1923.

SADHO SARAN RAI v. ANANT RAI.

DAS, J.

has been misled." A similar view has been taken in the Madras High Court [see *Vilakathala* v. *Vayalil*(1)]. These decisions, though not binding on this Court, are entitled to the greatest respect, and we have been referred to no decision which lays down a contrary rule in cases where it is asserted by a party, not that the consent was obtained from him by fraud, but that there was no consent in fact on his part. As I have said before, a distinction has been made in the Indian Courts between the cases where a party comes to Court and complains that he never consented to the order at all and the cases where a party comes to Court and admits that he did consent to the order but complains that his consent was obtained by fraud. In the one case the fraud is upon the party; in the other case, the fraud is upon the Court; and it is well-established, so far as the Indian Courts are concerned, that the Court has inherent jurisdiction to set aside the order when it is apprised of the fact that it was induced to sign the decree on a fraudulent representation of facts made to it.

In my opinion the order passed by the Court below is right and I would dismiss this appeal with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

SURAJDEO NARAYAN SINGH

v.

PARTAP RAI.*

1923.

May, 15.

Appeal—dismissal of, for default—fresh appeal, whether barred—Code of Civil Procedure, 1908 (*Act V of* 1908),

*Appeal from Appellate Order No. 245 of 1922, from an Order of Babu Brajendra Kumar Ghosh, Subordinate Judge of Muzaffarpur, dated the 10th July, 1923, confirming an order of Babu Devi Prasad, Munsif of Hajipur, dated the 14th May, 1921.

(1) (1914) 27 Mad. L. J. 172.

SURAJDEO NARAYAN SINGH v. PARTAP RAI.

section 2(2) and 96, Order 9, rule 4, and Order XLI, rule 19— Occupancy holding, whether saleable in execution of money decree.

The mere fact that an appeal has been dismissed for default is not a bar to the filing of a fresh memorandum of appeal within the period of limitation prescribed for the appeal.

An order dismissing an appeal for default on account of the appellant not having deposited the process fees for service of notice on the respondent, is not a decree.

Raghu Prasad Singh v. *Jadunandan Prasad Singh*(1), and *Abeda Khatun* v. *Majubali Chaudhuri*(2), distinguished.

Abdul Majid v. *Jawahir Lal*(3), referred to.

A non-transferable occupancy holding is saleable in execution of a money-decree obtained by some of the co-sharer landlords against the tenants.

Sundarmohan Panigrahi v. *Chana Raut*(4), followed.

Appeal by the decree-holders.

The facts of the case material to this report were as follows :—

The decree-holders, who were co-sharer landlords, obtained a money decree against the respondents who were their tenants. In execution of this decree they sought to sell certain trees and bamboos standing on the occupancy holding of the respondents. The respondents thereupon filed an objection under section 47, Civil Procedure Code, on the ground that the trees and bamboos being attached to the land of their non-transferable occupancy holding, were not liable to attachment and sale in execution of the money decree. The Munsif allowed the objection and dismissed the execution case by his order, dated the 14th May, 1921. Against this order the decree-holders preferred an appeal before the District Judge, which was registered as Miscellaneous Appeal No. 75 of 1921. This appeal was dismissed for default on the 3rd June, 1921. The dismissal was under Order XLI, rule 18,

(1) (1921) 6 Pat. L. J. 27.
(2) (1921) I. L. R. 48 Cal. 157.
(3) (1914) I. L. R. 36 All. 350, P.C.
(4) (1922) I. L. R. 1 Pat. 317, F.B.

on account of the failure of the appellants to deposit the process fees for service of notice on the respondents. Thereupon the appellants, instead of applying for re-admission of the appeal under Order XLI, rule 19, filed a fresh memorandum of appeal before the District Judge within the period of limitation for appeal, with a prayer that the copies of order and decree of the first Court filed by them in the previous appeal might be attached to the fresh memorandum of appeal. The District Judge allowed this prayes and the fresh appeal was registered as Miscellaneous Appeal No. 85 of 1921. This appeal No. 85 came on for hearing before the Subordinate Judge when an objection was taken by the respondents to the effect that the appeal was not maintainable. The Subordinate Judge has given effect to this objection and has dismissed the appeal, although he was of opinion that on the merits the appellants were entitled to succeed. The decree-holders prefer this second appeal against the order of the Subordinate Judge and it was contended on their behalf that the decision of the Subordinate Judge that the appeal was not maintainable was wrong in law.

P. C. Rai and *Sheonandan Rai*, for the appellants.

Siveshwar Dayal, for the respondents.

KULWANT SAHAY, J. (after stating the facts, as set out above, proceeded as follows) :—

In my opinion the view taken by the learned Subordinate Judge cannot be supported. There is nothing in law to prevent the entertainment of a fresh appeal on the dismissal for default of a previously filed appeal provided the later appeal was otherwise in order and was filed within the period of limitation. The only ground upon which a fresh appeal can be held to be barred is that the order of dismissal of the previous appeal would operate as *res judicata* to the hearing of the fresh appeal. The question is what is the effect of the order of dismissal for default The order does not amount to a decree within the definition of the

1923.

SURAJDEO NARAYAN SINGH v. PARTAP RAI.

