOVIND DAS v. INDRAWATI

on the allegation that the award was the result of collusion between the parties to the suit. Be that as it may, the decision of the suit by the court, in the situation that has arisen, will be far more desirable and in the interests of the parties concerned. We therefore reject this application with costs. The stay order is discharged.

Before Mr. Justice Ismail

KUTIKA KUER (PLAINTIFF) *v.* SRIDHAR MISIR AND OTHERS (DEFENDANTS)*

1939 *September*, 15

Civil Procedure Code, order XLI, rules 10, 17, 19; *order XLIII, rule* 1(*t*)—*Order rejecting appeal for appellant's failure to furnish security for costs—No appeal lies—Application for restoration of the appeal—Order rejecting the application for restoration—No appeal lies—No power of restoration upon subsequent filing of the security for costs.*

An order rejecting an appeal under order XLI, rule 10(2), of the Civil Procedure Code for failure to furnish security for costs does not come within the definition of a decree, nor is it one of the appealable orders mentioned in order XLIII, rule 1; it is therefore not appealable either as a decree or as an order.

Where, upon demand by the court under order XLI, rule 10(1), some security was furnished by the appellant but its sufficiency was challenged by the respondent, and on the date fixed for ascertainment of the question the appellant did not appear to prove the sufficiency and the court thereupon rejected the appeal; and then an application for restoration of the appeal was made, and the court dismissed that application: *Held* that no appeal lay from the order dismissing the application for restoration. The order rejecting the appeal was under order XLI, rule 10(2) and was not an order of dismissal for default under rule 17 inasmuch as the date fixed was not for the hearing of the appeal, and therefore the subsequent application for restoration was not one falling under rule 19 and its dismissal was not appealable under order XLIII, rule 1(*t*).

After an appeal has been rejected under order XLI, rule 10(2), the court has no power to restore it on the subsequent filing of the security for costs.

*First Appeal No. 154 of 1937, from an order of P. C. Agarwal, District Judge of Azamgarh, dated the 5th of April, 1937.

39

KUTIKA KUER v. SRIDHAR MISIR

Mr. *K. L. Misra*, for the appellant.

Mr. *Ambika Prasad*, for the respondents.

ISMAIL, J.:—The facts that have given rise to these connected appeals may be briefly stated. Mst. Kutika Kuer, plaintiff, brought a suit for a declaration that the house described in the plaint was not saleable in execution of the decree in favour of the respondent Sridhar Misir. The suit was dismissed by the trial court. The plaintiff appealed from the decree of the court of first instance. At the instance of the respondents on the 8th of August, 1936, the court directed the appellant to furnish security within a fortnight. It is not necessary to refer to various applications and orders that were made after the passing of the order on the 8th of August, 1936. Ultimately the appellant furnished security of immovable property. The respondent raised objection to the sufficiency of the security and the court fixed the 13th of February, 1937, for the disposal of the objection. On the date fixed no one appeared on behalf of the appellant to prove that the security furnished was in compliance with the order of the court and was sufficient. The appeal was accordingly rejected. The appellant then made an application to the lower appellate court for the restoration of her appeal. This application was also dismissed on the 5th of April, 1937. The appellant has now filed first appeal from the order of the 5th of April, 1937, and second appeal from the former order rejecting the appeal which was passed on 13th February, 1937. The first question for determination is whether the orders appealed against are appealable. Under rule 10, order XLI, of the Civil Procedure Code the appellate court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both. The order passed by the lower appellate court was obviously under this rule. Sub-rule (2) provides: "Where such

security is not furnished within such time as the court orders, the court shall reject the appeal." The order passed by the court below rejecting the appeal is not a decree within the meaning of section 2, sub-section (2). The order of the court was by no means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determined the rights of the parties. That being so no appeal is permissible under the Code from an order rejecting the appeal under order XLI, rule 10, sub-rule (2). Similarly the order of the court below is not appealable as an order. An examination of order XLIII, rule 1 will show that an order rejecting an appeal under order XLI, rule 10 is not one of the orders from which an appeal is allowed. This question was considered by a Full Bench of this Court in *Lekha* v. *Bhauna* (1). It was held that "An order rejecting an appeal under section 549 of the Code of Civil Procedure" (order XLI, rule 10) "is not appealable either as an order or as a decree." The Full Bench overruled an earlier ruling reported in *Siraj-ul-Haq* v. *Khadim Husain* (2). For the reasons given above I hold that the order of 13th February, 1937, is not appealable.

Now coming to the order of the 5th of April, 1937, I find that this is also not one of the orders mentioned in order XLIII, rule 1. Learned counsel for the appellant contends that it is in effect an order of dismissal of the appeal for the appellant's default provided by rule 17, order XLI of the Code. If this contention is well founded then the subsequent application for restoration would be covered by rule 19, order XLI. An appeal is provided from an order of refusal under rule 19, order XLI to re-admit an appeal. I however consider the argument of learned counsel untenable. The date on which the appeal was rejected was not fixed for the hearing of the appeal and therefore it could not be dismissed for the appellant's default under rule 17. It follows therefore that rule 19 also

(1) (1895) I.L.R. 18 All. 101. (2) (1883) I.L.R. 5 All. 380.

1939

KUTIKA KUER v. SRIDHAR MISIR

is inapplicable. The order of the court below clearly shows that the appellant was ordered to furnish security for costs of the respondent to enable him to proceed with his appeal. Unless the appellant complied with the order no date of the hearing of the appeal could possibly be fixed. I have no doubt whatsoever that the rejection of the appeal was under order XLI, rule 10, sub-rule (2) and not under rule 17. Under these circumstances the appellant is not entitled to appeal from that order.

Learned counsel for the appellant contends that his client has now deposited sufficient security for the costs of this Court as well as of the court below and that it would be a great hardship if he is not allowed to argue his appeal. Unfortunately no power is vested in the court to allow the appellant to proceed with his appeal. I therefore cannot consider the question of hardship. I however wish to refer to a passage in the judgment of a Bench of this Court in *Firozi Begam* v. *Abdul Latif Khan* (1): "We are compelled therefore to sustain the preliminary objection. At the same time we take the opportunity of expressing our opinion that, considering the serious consequences entailed by an order under section 549, it would be well if the legislature should consider whether it is not advisable to embody in the new Code of Civil Procedure some provision analogous to that contained in the second paragraph of section 381 and to give a right of appeal from orders passed under section 549" (order XLI, rule 10). I respectfully agree with the observations made by the learned Judges.

In the result I dismiss the appeals with costs.

(1) (1908) I.L.R. 30 All. 143(145).