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**(1910) 06 CAL CK 0004**

**Calcutta High Court**

**Case No:** None

Rukminimoyi

APPELLANT

Vs

Poran Chunder Bhera

RESPONDENT

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**Date of Decision:** June 28, 1910

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 17, 2

**Citation:** 14 Ind. Cas. 823

**Hon'ble Judges:** Mookerjee, J; Carnduff, J

**Bench:** Division Bench

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### **Judgement**

1. This is an appeal against an order made by the Court below under Order XLI, Rule 17 of the CPC of 1908, read with Section 2 of the Code. The appellant objected to proceedings in execution of a decree made against him. His objection was overruled on the merits in the Court of first instance on the 2nd March 1909. This order was clearly a decree because it was an order made u/s 47 of the Code. The appellant then appealed to the District Judge. When the appeal was called on for hearing on the 3rd August 1909, his Pleader intimated to the Court that he had, no instructions. The appeal was consequently dismissed. He subsequently made an application to set aside this order, under Rule 19 of Order XLI. The learned Judge, however, refused to re-admit the appeal. Up to the present time, no appeal has been preferred against the order of refusal. We are now concerned, therefore, with the appeal directed against the order of the 3rd August 1909. A preliminary objection has been taken to the hearing of the appeal on the ground that the order is not a decree within the meaning of Section 2, Sub-section (2) of the Code; nor is it an order specified in the Code as an appealable order. On behalf of the appellant, reliance has been placed upon the decision of this Court in the case of Radha Nath Singh v. Chandi Charan Singh 30 C. 660. In our opinion, the preliminary objection must prevail. Section 2 of the Code provides that the term "decree" does not include any order of dismissal for default; consequently, it does not include an order of

dismissal for default of an appeal under Order XLI, Rule 17. It may be observed that under the Code of 1882 there was a divergence of judicial opinion upon this point. It had been held, in the cases of Ramchandra Pandurang Naik v. Madhav Purushottam Naik 10 B. 23 and Radha Nath Singh v. Ghundi Charan Singh 30 C. 660 that an order of dismissal for default u/s 556 of the Code of 1882 was a decree and appealable as such. On the other hand, in the case of Pohkar Singh v. Gopal Singh 14 A. 361 it was assumed that an order of dismissal for default u/s 556 of the Code was not a decree. The Code of 1908 settles this divergence of judicial opinion, and, u/s 2 of the Code, we must hold that the order in question is not appealable.

2. The result is, that the preliminary objection is allowed and the appeal dismissal with costs. We assess the hearing fee at one gold mohur.