

1901 satisfaction of a rent decree obtained by him than is given to
 KEDAR NATH joint landlords acting together, seeing that the latter can obtain
 BANERJEE satisfaction of their decree by the sale of the tenure or holding
 v. in arrear.
 ARDHA
 CHUNDER
 ROY. And this circumstance will explain also the anomaly referred
 Maclean C. J. 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.

S. C. G.

Appeal dismissed.

1901
 Dec. 13.

Before Mr. Justice Rampini and Mr. Justice Pratt.

AMRITO LAL MUKHERJEE

v.

RAM CHANDRA ROY.

*Appeal—Second appeal—Order dismissing a suit for default of appearance—
 Decree—Civil Procedure Code (Act XIV of 1882) 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.

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

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

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

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

of First Instance not being appealable, the Lower Appellate Court acted without jurisdiction in setting aside the decision of the First Court.

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v.
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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."

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 appellant.

Babu Dwarka Nath Chuckerbutty for the respondent.

DEC. 13. RAMPINI AND PRATT J. J. 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

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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

(1) (1895) I. L. R. 23 Calc. 115. (2) (1896) I. L. R. 23 Calc. 827.

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* (1). We must accordingly dismiss this appeal with costs.

S. C. G.

Appeal dismissed.

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 LALL
 MUKHERJEE
 v.
 RAM
 CHANDRA
 ROY.

Before Mr. Justice Ameer Ali.

ATUL CHUNDER MOOKERJEE . . . PLAINTIFF.

v.

SOSHI BHUSHAN MULLICK . . . DEFENDANT.*

1901
 Dec. 5, 6,

Attorney and client—Attorney, application for change of—Discharge by attorney himself—Lien on cause-papers—Duties of attorney on record—Costs—Refusal by attorney to act until costs incurred are paid—Costs of the application.

Having once undertaken the conduct of a case, an attorney is bound, whether the client is rich or poor, to prosecute the case with due diligence; and he cannot say that, unless a large sum is paid to him, he will not continue to conduct the case.

Where a client himself discharges his attorney on record, the latter is entitled to hold the cause papers till his costs are paid, or an undertaking given for their payment. But where the attorney discharges himself expressly or by implication he has no such right; he must give up the papers to the new attorney to whom the client proposes to go, only retaining his usual lien on such papers.

Heslop v. Metcalfe (2), *Robins v. Goldingham* (3), *Wilson v. Emmet* (4) relied upon.

APPLICATION in chambers by the plaintiff for change of his attorney on the record, the latter having refused to prosecute the plaintiff's case, chiefly for want of funds.

It appears that the plaintiff appointed Babu Romesh Chunder Mitter, an attorney of this Court, to prosecute the suit on his behalf, and paid him from time to time sums amounting to Rs. 184 over and above all the out of pocket expenses incurred by Babu Romesh Chunder as his attorney.

* Application, in suit No. 512 of 1899, for change of attorney.

- (1) (1898) I. L. R. 22 Mad. 221. (2) (1837) 3 Myl. & Cr. 183.
 (3) (1872) L. R. 13 Eq. 440. (4) (1854) 19 Beav. 233.