

nized agent within the meaning of the Code of Civil Procedure, as long as Lalchand Shrichand, one of the partners of the firm, was present within the jurisdiction of the Court.

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The case came on for consideration on the 10th of August 1869, when it was sent down to ascertain further particulars.

It then appeared that the suit had been instituted on the 25th of January 1868, and that Lalchand's evidence was taken on the 14th August 1868.

PER CURIAM (COUCH, C. J., LLOYD and MELVILL, J J.):
 —The Court is of opinion that, Lalchand Shrichand being within the jurisdiction of the Court when the suit was commenced, Lakhmichand Kisanchand was not his recognized agent within the meaning of the Code of Civil procedure, and had not authority to present the plaint on his behalf, or to appoint a pleader for him. They should have joined in presenting the plaint or appointing a pleader; but unless the irregularity appears to have affected the merits of the case or the jurisdiction of the Court, the Appellate Court ought not on that account to reverse the decree.

Special Appeal No. 582 of 1868

June 15.

Ramshet bin Bachashet... .. *Appellant.*
 Balkrishna bin Ababhat... .. *Respondent.*

Procedure—Special Appeal—Ex parte Judgment in Regular Appeal.

A plaintiff or defendant, successful in the Court of first instance, who does not appear in the Court of Regular Appeal is not debarred by such non-appearance from preferring a Special Appeal.

This was a special Appeal from the decision of A. Lyon, Assistant Judge of the Konkan, at Thana, in Appeal Suit No. 148 of 1867.

The plaintiff, Balkrishna Ababhat, sued the defendants, Govind Balaji and Ramshet Bachashet, for possession of certain immoveable property mortgaged to him by the first defendant for Rs. 199, or to recover the amount of the

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mortgage money with interest by the sale of the property and from the defendant, Govind personally.

The defendant, Ramshet Bachashet, answered that the house had belonged to one Narayan Raghoshet; that he was dead, but his son and heir lived with him (Ramshet), and that, on account of such son, he had put a lock on the house; that he had taken measures to obtain a certificate of guardianship to the son; and that the defendant, Govind, had no proprietary right to the house.

The defendant, Govind Balaji, was duly summoned, but he did not put in an appearance.

The Munsif of Alibag, Thomas Taylor, dismissed the claim as against the property, but decreed that the plaintiff should recover from the defendant, Govind, the sum of Rs. 263-8-0 and all costs.

Thereupon the plaintiff appealed. In appeal the defendant, Ramshet Bachashet, did not appear in support of the Munsif's decree, nor did the defendant, Govind Balaji. The Assistant Judge, deciding the case on its merits, amended the Munsif's decree, and directed that the plaintiff should recover the sum of Rs. 263-8-0 out of the mortgaged property.

The defendant, Ramshet Bachashet, thereupon preferred a special appeal. A preliminary point being then taken as to whether a special appeal lay, the question was argued this day before a Full Bench, composed of COUCH, C. J., WARDEN, GIBBS, LLOYD, and MELWILL, JJ.

Shantaram Narayan for the Appellant: The ruling in special appeal, 459 of 1867, decided on the 10th October 1867, is opposed to my present contention. It is submitted, however, that that decision cannot be supported. Sec. 119 of the Code of Civil Procedure is the only section which prevents an appeal in *ex parte* cases, but that section refers to original suits. For appeals a different procedure has been prescribed by Secs. 346 and 347. Sec. 37 of Act XXIII. of 1861 says, that "unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeals which are vested in the Courts of Original

Jurisdiction in respect of original suits." It does not say that the *procedure* in appeal shall, unless when otherwise provided, be the same as in original suits, but that the Courts shall have the same *powers*. Sec. 346 of the Code provides, that if an appellant be absent on the day fixed for the hearing, the appeal shall be dismissed, and Sec. 347 allows the appellant the liberty of applying to the Court for the readmission of an appeal so dismissed; but no special provision is made to meet the case of a respondent who has not appeared to support the judgment obtained by him. This shows that his ordinary remedy of special appeal is preserved to him. Sec. 372, which gives a right to a party to prefer a special appeal from all decisions passed in regular appeal on the ground of the decision being contrary to law, &c., does not exclude the case of a respondent who did not appear below, but says that, "unless otherwise provided by any law for the time being in force," a special appeal shall lie in all cases. It is only by the application of Sec. 119 that a suitor can be deprived of his privilege to prefer a special appeal, but that section does not apply to appeals; for if it did, there would have been no necessity for Sec. 347. The practice of the Calcutta High Court allows special appeals in such cases: *Onda Bibee v. Acowrie Singh (a)*, *Tara Chand Ghose v. Anund Chunder (b)*.

