the order of the Munsif, returned the petition filed in the Court of the Munsif for the purpose of its being presented to that of the Subordinate Judge; and we order accordingly.

We make no order as to costs.

Appeal dismissed.

1903 AUG. 27.

APPELLATE CIVIL.

31 C. 203.

---

31 C. 207 (=8 C. W. N. 160).

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pratt.

JUNG BAHADUR *v.* MAHADEO PROSAD.*

[24th August, 1903.]

Appeal—Dismissal of application for default—Revivor—Civil Procedure Code (Act XIV of 1882), ss. 103, 318, 588, 647.

There is no appeal against an order rejecting an application under s. 103 of the Civil Procedure Code for reviving an application under s. 311 of the Code, which has been dismissed for non-appearance of the judgment-debtor

Ningappa v. *Gangawa* (1), *Raja v. Srinivasa* (2) and *Hurreenath Koondoo* v. *Modhoo Soodun Saha* (3) followed.

[Fol. 29 All. 596; 19 C. W. N. 25=27 I. C. 492. Ref. 3 C. L. J. 276; 14 C. L. J. 489=12 I. C. 745.]

APPEAL by Jung Bahadur and others, judgment-debtors.

The appellants made an application under s. 311 of the Civil Procedure Code for setting aside the sale of some property in execution of a decree made against them; but as negotiations for [208] a compromise were going on between them and the decree-holders, the hearing of the application was adjourned several times, and eventually it was fixed to be heard on the 20th of April 1901 when the application was dismissed for non-appearance of the judgment-debtors. On the 9th of May 1901 they applied, under s. 103 of the Civil Procedure Code, to the Subordinate Judge of Chupra for reviving their application under s. 311, alleging that their *karpardazes* misunderstood the date fixed to be the 27th of April, and so informed them; that their pleader's signature on the order sheet was not obtained, and they had no intimation that the 20th of April was the date fixed for the hearing of the case, and that on the 27th of April they, the judgment-debtors, sent their witnesses to attend the Court where they were informed that the case had been struck off on the 20th of April for want of prosecution on their part. The Subordinate Judge rejected the application, holding that s. 103 of the Code did not apply to the present case by reason of s. 647 of the Code.

The judgment-debtors appealed to the High Court, and the respondents took a preliminary objection that no appeal lay.

Babu *Makhan Lal* for the respondents. No appeal lies against the order of the Court below, rejecting the application of the judgment-debtor. S. 588, cl. (8) of the Civil Procedure Code gives an appeal only against an order rejecting an application to set aside the dismissal of a suit. S. 647 does not confer any right of appeal not expressly given

* Appeal from Order, No. 448 of 1901, against the order of M.L. Haldar, Subordinate Judge of Chupra, dated June 8, 1901.

(1) (1885) I. L. R. 10 Bom. 433.
(2) (1888) I. L. R. 11 Mad. 319.
(3) (1873) 19 W. R. 122.

1903 AUG. 24.

APPELLATE CIVIL.

31 C. 207= 8 C. W. N. 160.

elsewhere by the Code; its object is to make applicable to proceedings other than suits and appeals the mode of trial and procedure incidental and ancillary thereto. The explanation added to the section says that that section does not apply to applications for the execution of decrees. An appeal is a substantial right and not a mere matter of procedure. No appeal lies against an order rejecting an application purporting to have been made under s. 103 for reviving an application made under s. 311 of Code which had been dismissed for non-appearance: *Ningappa* v. *Gangawa* (1), *Raja* v. *Srinivasa* (2) and *Hurreenath Koondoo* v. *Modhoo Soodun Saha* (3).

[209] Babu *Joy Gopal Ghose* for the appellants. By s. 647 the procedure of the Code has been made applicable to all proceedings other than suits and appeals; hence s. 102 and s. 103 are applicable to applications made under s. 311 of the Code. By operations of s. 588 coupled with s. 647 an appeal lies from an order rejecting the application for reviving an application made under s. 311 which had been dismissed for default.

GHOSE AND PRATT, JJ. We think that the preliminary objection raised on behalf of the respondent in this case must prevail, namely, that no appeal lies against the order of the Court below, rejecting the application of the judgment-debtor purporting to be one under s. 103, Code of Civil Procedure, for the purpose of reviving an application made under section 311 of the Code which had been dismissed for non-appearance of the judgment-debtor. The Code does not provide an appeal against such an order. The question of the right of appeal in such a case seems to have been considered in the cases of *Ningappa* v. *Gangawa* (1) and *Raja* v. *Srinivasa* (2). In the first mentioned case, the principle underlying a decision of this Court in the case of *Hurreenath Koondoo* v. *Modhoo Soodun Saha* (3) seems to have been approved of; and, following the views expressed in these cases, we hold that no appeal lies in this case. The appeal is accordingly dismissed. We make no order as to costs.

This order will not affect the compromise which seems to have been entered into between two of the appellants and the respondents.

The said compromise will be recorded.

Appeal dismissed.

---

31 C. 210.

[210] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pratt.

NAGESHWAR PROSAD SINGH *v.* RUDRA PROKASH SINGH.*

[27th August, 1903].

Lunatic—Lunacy Act (XXXV of 1858), s. 23—Adjudication of lunacy upon evidence—Admission by the alleged lunatic.

It is necessary for the Court to adjudge, upon evidence, a person to be a lunatic within the meaning of s. 23 of the Lunacy Act (XXXV of 1858), before passing an order as to the management of his property and for the guardianship of his person; it cannot proceed upon an admission made by the person who is alleged to be a lunatic.

APPEAL by Nageshwar Prosad, the opposite party.

* Appeal from Order, No. 508 of 1901, against the order of H. Holmwood, District Judge of Gaya, dated Oct. 11, 1901.

(1) (1885) I. L. R. 10 Bom. 433.
(2) (1888) I. L. R. 11 Mad. 319.
(3) (1873) 19 W. R. 122.