

decree in execution of which the Court sale occurred had been obtained on the mortgage—*Kheeraj v. Lingaya*<sup>(1)</sup>; *Sheshgiri v. Salvador Vas*<sup>(2)</sup>.

We, therefore, amend the decree by adding to the relief thereby given a declaration that the plaintiff has a right to recover the amount due on the mortgage by sale of the property in suit, and a direction that the amount be recovered therefrom if he fails to recover it from the defendants Nos. 1 and 2; the defendant No. 3 to pay his own costs throughout and the costs of both appeals.

*Decree amended.*

(1) I. L. R., 5 Bom., 2.

(2) *Ibid.* 5.

## APPELLATE CIVIL.

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

SHIVDAYA'L RA'MCHARAN (ORIGINAL DEFENDANT No. 2), APPLICANT;  
KHETU GANGU AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.\*

1895.

February 5.

*Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 39—Pleader—Pleader duly appointed by a party to a suit cannot delegate his authority to another pleader—Ex-parte decree.*

The applicant (defendant No. 2) was one of two defendants in a suit in the Court of Small Causes in Bombay. He and his co-defendant (defendant No. 1) appointed separate pleaders (K. and W.) to conduct their case. On the day of hearing the applicant was unavoidably unable to be present, and his pleader (K.) being also engaged elsewhere requested W., the pleader of the other defendant in the suit, to hold his brief and to conduct the case for both defendants. W. did so. A decree was passed against both defendants. The applicant subsequently applied to the Full Court under section 37 of the Presidency Small Causes Court Act (XV of 1882) for a new trial on the ground that he had not been represented at the hearing and that the decree had been passed against him *ex parte*. The Full Court refused the application, holding that the applicant had been represented by a pleader, and that the decree against him was not *ex parte*. The appellant then applied to the High Court in its extraordinary jurisdiction.

*Held*, discharging the order of the Full Court, that the decree against the applicant was an *ex-parte* decree. K., who was the applicant's duly appointed pleader, could not delegate his authority to W., and as the applicant was not himself present, the decree was *ex-parte*. W. was not the duly appointed pleader of the applicant and could not, therefore, represent him at the hearing: see section 39 of the Civil Procedure

\* Application No. 119 of 1894 under the extraordinary jurisdiction.

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Code (Act XIV of 1882). The High Court sent back the case to the Small Causes Court to deal with the application for a new trial on its merits.

THIS was an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of the Full Court (consisting of C. W. Chitty, First Judge, and M. H. Hakim, Fifth Judge) of the Bombay Court of Small Causes.

The applicant (defendant No. 2) was one of two defendants who were sued by the plaintiffs in the Court of Small Causes at Bombay. The hearing of the case was fixed for the 8th June, 1894. On that day the applicant was unable to appear, as he was obliged to attend in the Presidency Magistrate's Court, in which one of the plaintiffs had instituted criminal proceedings against him. The applicant and his co-defendant had instructed separate pleaders to appear for them in Small Causes Court, but when the case was called on for hearing on the 8th June the applicant's pleader (Mr. Kápadia) being engaged elsewhere, asked Mr. Warden, who appeared as pleader for the other defendant, to hold his brief and conduct the case on behalf of the applicant. Mr. Warden accordingly did so, and on behalf of both the defendants contested their liability to the plaintiffs' claim. The Court, however, passed a decree for the plaintiff. Against this decree the defendant applied to the Full Court under section 36 of the Presidency Small Cause Court Act (XV of 1882) for a new trial and for a re-hearing of the suit, but the Court rejected the application on the ground that the decree was not an *ex-parte* decree, as Mr. Warden held Mr. Kápadia's brief on behalf of the defendant.

The defendant now applied to the High Court under its extraordinary jurisdiction, contending that the Full Court erred in law in holding that the decree was not an *ex-parte* decree, and that he had no proper opportunity of cross-examining the plaintiffs' witnesses, nor of adducing his evidence. A rule *nisi* was granted calling on the plaintiffs to show cause why the order of the Full Court should not be set aside.

*Sitánáth G. Ajínkya* appeared for the applicant (defendant No. 2) in support of the rule:—Mr. Kápadia was the pleader duly appointed by us to conduct our case. On the appointed day we

could not attend personally in Court, because we were obliged to appear in the Police Court to answer a complaint lodged against us by one of the plaintiffs. Mr. Kápadia, being engaged elsewhere, transferred his brief to Mr. Warden, who was engaged by our co-defendant to conduct his case. We had not given a vakalatnáma to Mr. Warden and had not engaged him; therefore he could not properly represent us in the suit, nor had he received any instructions from us in connection with the case. Under these circumstances the decree against us is an *ex-parte* decree—*Bhimáchárya v. Fakiráppa*<sup>(1)</sup>; *Hirá Dái v. Hirá Lál*<sup>(2)</sup>; *Rámtchal Rám v. Rámeshar Rám*<sup>(3)</sup>; *Doyal Mistree v. Kupoor Chund*<sup>(4)</sup>.

*Jehángir Dorábji* appeared for the opponents (plaintiffs) to show cause:—The defendant was properly represented by Mr. Warden. It is an old and established practice in the Bombay Court of Small Causes for one pleader to hold the brief of another pleader, and the practice is allowed by the Judges of that Court. An inveterate practice amounts to a rule of law—*Aszur Purshotam v. Ruttonbái*<sup>(5)</sup>; *Joyner v. Weeks*<sup>(6)</sup>.

SARGENT, C. J.:—Mr. Warden was admittedly not the duly appointed pleader of the defendant, and, therefore, had no authority, as required by section 39 of the Civil Procedure Code, to represent him at the hearing. Mr. Kápadia, who was the duly appointed pleader, could not delegate his authority to Mr. Warden, and as the defendant was not himself present, the decree passed against him was an *ex-parte* one. The Court below was, therefore, wrong in rejecting the defendant's application to set aside the decree on the ground that it was not an *ex-parte* decree.

We think that under these circumstances we ought to exercise our extraordinary jurisdiction and make the rule absolute, discharge the order of the Small Cause Court, and send back the case for the Court to deal with the application on its merits. Costs to follow the result.

*Rule made absolute.*

(1) 4 Bom. H. C. Rep., A, C. J., 206.

(2) I. L. R., 7 All., 538.

(3) I. L. R., 8 All., 140.

(4) I. L. R., 4 Cal., 318.

(5) I. L. R., 16 Bom., 152 at p. 157.

(6) L. R. (1891), 2 Q. B., 31 at p. 43.

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