Bakiravnath Mangesh for the Respondent: By Sec. 25 of Act XXIII. of 1861 a special appeal is subject to all the rules provided for a regular appeal, and the Madras High Court has ruled in the case of *Devappa Setti v. Ramandha Bhatt (c)* that the words "unless otherwise provided by any law for the time being in force," in Sec. 372 of the Code, include cases where respondents below were absent. The Calcutta High Court has ruled that a special appeal lies in such a case, but does not seem to have noticed in its decisions Sec. 25 of Act XXIII. of 1861.

Shuntaram Narayan in reply: Sec. 25 of Act XXIII. of 1861 merely shows how a special appeal is to be admitted

(a) 7 Calc. W. Rep. Civ. R. 425. (b) 10 *Ibid.* 450.

(c) 3 Mad. H. C. Rep. 109.

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and heard. But Sec. 337 of the Code shows that *all* the parties need not be before the Court in appeal; and, therefore, a plaintiff or a defendant, who does not appeal, has power to prefer a special appeal if the decision goes against him on the appeal of his co-plaintiff or co-defendant.

Couch, C.J.:—The question before us is not without difficulty. The Calcutta High Court has held that a special appeal lies in such a case; whereas the Madras High Court and a Division Court here have ruled otherwise. I am, however, of opinion that a special appeal lies from a decision given *ex parte* against a respondent below, since Sec. 372 of the Code says “unless otherwise provided by any law for the time being in force, a special appeal shall lie from all decisions passed in regular appeal.” Here the decision was passed in regular appeal, and therefore we must see whether we can find that it is distinctly provided that no special appeal shall lie in a case like the present. There is no direct provision on the point, and the argument against allowing a special appeal is founded only on Sec. 119 of the Code, which it is argued, should be applied to special appeals under Secs. 25 and 37 of Act XXIII. of 1861; but I am of opinion that neither of those sections can be held to have the effect of making Sec. 119 applicable to special appeals. Sec. 25 says that special appeals shall be subject to all the rules provided for regular appeals, so far as the same may be applicable, and Sec. 37 says that the Appellate Court shall have the same powers in cases of appeals as are vested in the Courts of Original Jurisdiction in respect of original suits. Supposing Sec. 37 can be construed so as to empower the Court to entertain an application for rehearing the case, that will not enable us to incorporate the prohibition of appeal in Sec. 119; since it is one thing for the Court to say that a provision prohibits an appeal, and another that the Court has a power to do a thing. There is a marked difference between the position of a defendant who sets up no defence and produces no evidence, and that of a respondent who holds a decree in his favour. In many cases the latter may say, “I have produced all my evidence, and the law applicable to my case is

clear, and, therefore, I will leave the matter in the hands of the Court, without going to the expense of supporting the decree I have obtained." I think there will be no great impropriety in his doing this, since he has put forward his case, and has succeeded; and, therefore, he cannot be subjected to the liability of a defendant who has not put forward any case. I agree with the decision of the Calcutta High Court, though not adopting all its reasons.

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WARDEN, J.:—As one of the Judges, whose decision it is now proposed to overrule, I think it necessary to observe that, upon reconsidering the matter, there does appear to be a difference between the position of a defendant in an original suit, and a respondent in appeal, and that section 119 is not applicable to appeals. I am, therefore, prepared to adopt the judgment delivered by the Chief Justice

GIBBS, J.:—I was also a party to the decision now objected to, and I must say that I have heard little in the arguments to make me change my opinion, but from the observations made by the learned Chief Justice, I must admit that the subject comes before me in a different light. If the position of a defendant and a respondent were the same, Sec. 119 of the Code would apply equally to a case where the respondent did not appear in the Appellate Court; but I am not now prepared to say that the positions of both are alike, and I therefore think that at which my brother Warden and I arrived in the case alluded to in the argument, and I need say no more than that I entirely concur with my Lord in his judgment.

LLOYD, J.:—I quite concur.

MELVELL, J.:—I also quite concur.

Special Appeal allowed.