1868.
In re GANESH SADA'SHIV.

his court was not placed under the charge of any other Munsif for the purpose of receiving plaints.

PER CURIAM (NEWTON and TUCKER, JJ.):—The Court of the Munsif having been closed by order of the Judge, and the Judge of no other court having been put in charge of the said Alibág Court for the purpose of receiving such plaints as might be presented, the date of the presentation of the plaint to the District Judge by the applicant must be considered as the date of presentation to the proper court; and the District Judge's order is, therefore, reversed, and he is directed to receive the plaint, and forward it to the Alibág Court, which should treat it as presented to that court on the date on which it was first presented to the District Court.

District Judge's order reversed.

Aug. 19.

Special Appeal No. 304 *of* 1868.

SHEK ABA'S valad SHEK DA'UD .....*Appellant.*
IBRA'HIMJI valad HASANJI .....*Respondent.*

Practice—Bátá *Allowance—Notice—Act XXIII. of* 1861, *Sec.* 5.

Where the Court of first instance ordered a co-defendant to be joined in the suit, but the plaintiff failed to pay the allowance necessary for the purpose of causing a notice to be served on such co-defendant, who accordingly did not appear at the hearing:—

Held that the proper course for the Court to have adopted was to dismiss the suit, under Sec. 5 of Act XXIII. of 1861.

Where the Court did not adopt that course, but proceeded with the suit, and passed a decree from which the original defendant appealed on the merits to the Assistant Judge, without taking the objection that the suit ought to have been dismissed, it was held that he could not raise this objection for the first time in special appeal.

Semble—The provisions contained in the first portion of Sec. 5 of Act XXIII. of 1861 are imperative.

THIS was a Special Appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Ratnágirí, in Cross Appeals Nos. 502 and 519 of 1867, amending the decree of the Sadr Amín of Ratnágirí.

The facts appear from the following extracts from the judgment of the Acting Assistant Judge:—

"The plaintiff (Ibráhimji) brought this suit to recover possession of two pieces of land, which he alleged the defendant, Shek Abás, had wrongfully got possession of by an *ex-parte* claim in the Mámlatdár's Court. Rs. 2 were sought as damages for fruit-trees alleged to have been destroyed.

"Shek Abás answered that the land was his, and that he had twice brought successful plaints against Ibráhimji for interfering with his possession.

"Rágho Lakshuman Agáshe was joined by the Court as co-defendant. He alleged (1) that the land was his, and that he had let it to Bápu Monghar, who was dead, but his brother, Agá Monghar, was alive; (2) that the defendant cultivated the land, but that he did not know who had planted the trees. The Ṣadr Amín also ordered the above Agá Monghar to be joined as a defendant, but, as the plaintiff did not pay the necessary *báttá*, no notice was issued to him.

"The Ṣadr Amín found that the plaintiff had not established that the land belonged to him, as he had failed to cause the notice to be served on Agá Monghar, but that the trees were shown to be his; and, therefore, threw out the claim for the land, and allowed it for the trees only. The claim for damages was thrown out for want of proof. Shek Abás appeals, urging that the plaintiff's claim to the land being thrown out, he had no right to the trees. The plaintiff appeals, urging that the trees and land go together, and that he had possession for a time exceeding the period of limitation.

"It seems from the evidence that the land in dispute appertains to the *dharas* of Rágho Lakshuman Agáshé, whom the lower court has joined as defendant, but the land has been in the enjoyment of the plaintiff for a very long term of years, and the trees have been planted and reared by him. The Ṣadr Amín has awarded only the portion of the claim that refers to the trees—apparently for the reason that the plaintiff did not pay into court the *báttá* necessary to cause

1868.
SHEK ABA'S v. IBRA'HIMJI HASANJI.

a notice to be served upon Agá Monghar, whom the Court had ordered to be joined as a defendant.

"It is not very clear upon what authority he proceeds, but, looking at Sec. 148 of the Civil Procedure Code, which I think is the only section applicable to such a state of circumstances, all that the Ṣadr Amín could do when the plaintiff failed to pay the *báttá* was to 'proceed to a decision of the suit on the record, notwithstanding such default.' Had he done this, he must, I think, have found upon the evidence that the plaintiff was entitled to possession of the land."

The case was heard before COUCH, C.J., and GIBBS, J.

Shántárám Náráyan, for the appellant, Shek Abás:—The plaintiff having failed to pay costs of process, the suit ought to have been dismissed under Sec. 5 of Act XXIII. of 1861; and the court of first instance having substantially done this, the lower appellate court had no power to modify his decision. It has been ruled that no appeal lies from an order dismissing a suit under Sec. 5 of Act XXIII. of 1861—a fresh suit under Sec. 7, or moving the Court to issue a fresh summons by satisfying it within thirty days as to the default, being the only remedies: *Mudhoosoodun Ghosal* v. *Beckwith* (*a*).

