1867.
July 25.

Special Appeal No. 112 *of* 1867.

BHAGVATSANGJI JA'LAMSANGI.....*Appellant.*
PARTA'BSANGJI AJJA'BHA'I and another ...*Respondents.*

Special Appeal No. 211 *of* 1867.

GANPATRA'M LAKHMI'RA'M and others .....*Appellants.*
JAICHAND TALAKCHAND .....*Respondent.*

District Judge—Judgment—Reasons for Decision—Decree—Irregularity —Merits—Special Appeal—Act VIII. of 1859, *Secs.* 350, 359, *and* 372— *—Act XXXIII. of* 1854, *Sec.* 4.

Held, that a District Judge not writing a judgment containing the reasons for his decision, until after the decree in appeal was passed, did not affect the decision of the case on the merits, and was not a ground of special appeal.

IN S. A. No. 112 of 1867, the special respondents, Partábsangji Ajjábhái and Jayasangji Ajjábhái, instituted the Original Suit (No. 122 of 1861) in the Court of the Munsif of Gogo, to recover from the defendant, Bhagvatsangji Jálamsangji, two shares of the land in the village of Kankhot, and two shares of the income of the said village for the Samvat years 1914, 1915, and 1916 (A.D. 1858, 1859, and 1860).

The defendant appeared, and contended that the plaintiffs had no right, title, or interest in the said village, or in the income thereof, as he, being the only son of the plaintiffs' eldest brother, was, by the custom of the Látia Garásiás, entitled to the whole of the estate, the younger brothers being merely entitled to *jivái*, or an allowance for their maintenance.

The Munsif, A'zam Jamyatrám Himatrám, by his decree passed on the 1st of December 1862, ordered that the plaintiff should recover possession from the defendant of two shares, being 57 out of 100 *docrás* of the said village, and also certain sums of money in respect of the income thereof, and for mesne profits together with costs.

The defendant then appealed to C. H. Cameron, Judge of

1867.

BHAGVATSANGJI JA'LAMSANGJI v. PARTA'BSANGJI AJJA'BHA'I et al.

the District of Ahmedábád, in Appeal Suit No. 383 of 1862, on the ground (among others) that the decision of the Munsif was contrary to the custom of the country and of the caste. To that appeal the plaintiffs appeared, and the District Judge, on the 5th of December 1863, reversed the decree of the Munsif, and threw out the plaintiffs' claim with costs, on the ground (which was not taken by the defendant) that a suit for a tálukdári village was not cognisable by the court; as "the land in tálukdári villages belongs to Government, as shown by the Bombay Act No. VI. of 1862."

The plaintiffs then preferred a special appeal (No. 373 of 1864) to the High Court, which came on for hearing on the 25th of July 1864, before ARNOULD, Acting C.J., NEWTON and JANA'RDAN VA'SUDEVJI, JJ.

Dhirajlál Mathurádás for the appellants.

Nánábhái Haridás for the respondent.

PER CURIAM:—The Court, holding that the District Judge has erred in considering the case removed from his cognisance by the Tálukdári Act, reverse his decree, and remand the case to him for a judgment on the merits.

Case remanded.

The aforesaid Appeal Suit, No. 383 of 1862, was, accordingly, re-heard in the District Court of Ahmedábád, on the 17th of October 1864, by the then Judge, E. P. Down, who affirmed the aforesaid decree of the Munsif of Gogo, on the ground solely that Colonel Lang, the Political Agent in the province of Káthevád, had decided that four other villages in that province should be divided between the plaintiffs and the defendant, in the same proportion as the said Munsif of Gogo had, by his decree, ordered the said village of Kankhot to be divided.

The defendant then preferred a special appeal (No. 17 of 1865) to the High Court, which came on for hearing on the 26th of July 1865, before FORBES and NEWTON, JJ.

1867.

BHAGVATSANGJI JA'LAMSANGJI v. PARTA'BSANGJ AJJA'BHA'I *et al.*

Reid and *Nánábhái Haridás* for the appellant.

Howard and *Dhirajlál Mathuradás* for the respondent.

