

(1913) 02 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1037 of 1911

Parbati and another

APPELLANT

Vs

Toolshi Kapri and Others

RESPONDENT

Date of Decision : 27-02-1913

Acts Referred:

Citation : (1913) 02 CAL CK 0004

Final Decision : Dismissed

Judgement

1. This is an Appeal against an order by which the Court of Appeal below has dismissed an appeal as incompetent. The Appellant was the Plaintiff in a suit under sec. 106 of the Bengal Tenancy Act, which was dismissed for default on the 13th August 1910. The Court in the absence of the Plaintiff, received the evidence of the Defendants, expressed an opinion on the merits of the case, but ultimately made an order of dismissal for default under r. 8 of Or. 9 of the Code of 1908. The Plaintiff did not apply under r. 9 for restoration of the suit, but preferred an appeal to the Special Judge who dismissed the appeal on the 16th January 1911. We are now invited to set aside this order and to hold that the appeal was competent, inasmuch as the Court of first instance had recorded the evidence of the Defendants and had drawn up a formal decree. We are of opinion that there is no substance in this contention. The order, on the face of it, purports to have been made, and could only have been made under r. 8 of Or. 9. As was pointed out by Jackson, J., in *Buldeo Misser v. Syud Ahmed Hossein* 15 W.R. 143 (1871), and by Couch, C.J., in *Mohesh Chander v. Tkakoor Das* 20 W.R. 425 (1873), the Court should not have received the evidence on behalf of the Defendants nor should the merits have been examined, it was also unnecessary to draw up a formal decree. The fact that the decree was drawn up obviously cannot alter the nature of the order which must depend upon the circumstances under which it was made. Now it is clear that under sec. 2 of the Code of 1908 this order of dismissal for default is not a decree, and is not liable to be challenged by way of appeal. As was pointed out by this Court in the case of *Rukminimayi Dasi v. Paran Chandra Bhera* ILR 39 Cal. 341 (1910), the Code of

1908 has in this respect altered the pre-existing law. But much stress has been laid upon sec. 107 of the Bengal Tenancy Act, which it has been argued, controls the effect of sec. 2 of the Civil Procedure Code. In our opinion, sec. 107 does not assist the Appellants. The section merely provides that a suit under sec. 106 is to be tried in accordance with the procedure laid down in the CPC for trial of suits and that the decision in every such proceeding shall have the force and effect of a decree of a Civil Court in a suit between the parties. The term "decision" plainly implies an adjudication on the merits and does not include an order of dismissal of the suit for default. The conclusion follows that the appeal presented to the Special Judge was incompetent, and has been rightly thrown out. The present Appeal consequently fails and is dismissed with costs. We assess the hearing-fee at one gold mohur.