

Special Appeal No. 505 of 1869.

1870.
April 22.

VINA'YAK JOSHI *et al.* *Appellants.*
JANA'RDAN JOSHI *et al.* *Respondents.*

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Procedure—Regulation Law—Withdrawal from Suit without Leave of Court—Civ. Proc. Code, Sec. 97.

A plaintiff without leave of the Court withdrew from a suit in 1853. He filed a fresh suit on the same cause of action in 1866.

Held that he was not debarred from doing so, as the provisions of Sec. 97 of the Code of Civil Procedure did not apply.

THIS was a Special Appeal from the decision of A. Lyon, Assistant Judge of Tháná, in Appeal Suit No. 465 of 1867, confirming the decree of the Šadr Amín of Ratnágirí.

The plaintiffs sued for the redemption of a piece of land which had been mortgaged to the defendants' ancestors. The defendants pleaded, *inter alia*, that in 1851 the plaintiffs had brought a similar suit against them on the same cause of action, and had withdrawn from it in 1853 without the permission of the court.

The court of first instance, as well as the court of appeal, held that the withdrawal from the old suit was no bar to the present claim.

The Special Appeal was argued on the 31st of January 1870, before WARDEN and MELVILL, JJ.

Pándurang Balibhadra for the special appellants.

Šívshankar Govindrám for the special respondents.

Cur. adv. vult.

April 22. MELVILL, J.:—I do not think that either of the two previous suits is a bar to this claim. The subject-matter of the suit in which the decree No. 50 was passed was not the same; and Vishṇu, who alone prosecuted the appeal in the lower court, was no party to it. In the other suit, which was instituted in 1851, the plaintiff filed a *rázinámá*;

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and it is argued that the provisions of Sec. 97 of the Code should be made applicable, and that the plaintiff, having withdrawn without permission, should be held to be precluded from bringing a fresh suit. But under the old Regulations no special permission was required, and the law permitted a plaintiff to withdraw in any case, with license to bring a new suit; and it is impossible to hold that the plaintiff, having availed himself of the liberty which the law allowed him, is now affected by the provisions of Sec. 97 of the Code.

It has been objected in special appeal that the court below erred in hearing the appeal, as the appellants had made an application reciting the substance of a compromise. But it appears that only one of the appellants made any such application, so that the court had no choice but to proceed with the appeal.

I would confirm the decree with costs.

WARDEN, J., concurred.

Decree confirmed with costs.

Special Appeal No. 510 of 1869.

Feb 7.

MATHURA'DA'S RANCHODDA'S Appellant.

KA'LIA' KHUSHA'L Respondent.

Mortgage—Purchaser at Court's Sale—Priority.

Held that the rule laid down in Ganpat Bajáshet v. Khandú Chaúgshet (a), "that an unregistered mortgage without possession is not valid against a purchaser with possession," does not apply to a purchaser at a Court's sale whose instrument of purchase is not registered.

THIS was a special appeal from the decision of George Ayerst, Acting Assistant Judge of Súrat, in Appeal Suit No. 119 of 1869, reversing the decree of the Šadr Amín of Broach.

The plaintiff, Mathurádás Ranchođdás, instituted this suit to recover possession of a house, in accordance with a decree which he had obtained against Bhúliá Harká and Jeṭhá