PER CURIAM:—The Court, holding that the District Judge was not justified in deciding the case solely upon the opinion expressed by Colonel Lang, without exercising his own judgment upon the evidence recorded in the case, reverse his decision, and again remand the case to the District Court for a decision on the merits. And the Judge is directed to decide upon the evidence recorded, and upon any other evidence which he may see fit to receive, whether the plaintiff is entitled to any, and what, share in the lands claimed, and to pass a new decree.

Case remanded.

The aforesaid Appeal Suit, No. 383 of 1862, accordingly, came on for hearing a third time, in the District Court of Ahmedábád, before the then Judge, A. R. Grant, by whom a decree was passed, on the 7th of January 1867, confirming the aforesaid decree of the Munsif of Gogo, with all costs on the defendant.

The defendant then preferred another special appeal (No. 112 of 1867) to the High Court, upon the following grounds of objection to the decree appealed against:—That it was contrary to law in that: (1) It was pronounced at a time when the judgment was not written out by the Judge, and was, therefore, not capable of being recorded; (2) The judgment was written by the Judge nearly a year after the case was heard, and at a time when he was suspended from his office of Judge, and when the office was held by another individual; (3) The Judge had held the custom of Látia Garásiás to differ, according as the estates in dispute were large or small, and that in the absence of evidence of any difference of custom; (4) The Judge had decided contrary to the custom governing large estates, which he held undeniably proved.

The case was heard on the 11th of July, 1867, before COUCH, C.J., NEWTON and WARDEN, JJ.

1867.

BHAGVATSANGJI JA'LAMSANGJI v. PARTA'BSANGJI AJJA'BHA'I *et al.*

Nánábhai Haridás, for the appellant:—Mr. Grant did not hold the office of District Judge when he wrote the judgment in this case, and the judgment was not written out when he stated in court what his decision was. There was no evidence to warrant the finding of the Judge that the custom of the Látia Garásiás differed, according as the estates in dispute were large or small.

No one appeared for the respondent. The decree of the District Court in Gujaráti was produced, dated the 27th of January 1866, and signed by the Judge and indorsed by the Sheristedár, as recorded in the case on that day.

Cur. adv. vult.

COUCH, C.J.:—We are of opinion that the not writing a judgment, containing the reasons for the decision, before the decree was passed, has not affected the decision of this case upon the merits, and is not a ground of special appeal.

Act XXXIII. of 1854, Sec. 4, expressly provided that no appeal should lie on the ground of non-compliance with similar provisions to those of Sec. 359 of Act VIII. of 1859.

The Code of Civil Procedure has not expresssly so provided; but it may have been considered by the Legislature that the provisions of Secs. 350 and 372 would be quite sufficient to show that the point under consideration was not a ground of appeal.

In this view of the Law, even if we entertained any doubt, which we do not, we are supported by a decision of the Calcutta High Court, where Sir Barnes *Peacock*, C. J., and *Levinge*, J., held that the mere circumstance that the judgment was delivered out of court was not a ground of special appeal.

As to the other point taken, the finding of the Judge is one of fact upon the evidence, and there is no error in law in his decision, which we affirm with costs.

Decree affirmed.

1867.
GANPATRA'M LAKHMI'RA'M v. JAICHAND TALAKCHAND et al.

IN S. A. No. 211 of 1867, the original suit was brought by the special respondent to compel the defendants (special appellants) to close certain windows overlooking an inclosure attached to the plaintiff's house, and thereby encroaching on his privacy.

The Principal Sadr Amín of Ahmedábád threw out the plaintiff's claim; but the District Judge, A. R. Grant, in Appeal Suit No. 240 of 1864, on the 27th of January 1866, reversed his decision, and passed a decree for the plaintiff, ordering the windows to be closed.

Against this decree a special appeal was preferred, which came on for hearing on the 11th of July 1867, before COUCH, C.J., NEWTON and WARDEN, JJ.

Dhirajlál Mathurádás, for the appellant, contended that the judgment in this case was contrary to law, as it was written by Mr. Grant after he had ceased to hold the office of Judge; and was not pronounced by him in open court, with the reasons for the decision, as directed by Sec. 359 of Act VIII. of 1859.

Shántárám Náráyan, for the respondent, contended that that point could not be raised, as there was nothing to show that the Judge had ceased to hold office on the day the judgment was written. After the hearing of the appeal on the 27th of January 1866, the decree was signed by the Judge, and indorsed by the Sheristedár, as recorded in the suit on that day. There is also, on the petition of appeal, a note by Mr. Grant of his decision.

