

(1891) 03 CAL CK 0010
In the Calcutta High Court

Sarut Sunduri Debi on her death her heir Hemanto Kumari
Debi and Another

APPELLANT

Vs

Jogodindro Nath

RESPONDENT

Date of Decision : 04-03-1891

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2

Citation : (1891) ILR (Cal) 322

Hon'ble Judges : Trevelyan, J; Banerjee, J

Bench : Division Bench

Judgement

Trevelyan and Banerjee, JJ.—The learned pleader for the respondents has taken a preliminary objection that no special appeal lies in this case. The order of the Court below, which is the subject of the appeal before us, is an order giving leave to withdraw the appeal and to withdraw the suit with liberty to bring a fresh suit. The appellant before that Court had a decree made against him by the first Court, and the Appeal Court, under the powers which it has under the Code similar to those exercised by an original Court, gave this leave. The learned Advocate-General, who appears for the appellant, contends that an appeal does lie. The order is not included amongst the orders which are appealable u/s 588: but he contends that the order made is a decree within the meaning of the word "decree" as given in Section 2 of the Code of Civil Procedure. A decree is there defined as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal". There can be no question that where an order of this kind is made by the first Court it does not come within the definition of a decree in the terms of Section 2: but it is contended that in cases in which the decree of the first Court has been got rid of by a decree of the Appellate Court the order which gets rid of that decree must be itself a decree: and in support of this contention he relies on a decision of Mr. Justice Straight and another learned Judge of the Allahabad High Court in the case of *Ganga Ram v. Data Ram* ILR 8 All. 82. There is no doubt that decision is an express authority

in favour of the proposition; but there is also an earlier decision of another Division Bench of the same Court, the case of Kalian Singh v. Lekhraj Singh ILR 6 All. 211 which is an authority for the contrary proposition. Speaking with all respect to the Court which gave judgment in the case of Ganga Ram v. Data Ram ILR 8 All. 82 it seems to us that we must prefer the other decision with regard to this matter. We do not think that this order is in any sense a decree. The setting aside or annulling of a decree by the Appellate Court, as it has been done in this case, does not set aside the decree as the term is used in its ordinary sense; it does not substitute anything for the decree which is set aside, but simply wipes it out and leaves the parties to the determination of their rights in a subsequent suit, and what is done with regard to the first Court's decree is merely ancillary to the rest of the order, which is not a decree. The rest of the order does not express any adjudication on the thing claimed, and the setting aside of the first Court's decree, or annulling it, whatever the term used may be, is also no adjudication upon any right claimed. It says, it is true, that the person who obtained that decree will not be at liberty to make use of it, but the right which is declared by that decree will still be open for the determination of the Court in the subsequent suit, and is not adjudicated upon in this particular suit. It has also been pointed out to us that the Appellate Court in setting aside the decree does not do so in any sense of adjudicating whether the decree was a right or a wrong decree. That being so, we think that no appeal lies against an order of this description, and this appeal must therefore be dismissed with costs.