1871.
July 24.

Special Appeal No. 135 *of* 1871.

DEṢA'JI LAKHMA'JI ..... *Appellant.*
BHAVA'NIDA'S NAROTAMDA'S ..... *Respondent.*

Pleader's Fees—Special Appeal—Costs.

Unless the order of a lower court in awarding costs be contrary to law, no special appeal will lie against such order.

Amír Sáheb v. *Jamsedji* (4 Bom. H. C. Rep., A. C. J. 41) followed.

Semble. A regular appeal in respect of costs will not lie where there has been *bonâ fide* care and discretion exercised on the part of the court below.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Súrat, in Appeal No. 1 of 1869, confirming the decree of the Subordinate Judge of Súrat.

The suit was brought to recover damages caused to the plaintiff by breach of a contract on the part of the defendants to deliver cotton.

One of the defendants, Miṭhá Rághú, made a separate defence, and engaged a separate Pleader. The defence of the other defendants, including the appellant Desáji, was substantially the same, but Desáji employed a separate Pleader.

The court of first instance allowed a part of the claim. It awarded the costs in proportion on the plaintiff and one of the defendants; and the costs of the other defendants were thrown on the plaintiff.

The District Judge upheld this decree, but with regard to the assessment of costs said: "As to costs it is urged by the appellant that only one fee should be allowed to counsel for all the subordinate defendants, as their defence was the same, and he quotes the case of *Joykissen Mookerjee* v. *Hurrybungso Burraul and others* (*a*). Against this the respondent's *vakíl* quotes *Rajah Rooddur Narain Roy* v. *Coomar Narain Patnaik and others* (*b*). This last, however, appears to be a decision having reference to special rules of the Calcutta High Court, and not generally applicable.

(*a*) Marshall 95, from the Indian Digest, Head "Costs," p. 176.
(*b*) 13 Calc. W. Rep., Civ. R. 320.

"I consider that one fee might fairly be allowed for all the subordinate defendants except Nichhá Rághú, who made a statement distinct from the general defence, and another fee on his account."

The special appeal was heard by MELVILL and KEMBALL, JJ.

Chunilál Mániklál, for the appellant:—This special appeal has reference to costs only. Under Reg. II., of 1827, Sec. LII., cl. 1, "Each Pleader employed in prosecuting or defending an original suit shall be entitled to a percentage," &c. If the word "party" in this section meant "plaintiff or plaintiffs" on the one side, and "defendant or defendants" on the other, then one of several individuals on the one side or the other could not, under cl. 3, Sec. LII., withdraw the authority vested in a Pleader who might have behaved badly to him, or in whom he might not have confidence. This would be inequitable. Then the case set up by one individual may not be the same as his co-defendants', and he should not be compelled to disclose it to the Pleader engaged by them: *Ramchunder Gossain* v. *Mutty Lal Bagchee* (*c*).

Nánábhái Haridás, for the respondent:—By Reg. II. of 1827, Sec. LIII., cl. 2, "Either party may engage two or more Pleaders to conduct his suit or defence, but the party found liable in costs will not be answerable for more than the established fee of one Pleader on behalf of the other party." The award of more than one Pleader's fee is illegal. Till Act I. of 1846 came into operation, this fee was recovered as costs in the suit, and no separate suit was necessary. In the matter of costs Sec. 187 of the Code of Civil Procedure gives to the court the largest possible discretion; and when such a discretion is *bonâ fide* exercised no appeal lies: *Atterborough* v. *Kemp* (*d*); *Amir Sáheb* v. *Jamsedji* (*e*); *Joykissen Mookerjee* v. *Hurrybungso Burraul* (*f*).

PER CURIAM:—If this were a regular appeal, we should be inclined to hold, on the authority of *Atterborough* v. *Kemp*,

(*c*) 11 Calc. W. Rep., Civ. R. 19.
(*d*) 7 Jur. 665. (*e*) 4 Bom. H. C. Rep., A.C. J. 41.
(*f*) Marshall's Rep. 95.

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that the appeal could not be allowed: for it is evident that there has been a *bonâ fide* exercise of discretion by the court below. But, the appeal being a special appeal, we have no doubt that we ought to follow the decision in *Amír Sáheb* v. *Jamsedji* (*ubi suprà*), in which it was held that a special appeal is not admissible on a matter of costs, unless the order of the lower court be contrary to the law laid down in some Act or Regulation. Now although it may be argued, and has been argued by Mr. Nánábhái, that the court below was not justified in law in awarding so many as two Pleaders' fees against the plaintiff (a point which it is not necessary for us to decide), it has certainly not been shown to us that there is any law which made it obligatory on that court, contrary to its own discretion, to award a third Pleader's fee.

Decree confirmed.

July 27.

Special Appeal No. 76 *of* 1871.

RUPA'BA'I, widow of Hormasji Nowrozji ...*Appellant.*
PARBHURA'M KIRPA'SHANKAR .....*Respondent.*

Fraud—Money paid under a Mistake induced by Fraud—Apportionment —Consideration.

A, a *gumástá* of B's deceased husband, represented to B that he had her husband's will in his possession, containing a legacy in A's favour, and obtained from B an agreement for Rs. 2,000, expressed to be in consideration of the alleged will being given up to B, of A foregoing his legacy, and of services to be rendered by A in winding up the affairs of the shop. In pursuance of this agreement B paid a sum of money to A; but, upon discovering that the alleged will was not a will at all, sued to recover back the money so paid by her.

Held that, under the circumstances, the taking of the agreement was a fraud upon B; that the payment of the sum of money by B was not a voluntary payment, and could be recovered back; and that the Court could not apportion the amount (if any) that might be claimable by B for work done under the agreement.

THIS was a special appeal from the decision of F. D. Melvill, Acting Judge of the District of Ahmedábád, in Appeal Suit No. 110 of 1868, confirming the decree of M. H. Scott, Assistant Judge at that station.

The facts of the case were these:—