Cur. adv. vult.

COUCH, C.J. :—We are of opinion that the irregularity objected to has not affected the merits of this case; and that there is no ground of special appeal.

Decree affirmed.

NOTE.—In Special Appeal No. 213 of 1867, decided on the 3rd of July, it was held by NEWTON and WARDEN, JJ., that the not giving reasons, when the decree of the lower court is reversed, is not a ground of special appeal. And see 1 Calc. W. Rep., Civ. R., 244; 2 Calc. W. Rep., Civ. R., 77; 5 Calc. W. Rep., Civ. R., 178.—ED.

1867.
DULLABH JOGI v. NA'RA'YAN LAKHU'.

The plaintiffs then presented a special appeal (No. 226 of 1865) to the High Court, which was heard, on the 5th of December 1865, before WARDEN and JANA'RDAN VA'SUDEVJI, JJ.

PER CURIAM :—The Court holds that Reg. II. of 1827, Sec. XXI., Cl. 1, is not applicable to a claim of this nature, namely, the right to be allowed to use certain cooking utensils. The Court, therefore, reverses the decree of the lower court, and remands the case for re-trial on the merits.

Case remanded.

The appeal (No. 149 of 1864) then came on for re-hearing, in the District Court, before C. G. Kemball, Acting Judge of Súrat, who recorded the following decision :—

"The issues for decision are :—(1) Whether this action is within the cognisance of the civil courts, as regards Sec. 2 of Act VIII. of 1859 ; (2) If it is, whether the claim urged by the plaintiffs was sufficiently established on the evidence to warrant the decree passed by the Munsif.

"On the first point, I am of opinion that this suit cannot be maintained, the same cause of action having already been heard and determined in a suit decided on the 8th of July 1863. It is true that the said suit was decided on a preliminary point respecting the amount entered in the plaint, but that does not, in my opinion, affect the question at issue, whether the present suit is within the cognisance of the civil courts.

"With regard to the second point, it appears unnecessary to express any opinion beyond remarking that, after reading over the evidence, I demur to the Munsif's finding.

"On the first point the decision of the lower court is reversed, with costs on the respondents."

The plaintiffs then preferred the present special appeal, which came on for hearing this day before COUCH, C.J., and NEWTON, J.

Shántárám Náráyan, for the appellants :—The first suit having been rejected by the District Court in appeal, on the ground that the claim was improperly valued, the cause of

1867.

DULLABH JOGI v. NA'RA'YAN LAKHU' *et al.*

action could not be said to "have been heard and determined," within the meaning of Sec. 2 of Act VIII. of 1859. (*b*)

Nánábhái Haridás, for the respondents :—The plaintiff is only entitled to present a fresh plaint in respect of the same cause of action, under Sec. 36 of Act VIII. of 1859, when the former plaint has been *rejected* "on any of the grounds mentioned in Secs. 29 and 31" of the Act. But in this case the first plaint had been admitted and registered, and the Munsif heard the suit, pronounced his judgment, and made a decree, which was reversed in appeal by the District Judge. The cause of action in the first suit was, therefore, "heard and determined;" and a second suit between the same parties on the same cause of action was prohibited by Sec. 2 of Act VIII. of 1859.

COUCH, C.J. :—This case comes within the spirit of Sec. 36 of Act VIII. of 1859.

There is no express power given by the Code of Civil Procedure to reject a plaint, after it has been registered, on the ground that the claim had been improperly valued. When a suit, therefore, is rejected at any subsequent stage of the proceedings on that account, the rejection ought to have only the same effect, as if the plaint had been originally rejected, in accordance with Sec. 31 of the Act, when it was presented for registration.

Independently of Sec. 36 of the Act, we should have held upon principle that in such a case as this, the action was not barred. The former suit was not heard and determined, for it failed by reason only of an informality; and it would be contrary to all principles of justice that the parties should be held to be conclusively barred thereby.

We, therefore, reverse the decree of the District Judge, and remand the case once more; and in doing so we express a hope that it may now at last be decided upon the merits.

The costs to follow the final decision.

Decree reversed and suit remanded.

(*b*) Sec. 2 :—"The Civil Courts shall not take cognisance of any suit brought on a cause of action, which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim."—ED.