

Pitambar Dhal and anr. Vs. Baidya Nath Sit and ors.

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Court : Kolkata

Decided On : Aug-24-1917

Reported in : 43Ind.Cas.374

Judge : Asutosh Mookerjee and ;Beachcroft, JJ.

Appellant : Pitambar Dhal and anr.

Respondent : Baidya Nath Sit and ors.

Judgement :

1. The preliminary objection, taken to the competency of this appeal, is well-founded and must prevail. The appellants instituted a suit in forma pauperis. On the day fixed for trial when the suit was called on, neither the plaintiffs nor the defendants entered appearance. The result was that the suit was dismissed under Rule 3 of Order IX of the Code, which provides that where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. The plaintiffs thereupon applied for an order to set the dismissal aside. This application was made under Order IX, Rule 4, and was dismissed on the merits. Against the order of dismissal the present appeal has been preferred. Order XLIII, Rule 1, Clause (c), shows that an appeal lies against 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. Rule 9 applies to cases under Rule 8, that is, cases where the defendant appears and the plaintiff does not appear and the suit is accordingly dismissed for default. The Code distinguishes between cases where

neither party appears and cases where the plaintiff is absent and the defendant appears. These are the two classes of cases contemplated by Rules 3 and 8 respectively, and the applications for restoration are made under Rules 4 and 9. It is worthy of note that whereas an appeal is allowed against an order refusing to set aside a dismissal of a suit under Rule 9, no appeal is allowed against an order refusing to set aside a dismissal of a suit under Rule 4. The present case is covered, not by Rule 9, but by Rule 4. The appeal is dismissed with costs. We assess the hearing fee at one gold mohur.

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