

1901  
JULY 31.  
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—  
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longer time may have been given to a co-sharer landlord to have [60] satisfaction of a rent decree obtained by him than is given to joint landlords acting together, seeing that the latter can obtain satisfaction of their decree by the sale of the tenure or holding in arrear.

And this circumstance will explain also the anomaly referred to in the appellant's argument.

For these reasons I think the order appealed against is right, and these appeals should be dismissed with costs.

MACLEAN, C. J. I concur.

*Appeal dismissed.*

29 C. 60.

*Before Mr. Justice Rampini and Mr. Justice Pratt.*

AMRITO LAL MUKHERJEE v. RAM CHANDRA ROY.\*  
[13th December, 1901.]

*Appeal—Second Appeal—Order dismissing a suit for default of appearance—Decree—Civil Procedure Code (Act XIV of 1892) s. 2.—Remand.*

An order dismissing a suit for default of appearance is not a decree within the meaning of s. 2 of the Civil Procedure Code and therefore no first or second appeal lies therefrom.

*Jagannath Singh v. Budhan* (1), *Anwar Ali v. Jaffer Ali* (2) and *Gilkinson v. Subramania* (3) referred.

A suit was dismissed for default of appearance. On appeal by the plaintiff, the Lower Appellate Court set aside the dismissal of the suit and as a necessary consequence directed the Court of First Instance to proceed to try it.

*Held*, that this was not such an order as could be passed under the remand sections of the Civil Procedure Code and the order of the Court [61] of First Instance not being appealable, the Lower Appellate Court acted without jurisdiction in setting aside the decision of the First Court.

ONE Ram Chundra Roy, the respondent, brought a suit for an account against a lessee to whom land was let at a rent to pay off from the usufruct a mortgage debt, in the Second Court of the Subordinate Judge of Hooghly on the 17th April 1900. After several adjournments, the plaintiff's pleader stated his case and examined a witness on the 7th September 1900, and asked for an adjournment of the case till the next day. On the next day the plaintiff not being present and no witnesses being in attendance, a petition was put in on his behalf praying that summons be issued on his witnesses and also for an adjournment of the case. The learned Subordinate Judge refused the said application and dismissed the suit. The material portion of his judgment was as follows :—

"The case was opened yesterday, but to-day the learned pleader for the plaintiff is absent. He examined one witness yesterday, whose evidence proves nothing material. To-day another petition for postponement was filed but that has also been rejected, neither the plaintiff nor his pleaders being present. The suit is dismissed for default."

\* Appeal from Order No. 17 of 1901, against the order of D. Cameron, Esquire, District Judge of Hooghly, dated the 11th of December 1900, reversing the order of Babu Hemango Chunder Bose, Subordinate Judge of that district, dated the 8th of September 1900, and remanding the suit to his Court for trial according to law.

(1) (1895) I. L. R. 23 Cal. 115.

(3) (1898) I. L. R. 22 Mad. 221.

(2) (1896) I. L. R. 23 Cal. 827.

The plaintiff appealed to the District Judge of Hooghly, who set aside the Subordinate Judge's order dismissing the suit for the plaintiff's default and remanded the case to the Subordinate Judge for trial according to law.

Against this decision the defendant Amrito Lal Mukherjee appealed to the High Court.

DEC. 10. Dr. *Ashutosh Mukherjee* and Babu *Biraj Mohun Mozumdar* for the appellants.

Babu *Dwarka Nath Chuckerbutty* for the respondent.

DEC. 13. RAMPINI AND PRATT, JJ. This is a second appeal from an order of the District Judge of Hooghly setting aside an order of the Subordinate Judge of that district, dismissing a suit for default.

It is contended that as the suit was dismissed for default no appeal lay to the District Judge and he had no jurisdiction to [62] set aside the order of the Subordinate Judge. The plaintiff should have applied to the Subordinate Judge under s. 103 for the restoration of the case to the file and might have appealed to the District Judge from an order refusing to set the dismissal aside.

It is further urged that the District Judge improperly interfered with the discretion of the Subordinate Judge, who refused to grant a further postponement of the case.

It seems to us that both these pleas are well-founded. The suit was dismissed for default of appearance by the Subordinate Judge. His order expressly states this. Such an order is not a decree and consequently no appeal lay from it to the District Judge. *Jagarnath Singh v. Budhan* (1) and *Anwar Ali v. Jaffer Ali* (2).

We are also disposed to think that the Judge's order is wrong on the merits, inasmuch as he would seem to have improperly interfered with the discretion of the Subordinate Judge in refusing any further adjournment of the case—a discretion which we think was very rightly exercised by the Subordinate Judge.

It is, however, unnecessary for us to express any definite opinion on this latter point, as it appears that no second appeal lies to us in the case. The District Judge no doubt acted without jurisdiction, but does a second appeal lie to us to enable us to set aside the District Judge's order without an application under s. 622? The learned pleader maintains that the Judge's order was one of remand under s. 562. But the Judge does not profess to pass his order under s. 562. He allows the appeal, sets aside the dismissal of the suit, and as a necessary consequence, directs the Subordinate Judge to proceed to try it. This is not such an order as can be passed under the remand sections of the Civil Procedure Code. There is no regular appeal from an order such as was passed by the District Judge, as his order is not a decree. It is not a formal expression of an adjudication deciding the suit nor yet deciding the appeal, for there was no appeal lawfully preferred to him. Hence it would seem that [63] no second appeal lies in this case, in which view we are fortified by the decision of the Madras High Court in *Gilkinson v. Subramania* (3). We must accordingly dismiss this appeal with costs.

*Appeal dismissed.*

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(1) (1895) I. L. R. 29 Cal. 115.  
(2) (1896) I. L. R. 28 Cal. 827.

(3) (1898) I. L. R. 22 Mad. 221.