

1926

RAJA  
BRAJA-  
SUNDER DEB  
v.  
BHABAN  
SAHU.  
  
KULWANT  
SAHAY, J.

Court Rules has no application to the facts of the present case. I am inclined to agree with this contention. Rule 5 of Chapter VI does not seem to contemplate cases like the present: it provides for cases where a decree is made against the trustee, executor, administrator or a receiver or manager appointed by a court, who as such was a party to such decree, and where the beneficiary is affected by the decree and desires to appeal against it, he may name himself in the memorandum of appeal as an appellant. It contemplates cases where the beneficiary is not a party, but is affected by the decree. In the present case, the Raja was a party and the provisions of Rule 5 do not seem to apply. The order of this court giving him leave to appeal does not discuss the question and was passed *ex parte*, without notice to the Respondents. It is, however, not necessary to decide this question inasmuch as the appeals fail on the merits.

These appeals must be dismissed with costs.

MACPHERSON, J.—I agree.

*Appeals dismissed.*

## APPELLATE CIVIL.

*Before Das and Adami, JJ.*

CHAUDHARY CHANDRIKA PRASAD SINGH

v.

MITHU RAI.\*

1927

Jan., 25.

*Code of Civil Procedure, 1908 (Act V of 1908), section 2(2), and Order XLI, rule 23—Issues decided by lower court and suit dismissed—appeal to District Court—certain issues framed and case remanded—appeal to High Court, whether maintainable.*

\* Appeals from Appellate Decrees nos. 590 and 638 of 1926 from a decision of J. Chatterji, Esq., Additional District Judge of Shahabad, dated the 27th March, 1926, reversing a decision of Babu Ramchandra Misra, Munsif of Arrah, dated the 12th January, 1926.

Where the trial court decides a suit after determining all the issues, and, in appeal, the District Judge frames certain other issues and remands the case to the court of first instance for decision of those issues, the order of remand is neither an order under Order XLI, rule 23, nor a decree, but an order made under the court's inherent powers, and, therefore, is not appealable.

1927

CHAUDHARY  
CHANDRIKA  
PRASAD  
SINGH  
v.  
MITHU  
RAI.

Appeals by the plaintiffs.

*P. Dayal* and *K. N. Varma*, for the appellants.

*S. M. Mullick* and *Ragho Saran*, for the respondents.

DAS, J.—These appeals are directed against the order of the learned Additional District Judge of Arrah, dated the 27th March 1926 by which after framing certain issues he remanded the case to the court of first instance for decision of those issues.

A preliminary point is taken that no appeal lies. I agree that the appeals are incompetent and that they should be dismissed on that ground.

The question is whether the remand made by the learned Additional District Judge is under the provision of Order XLI, rule 23 of the Code or not. It is conceded that if the remand be under rule 23, then the appeal lies to this Court. Rule 23 runs as follows:—

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

The critical question then is whether the court of first instance disposed of the suit upon a preliminary point and the decree of the court of first instance was reversed in appeal. Now, in referring to the judgment of the first court I find that seven issues

1927

CHAUDHARY  
CHANDRIKA  
PRASAD  
SINGH  
v.  
MITRU  
RAI.  
DAS, J.

were drawn up by that Court and that every one of those seven issues was tried by the court. The learned Advocate for the appellant contends that in substance the court of first instance decided the suit on the 4th issue, namely, on the issue as to limitation and left the merits of the case between the parties undetermined. He argues on this footing because the learned Judge in the court below held that there were certain matters which were left undetermined. But that is not the scope of Order XLI, rule 23, Order XLI, rule 23, operates only when one of the preliminary issues is tried by the court of first instance and that Court disposes of the suit on that ground and says that he is not going to try the suit on any other issue. In this instance the court of first instance decided all the issues and in my opinion it cannot be urged that the remand by the lower Appellate Court was under the provision of Order XLI, rule 23, of the Code. It was clearly a remand in the exercise of the inherent power of the court.

Then the next question is whether an appeal lies from that order. It is conceded that the Civil Procedure Code has not given an express right of appeal from an order of remand in the exercise of the inherent powers of the court. But it is contended that although no appeal may lie from the order of remand looked upon as an order, still that order should be looked upon as a decree and in that view the appeal should be entertained. A decree is defined in the Civil Procedure Code as the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Now, in this case the learned Judge in the court below has not determined the rights of the parties either conclusively or otherwise or at all. All that he has done is to hold that the rights of the parties cannot be decided until certain important matters are decided. He has therefore left them very

much at large. In my opinion therefore the order of the learned District Judge cannot be looked upon as a decree within the meaning of that term as used in section 2 of the Code of Civil Procedure. I am aware that other courts and other Judges have taken a different view; but I adhere to the opinion which I have frequently expressed in this court.

I hold that these appeals are incompetent and I dismiss them with costs.

ADAMI, J.—I agree.

*Appeals dismissed.*

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## APPELLATE CIVIL.

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*Before Das and Adami, JJ.*

KHEDU NAEK

v.

RAJIB RAY.\*

1927

CHAUDHARY  
CHANDRIKA  
PRASAD  
SINGH  
v.  
MITRU  
RAI.

DAS, J.

1927

Jan., 26.

*Ex parte decree—decree passed in presence of defendants represented by pleader—application to set aside decree not maintainable.*

On the 9th June, 1925, the order sheet in a suit recorded that the parties were ready. On the application of the parties, however, the hearing of the suit was adjourned to allow the parties to settle out of court. Subsequently the suit was compromised between the plaintiff and all the defendants except defendants 2 and 3. The pleader for defendants 2 and 3 stated that he had no power to compromise. The plaintiff thereupon led evidence as against defendants 2 and 3 and the court on the 11th in its judgment purported to decree the suit *ex parte* as against these defendants and in terms of the compromise as against the others. Defendants 2 and 3 applied to set aside the decree as against them.

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\* Appeal from Original Order no. 125 of 1926, from an order of Babu Ashutosh Mukerji, Subordinate Judge of Hazaribagh, dated the 12th April, 1926.