courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.

Website: www.courtkutchehry.com

Printed For:

Date: 21/10/2025

Gosto Behary Sardar Vs Hari Mohan Adak

Appeal from Appellate Decree No. 1806 of 1902

Court: Calcutta High Court

Date of Decision: Aug. 20, 1903

Final Decision: Dismissed

Judgement

Mitra, J.
The Plaintiff instituted the suit in appeal for the recovery of possession of a jalkar and for mesne profits during the pendency of

the suit. There was a reference to arbitration. An award was filed on the 19th February 1901 and the case was then fixed for hearing on the 8th

March 1901. On that day on the application of the Defendant the case was postponed to the 19th March 1901. An objection was taken by the

Defendant to the award which was in favour of the Plaintiff. On the 19th March neither the Plaintiff nor his pleader was present. The Court, at the

instance of the Defendant, examined one of the arbitrators, Harilal Mandal, and he said that, he did not join in the sittings of the arbitrators. The

award was accordingly set aside, and at the same time the Plaintiff or his pleader not having been present, the suit was dismissed for default. The

order made is obviously one under sec. 102 read with sec. 157 of the Civil Procedure Code. An application was thereafter made for the revival of

the suit by the Plaintiff under sec. 103, C.P.C. That application also failed for non-appearance of the Plaintiff. Then the Plaintiff appealed to the

District Judge against the decree made on the 19th March dismissing the suit for default. The District Judge has held that the appeal is barred and

that the only remedy the Plaintiff had was by an appeal under sec. 588, cl. (8) of the Civil Procedure Code.

3. The Plaintiff has appealed to this Court and urges that the decree made on the 19th March 1901 is appealable and that his only remedy was not

under sec. 588, cl. (8) of the Code.

4. I think the contention is correct. An order under sec. 102 dismissing a suit is as much a decree as an order under any other section deciding a

suit. The order is final between the parties unless it be set aside on an application under sec. 103 and it decides the suit. The order, therefore,

comes within the definition of the word ""decree"" in the Code of Civil Procedure. The decree drawn on the order is ""a formal expression of an

adjudication of the right claimed,"" it being one of the facts of the dismissal of the case, not for the reason that sufficient evidence was not adduced

but for the reason that the Plaintiff was absent and no evidence was adduced.

5. In Ablakh and another v. Bhagirathi ILR 9 All. 427 (1887) it was held that sec. 103, C.P.C., did not take away the right of a Plaintiff to appeal

from a decree dismissing a suit under sec. 102, C.P.C., and the learned Judges followed an earlier decision of that Court : Partab Rai v. Ram

Kishen (1883) A.W.N. 171. The decision of the Full Bench of this Court in Radha Nath Singh v. Chandi Charan Singh ILR 30 Cal 660 (1903)

supports the view taken by the Allahabad Court and the view I am disposed to take. The Full Bench case related to an order dismissing an appeal

for default under sec. 556, It has been held by the majority of the Judges of the Full Bench that there is an appeal against such an order as if it is a

decree and the mere fact that a further remedy is given under sec. 558, C.P.C., does not bar an appeal. The learned Chief Justice in his referring

order relied upon the definition of the word ""decree"" and he is clearly of opinion that an order dismissing an appeal for default is a formal

expression of an adjudication upon the right claimed by the Appellant.

6. It has been contended by the learned vakil for the Respondent that the order in question being one expressly mentioned in sec. 588 is not a

decree as the definition of the word ""decree"" excludes ""orders"" specified in sec. 588. But sec. 588 itself does not in terms refer to an order made

under sec. 102. It refers to an order made under sec. 103. Sec. 688 gives the right of appeal as from an order when an order is made under sec.

103 and it does not allow an appeal from an order under sec. 102 dismissing a suit for default. Similarly an order of refusal of an application to re-

admit an appeal under sec. 558 is mentioned in sec. 588; but not an order under sec. 556 and it has therefore been held that an appeal may be

preferred against an order dismissing an appeal for default, without recourse to the procedure laid down for re-admission of the appeal. For these

reasons, I remand it to the lower Appellate Court for a decision on the merits. Costs will abide the result.