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**(1922) 03 CAL CK 0028**

**Calcutta High Court**

**Case No:** None

Hara Kumar Mitter

APPELLANT

Vs

Murari Mohan Bose and Others

RESPONDENT

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**Date of Decision:** March 22, 1922

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1(c), Order 9 Rule 9, 141

**Citation:** AIR 1922 Cal 572 : 69 Ind. Cas. 1003

**Hon'ble Judges:** Lancelot Sanderson, C.J; Thomas Richardson, J

**Bench:** Division Bench

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### **Judgement**

Thomas Richardson, J.

In my opinion, this Rule should be discharged on the ground that there is no substance in the contention advanced on the petitioner's behalf;; The petitioner brought a suit in ejectment against the opposite parties. The petitioner not appearing when the suit was called on for hearing the suit was dismissed tinder Rule 8 of Order IX. The petitioner then applied under Rule 9 of the same Order for an order setting aside the dismissal. The petitioner again failed to appear at the proper time and application was in its turn dismissed for default. The petitioner then applied to have the dismissal of the previous application set aside. The second application was heard and refused by the learned Munsif in the Court of first instance by an order, dated 5th February 1921. From that order the petitioner appealed. The appeal was heard by a learned Subordinate Judge who dismissed it on the ground that no appeal lay. The petitioner then obtained this Rule sailing upon the opposite party to show cause why the learned Subordinate Judge's order should not be set aside on the ground he had erred in holding that the appeal was incompetent.

2. In my opinion, the learned Subordinate Judge was quite right in the view which he took, Clause (c) of Rule 1, of Order XLIII allows an appeal from an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set

aside the dismissal of a suit. The clause applies, therefore, only in cases when a "suit" has been dismissed. It is clear that while the order dismissing the petitioner's first application remained in force no fresh application could be made to set aside the dismissal of the suit. It is also clear that the suit came to an end with the order dismissing it for default and the first application, namely, the application to set aside the dismissal of the suit was not itself a suit. It follows that the order dismissing the second application was not an order refusing to set aside the dismissal of a suit within the meaning of Clause (c) of Rule 1 of Order XLIII. This reasoning is similar to that adopted in *Charu Chandra Ghosh v. Chandi Charan Boy Chowdhury* 27 Ind. Cas. 492 : 19 C.W.N. 25. It is at least extremely doubtful whether, regard being had to the observations of the Privy Council in the case, there cited, of *Thakar Prasad v. Fakir Ullah* 22 I.A. 44 : 17 A. 106 : 5 M.L.J. 3 : 6 Sar. P.C.J. 526 : 8 Ind. Dec. 393, Section 141 of the Code applies at all to proceedings under Rule 9 of Order IX, but even if the contrary be assumed Section 141 cannot operate to give an appeal from an order not otherwise appealable under Order XLIII.

3. The Rule must, in my opinion, be discharged with costs, hearing fee two gold mohurs.

Lancelot Sanderson, C.J.

4. I agree.