

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

RA'MCHANDRA NA'RA'YAN KULKARNI (ORIGINAL DEFENDANT No. 2),
 APPLICANT, v, DRA'UPADI KOM NA'RA'YAN (ORIGINAL PLAINTIFF),
 OPPONENT.*

1895.
 January 29.

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Special Judge—Ex-parte order—Review—Reasonable exercise of discretion.

The Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879) has power to review an *ex-parte* order made by him.

THIS was an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. H. Jopp, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The opponent (plaintiff) brought a redemption suit against the applicant Rámchandra Náráyan Kulkarni (defendant No. 2) and two others in the Court of the Second Class Subordinate Judge of Mádhá in the Sholápur District. The Subordinate Judge having dismissed the suit, the opponent-plaintiff applied for revision to the Special Judge under the Dekkhan Agriculturists' Relief Act, who, without issuing notice, reversed the decree of the Subordinate Judge and remanded the case for retrial. The applicant, having learnt after the remand that the decree of the Subordinate Judge had been reversed, applied to the Special Judge for a review of his order on the ground that the order was *ex parte*. The Special Judge accordingly ordered a notice to issue to the opponent (plaintiff) to show cause why the order reversing the Subordinate Judge's decree should not be set aside. The application came on for hearing before the Special Judge (C. H. Jopp, who had in the meanwhile succeeded Ráo Bahádúr Ránade), who rejected it with the following remarks:—

"The decision in Printed Judgments for 1887, page 116 (1), may perhaps be recon-

* Application No. 107 of 1894 under the extraordinary jurisdiction.

(1) Decision in Printed Judgments for 1887, p. 116:—

The Acting Special Judge issued a notice to the defendants to attend his Court at Sângolá on the 18th or 19th February, 1886. This was served on the evening of the 18th, and on the 19th the defendants went 24 miles to attend the Special Judge's Court. The *roznáma* (or journal) says they did attend it; but this is plainly wrong and is contradicted by the judgment. The Court was closed when the defendants

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ciled with that in Printed Judgments for 1886, page 11 (1), by supposing that though the Special Judge is not obliged by law to issue notices at all, if he issue notices to one party he is bound to do so to the others. It may be, therefore, that when notices were issued and served on the other parties, a notice should have been served on defendant No. 2. But even if this is granted, I do not see what power I have to act in this matter. No power is given by the Dekkhan Agriculturists Relief Act to the Special Judge to set aside any order or decree passed *ex parte* by him. It has frequently been ruled that the provisions of the Civil Procedure Code do not apply to the proceedings of the Special Judge. I have, therefore, no power to set aside the decree in this case under section 108 of the Civil Procedure Code, and I see no reason for holding that the power to set aside a decree passed *ex parte* against a defendant or opponent is one inherent in every Court of justice."

Against this decision the applicant applied under the extraordinary jurisdiction and obtained a rule *nisi* calling upon the opponent to show cause why the decision should not be set aside on the ground that the Special Judge erred in holding that he had no jurisdiction to set aside the *ex-parte* decree passed by his predecessor and to restore the case to the file.

arrived on the 19th, and the Acting Special Judge went away the next morning. He ordered the Subordinate Judge to get extracts from the first defendant's books. These were sent, but no new notice was sent to the defendants. The plaintiffs were heard on the review, but the defendants were not. It cannot, we think, be said that they failed to attend the Court through any neglect, and the Acting Special Judge ought to have given them a hearing before he, on the 31st March, 1886, reversed the decision of the Subordinate Judge in their favour, a decision with which his own Assistant agreed. Justice required that, when the plaintiffs were heard against the judgment of the Subordinate Judge approved by the Assistant Special Judge, the defendants should be heard in support of it, unless there was a default of attendance on their part. We, therefore, set aside the decree of the Acting Special Judge and direct him to re-hear the review, giving an opportunity to both sides to be heard.

(1) Decision in Printed Judgments for 1886, p. 11 :—

Section 53 of Act XVII of 1879 does not expressly provide for notice being given to the parties; and having regard to the very special nature of the Act, we cannot, we think, assume on general principles that such notice was necessary before the power of revision could be exercised under that section. It is to be remarked that section 74 only makes the Civil Procedure applicable to suits and proceedings before the Subordinate Judge; and, in the absence of any rule, regarding notice, made by the local Government under section 75 of the Act of 1879, the conduct of the proceedings before the Special Judge must, we think, be deemed to be entirely in his own discretion. This was, apparently, the opinion of the Division Court, consisting of West and Nánáblai, JJ., in petition No. 89 of 1884, in which the same point was raised.

Gangarām B. Rele appeared for the applicant in support of the rule:—He relied on *Vishvanáth v. A'ba*⁽¹⁾, *Badarichárya v. Rám-chandra*⁽²⁾ and *Rámsing v. Bábu Kisansing*⁽³⁾.

Dáji A'báji Khare appeared for the opponent to show cause.

SARGENT, C. J.:—The Special Judge considers that a Special Judge has no power to set aside an *ex-parte* order made by him, because no such power is given him by the Act, and it is not, he considers, a power inherent in every Court. We have already held in *Vishvanáth v. A'ba*⁽¹⁾ followed in *Badarichárya v. Rám-chandra*⁽²⁾ and *Rámsing v. Bábu Kisansing*⁽³⁾ that “the conduct of the proceedings before the Special Judge must be deemed to be in his own discretion;” and in the last two cases it was held that the granting a review of judgment may be a most reasonable exercise of such discretion. Similarly the setting aside an *ex-parte* decree or order may well be a most reasonable exercise of discretion on the part of the Court.

For these reasons we think that the Special Judge was wrong in holding he had no power to entertain the application, and must, therefore, make the rule absolute, discharge the order of the Special Judge, and send back the application for his consideration on the merits. Costs to follow the result.

Rule made absolute.

(1) P. J., 1886, p. 11.

(2) P. J., 1893, p. 35; I. L. R., 19 Bom., 113.

(3) *Ibid.* p. 575; I. L. R., 19 Bom., 116.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE HAUSAMBHAI ABDULABHAI.*

1895.

January 31.

Provincial Small Cause Court Act (IX of 1887), Sec. 27, and Art. 35, Cl. (i), Schedule

II—*Suit for damages—Cognizable by Small Cause Court—Jurisdiction—Registration of plaint which has been ordered to be returned.*

A suit to recover damages for injury to a wall caused by the diversion of a water-course is cognizable by a Provincial Small Cause Court. Such a suit does not fall within the exception of article 35 (i) of Schedule II to Act IX of 1887.

THIS was a reference under section 617 of the Code of Civil Procedure (Act XIV of 1882) by Ráo Bahádur Krishnamukh

* Civil Reference, No. 16 of 1894.

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