Ganpatráv Bháskar, for the respondent:—This point cannot now be raised, it not having been taken in the court below. When the plaintiff did not pay the costs of serving the process on Agá Monghar, it was discretionary with the Ṣadr Amín either to dismiss the suit or to proceed with it. The decree does not affect the right of the party who was not before the court. [GIBBS, J.:—How can the Court proceed to hear the suit if one of the defendants is not served with a notice? The suit is incomplete, and the law says it should be dismissed. Though the word *may* occurs in the 5th section, can the Court do anything but dismiss the suit.]

[COUCH, C. J.:—The 5th section equally applies to a case where there is only one defendant. How can it then be

(*a*) Wym. Rep. 155.

discretionary with the Court to proceed with a suit in which the only defendant has never been served, owing to a default on the part of the plaintiff?] That point, I submit, cannot now be taken.

COUCH, C.J.:—Rágho having answered before the Ṣadr Amín that the land in dispute was in the possession of Agá Monghar, the Ṣadr Amín thought it right to make Agá a co-defendant; but as the plaintiff did not pay the costs for serving the notice on Agá Monghar, he could not be made a party to the suit. The proper course for the Ṣadr Amín to have adopted was to dismiss the suit, under Sec. 5 of Act XXIII. of 1861, leaving the plaintiff, if he had omitted to pay the costs by accident, &c., to apply to the court for a fresh summons, or to file a new suit under Sec. 7 of that Act. I can conceive no other way of enforcing obedience to such an order. This course was not adopted, but a decree was passed. From that decree an appeal was preferred, and although Shek Abás was the appellant below, he did not raise the objection that the suit should have been dismissed altogether. I am of opinion that the objection should not be allowed now, because had it been taken below and been decided in favour of the appellant, the plaintiff could have applied to the court or filed a new suit, and the time taken up in special appeal would have been saved. Here the appellant tried to get a decree in his favour in the court below, and having failed there, he now turns round and says that the suit should have been dismissed. The lower court has awarded the plaintiff possession of the land, finding that the land had belonged to Rágho, but that the plaintiff had been in possession for many years. Rágho does not appeal, but Shek Abás does, and says that the decree is wrong, because the occupier is not a party to the suit. The present appellant cannot take the objection, as it does not affect the merits of the case, since the previous claim of tenancy is not affected by the decision, which is not binding on Agá Monghar.

GIBBS, J.:—I quite agree. I at first doubted whether we were not bound by Sec. 5 of Act XXIII. of 1861; but it has been pointed out to us that the point was not taken be-

1868.
SHEK ABA'S v. IBRA'HIMJI HASANJI.

low, and, therefore, it is not desirable to allow it to be raised now: and moreover, when we look into the case, we find that the appellant, Shek Abás, has received no injury by the non-dismissal of the suit; and the man who was not served with a notice has his rights undisturbed.

Decree confirmed with costs.

Aug. 24.

Civil Petition.

VITHOBA' bin KESHAVSHET.....*Petitioner.*
SHA'BA'JIRA'V and ANANDRA'V .....*Opponents.*

Jurisdiction—Mortgage—Assessment paid by Mortgagee—Mofussil Law.

A suit by a mortgagee to compel a mortgagor to repay him the amount of Government assessment, which he has been compelled to pay when in occupation of the mortgaged property, is in the Mofussil an obligation in Equity to repay, and is not cognisable by a Court of Small Causes.

THE petitioner held certain land in mortgage, and while the mortgage was in existence the revenue authorities obliged him to pay the assessment due on the land. The mortgagor afterwards sued the mortgagee, and obtained a decree for redemption, under which he was put in possession of the land. But the amount which the mortgagee had paid on account of the assessment was not charged to the mortgagor. The mortgagee, therefore, sought to recover the same by a suit which he filed in the Court of the Principal Ṣadr Amín at Puṇá. The Principal Ṣadr Amín refused to receive the plaint, on the ground that the suit was cognisable by the Court of Small Causes. The Judge of the latter, however, was of opinion that the suit was not cognisable by him, but by the Principal Ṣadr Amín. The petitioner thereupon petitioned the Judge of the District, F. Lloyd, who concurred in opinion with the Principal Ṣadr Amín.

As neither the Principal Ṣadr Amín, nor the Judge of the Small Cause Court, would receive the plaint, the petitioner made the present application to the High Court.

It was heard before COUCH, C.J., and NEWTON, J.

Shántárám Náráyan for the petitioner.