

*Special Appeal No. 539 of 1866.*1867.
Jan. 28.

AMI'RSA'HEB HAFIZULLA' *Appellant.*
 JAMSHEDJI RUSTAMJI *Respondent.*

Costs—Discretion—Special Appeal.

An improper exercise of discretion in awarding costs—against which a Regular Appeal would lie—is no ground for allowing a special appeal; unless the award is contrary to some particular law on the subject.

THIS was a special appeal from the decision of J. K. Naylor, Acting Senior Assistant Judge of the Súrat District at Broach, in Appeal Suit No. 153 of 1864, amending the decree of the Şadr Amín of Broach, in Original Suit No. 1110 of 1864, by altering the award of costs.

Amírsáheb Hafizullá brought a suit to recover possession of two buildings: alleging that they were wrongfully taken from him and retained by Jamshedji Rustamji and Rualláh *alias* Mírsáheb valad Hemudullá Chhotesáheb. The Şadr Amín of Broach passed a decree in favour of the plaintiff, on the ground that the buildings in question were proved to belong to one Hedarsáheb, in succession to whom they belonged to his heir, Amírsaheb, and ordered plaintiff's costs to be paid by both the defendants.

The defendant, Jamshedji Rustamji, appealed against the decision for costs, on the ground that he had taken the property in question in mortgage from his co-defendant, Rualláh, and that it was unjust that he as mortgagee should be burdened with the costs of an action for the merits of which the other defendant was responsible.

The decision of the District Judge was as follows:—

“The reason he (the Şadr Amín) gives for his finding as to costs is, that Jamshedji took the disputed property in mortgage from Rualláh, without having in the first place made due inquiry as to whether Rualláh was really the owner. But I conceive that a man who mortgages property to which he has no claim, is very much more at fault than the person who unwillingly takes such property in mort-

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gage; and it is just that the former should be burdened with any expense the true owner may be put to in substantiating his right, and not the latter.

“ I, therefore, amend the Şadr Amín’s decree; and order that Amírsáhob’s expenses be paid by Rualláh alone, and that the costs of the appeal be also paid by Rualláh.

Dhírajál Mathurádás, for the appellant, contended that as the mortgagee had derived benefit from the estate, and had disputed plaintiff’s claim, he ought to pay the costs, and more particularly because the mortgagor was insolvent.

Shántárám Náráyañ for the respondent.

COUCH, C.J. :—The first point to be determined is whether there is any ground of special appeal in this case. In the High Court at Calcutta Sir Barnes *Peacock* lays down the following proposition of law :—

“ Whether a special appeal will lie or not, must depend upon circumstances. If the lower court should award costs to the losing party, it might be an improper exercise of discretion, against which a regular appeal would lie; but it would not be a matter of special appeal, unless it should be held contrary to law to award costs under any circumstances to the losing party. If costs should be allowed contrary to law, it would be a subject of special appeal.

“ For instance, if the Court should allow costs for three pleaders for one plaintiff, where the law allows costs for only one pleader, or should allow costs for a pleader calculated according to a higher percentage than the law allows, it would be an error of law, and a matter for special appeal. Many other instances might be cited in which the Court might exercise its discretion in awarding costs contrary to the law laid down in some Act or Regulation. In such a case a special appeal would lie, but where there has been merely an unsound exercise of discretion, a special appeal would not lie.”

I entirely concur in this.

The proper remedy is to apply for a review of the Judge’s decision if there is any obvious error. However, this point

does not arise before us now. If I were sitting in Regular Appeal, I should allow the costs to be paid in the first instance by both defendants, with liberty to the mortgagee to recover them from the mortgagor; but it would be inequitable to leave the plaintiff without his costs, whilst the mortgagee is solvent.

NEWTON, J., concurred.

PER CURIAM:—The Court confirms the Assistant Judge's decree with costs.

Decree confirmed.

Special Appeal No. 296 of 1866.

AJURA'M MANIRA'M.....*Appellant.*
KUSA'JI valad SHEKOJI and another.....*Respondents.*

Mistake of Judge—Material issues—Remand.

In a suit to redeem land alleged to have been purchased by the special appellant at an auction sale, and then mortgaged by him to the respondents the District Judge reversed the Munsif's decree for redemption—being under a mistake as to what was necessary to be proved with reference to the dimensions of the land; and as the mistake was one which was likely to have affected his conclusions on other facts in dispute, and as other material questions had not been decided, the issues in the case were framed by the High Court, and the suit remanded for a new decree to be passed upon them.

THIS was a special appeal from the decision of A. St. J. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 79 of 1866, reversing the decree of the Munsif of Sirur in Original Suit No. 1582 of 1864.

The original suit was brought by the special appellant, who claimed to redeem certain land mortgaged to the defendants (the special respondents) in 1853.

The defendants denied the mortgage; and the Munsif, finding that the plaintiff had purchased the land in question at an auction sale, and subsequently mortgaged it to the defendants, passed a decree for redemption on payment by the plaintiff of Rs. 210.

On appeal by the defendants from this decree, the Judge laid down the following issues:—(1) Is the land that of which plaintiff had the hereditary, or any other valid pro-

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