KULWANT SAHAY, J.

term as given in the Code of Civil Procedure. The appeal was not heard and decided on the merits. As was pointed out by the Judicial Committee of the Privy Council in *Abdul Majid* v. *Jawahir Lal* (1), the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellants had not complied with the condition under which the appeal was open to them and therefore they were in the same position as if they had not appealed at all. The learned Subordinate Judge seems to hold that the only remedy available to the appellants was an application for re-admission of the appeal under Order XLI, rule 19. This rule gives an option to the appellants to apply for readmission of the appeal, but it does not take away any other remedy that may be available to them. Reliance has been placed by the learned Vakil for the respondents on *Raghu Prasad Singh* v. *Jadu Nandan Prasad Singh* (2) where it has been held by a Division Bench of this Court that where there has been an appeal and that appeal is dismissed for default on the part of the appellants for failure to pay the printing cost, an application for execution of the decree awarding costs to the respondents passed by the first Court was within time, if presented within three years from the date of dismissal of the appeal, and it has been contended that the effect of the decision is that although an appeal is dismissed for default, the position is not the same as if no appeal had been filed at all. The decision of that case turned upon the interpretation of Article 182 (2) of the Limitation Act and it was held that where there has been an appeal and where that appeal has been properly presented and is within time, any order of the High Court dismissing the appeal or putting an end to the appeal in any way is either a decree or an order within the meaning of Article 182 (2)

(1) (1914) I. L. R. 36 All. 350, P.C. (2) (1921) 6 Pat. L. J. 97.

of the Limitation Act. Clause (2) of Article 182 provides that where there has been an appeal, the period of limitation for execution of the decree or order of any Civil Court, not provided for by Article 183 or by section 48 of the Code of Civil Procedure is three years from the date of the final decree or *order* of the Appellate Court or the withdrawal of the appeal, and their Lordships held that although an appeal might be dismissed for default, the order of dismissal is an order within clause (2) of Article 182 and the period of limitation would run from the date of the order of dismissal of the appeal. Their Lordships did not hold that the order dismissing the appeal would amount to a decree and this case is no authority for the proposition that the order would operate as a bar to the entertainment of a fresh appeal, if presented within time. As I have already said, the decision turned entirely upon the interpretation of clause (2) of Article 182 and does not, in my opinion, help the respondents in the present case.

Reference has been made by the learned Vakil for the respondents, to the provisions of Order IX, rule 4, of the Code of Civil Procedure, and it is argued that inasmuch as the right to bring a fresh suit is given by that rule to a plaintiff whose suit is dismissed for default under rule 2, Order IX, in addition to his right to apply to set aside the dismissal, and inasmuch as no right to prefer a fresh appeal has been given to an appellant under Order XLI, rule 19, it follows by analogy that an appellant, whose appeal is dismissed under Order XLI, rule 18, has no right to prefer a fresh appeal and his only remedy is by an application for readmission of the appeal. I cannot agree with this contention. The omission of a provision for fresh appeal in Order XLI, rule 19, cannot have the effect of taking away such right, if it is not otherwise barred.

It is next contended by the learned Vakil, for the respondents, that section 96 of the Code of Civil

1923.

SUBAJDEO NARAYAN SINGH v. PARTAP RAI.

KULWANT SAHAY, J.

Procedure contemplates only one appeal. The words used are "*an* appeal shall lie from every decree" and it is contended that *an* appeal having been once preferred and dismissed, although for default, a fresh appeal cannot be maintained. To my mind the interpretation put upon section 96 by the learned Vakil is not correct. The words "an appeal" do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. Reliance has been placed by the respondents upon the case of *Abeda Khatun* v. *Majubali Chaudhuri* (1). In that case the plaintiffs made an application under section 105 of the Bengal Tenancy Act for enhancement of rent of a tenure. Subsequently the plaintiffs appeared and stated that they did not wish to prosecute the proceeding under section 105, whereupon the proceeding was dismissed for non-prosecution. Subsequently the plaintiffs brought a suit in the Civil Court for enhancement of rent. It was contended by the defendant that the suit was barred by section 109 of the Bengal Tenancy Act and their Lordships held that the suit was so barred although the application under section 105 of the Bengal Tenancy Act had been withdrawn and the proceeding was dismissed for non-prosecution. In the course of their judgment their Lordships observed "An application which has been made, whether it is withdrawn or whether it is dismissed for non-prosecution, is nevertheless an application made within the meaning of the provisions of section 109." The decision of that case depended on the interpretation of section 109 of the Bengal Tenancy Act which provides that a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken under sections 105 to 108. Section 109 clearly operates as a bar to the entertainment of any application or suit by the Civil Court

(1) (1921) I. L. R. 48 Cal. 157.

where the subject-matter of the application or suit has already been the subject of an application made or suit instituted under sections 105 to 108 of the Act and the applicant whose application, under section 105, is dismissed, cannot avoid the consequence merely by not prosecuting the application or suit. Their Lordships did not hold that a fresh application under section 105 of the Bengal Tenancy Act was not maintainable. This case is clearly distinguishable from the facts of the present case.

The order of the learned Subordinate Judge holding that the appeal was not maintainable must therefore be set aside.

As regards the merits, the learned Subordinate Judge has come to the conclusion that the order of the Munsif was wrong. After the decision of the Full Bench of this Court in *Sundarmohan Panigrahi* v. *Ghana Raut* (1), the objection raised by the judgment-debtors cannot be sustained. The law is now settled that a non-transferable occupancy holding can be sold in execution of a money decree and the learned Vakil for the respondents frankly admits that the decision of the learned Subordinate Judge on the merits is correct.

The result is that this appeal is allowed, the order of the learned Subordinate Judge is set aside, the objection of the judgment-debtors respondents to the execution of the decree is dismissed and it is ordered that the execution do proceed according to law. The appellants are entitled to their costs in this Court and in the Courts below.

DAS, J.—I agree

Appeal allowed.

(1) (1922) I. L. R. 1 Pat. 317, F.B.