

## APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1878.  
November 27.

MODALATHA (APPELLANT), 1ST DEFENDANT.\*

*Act X of 1877, Sec. 584—Construction—Second Appeal—Defendant.*

A defendant who obtains a judgment in his favor in the Court of First Instance, and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a rehearing, may under Act X of 1877 present a second appeal against the decree of the Lower Appellate Court.

THE appellant was defendant in a suit in the Court of the Subordinate Judge of North Malabar. The Subordinate Judge made a decree in his favor, but on appeal by the plaintiff to the District Court, he did not attend, and the case was heard *ex parte* under Section 556 of Act X of 1877, and the decree in his favor modified.

The appellant did not apply to the District Judge for a rehearing under Section 560, but presented a memorandum of second appeal to the High Court. The question was raised whether he was entitled to file an appeal from the decree of the Lower Appellate Court without first applying for a rehearing to the Lower Appellate Court, or whether an appeal lay from an appellate judgment "*ex parte*."

The matter having been mentioned by the Registrar to the Court, notice was directed to issue to the plaintiff to show cause why the memorandum of appeal should not be received.

Mr. *Shephard* for first defendant:—Section 584 gives the right of appeal from all decrees, and there is no provision of the present code prohibiting an appeal from a judgment *ex parte*. The late code contained in Section 119 a prohibition against an appeal from a dismissal of a suit for default of plaintiff, and decree *ex parte* against defendant. There is no provision in the present code corresponding to Section 119. The cases *Chidambara Pillai v. Kaman*, (1), and *Dévappa Setti v. Rámanádha Bhatt* (2), were decisions under the late code. It was decided in *Dévappa Setti v. Rámanádha Bhatt* (2) that an application to rehear was necessary to be made by a respondent in the Lower Appellate Court who had not appeared there, and against whom the case was heard

\* Admission Case No. 2 of 1878.

(1) 1 Mad. H. C. Rep., 189.

(2) 3 Mad. H. C. Rep., 109.

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*ex parte*. Independent of the fact that it was under the late code, it was practically overruled in *Chinnappa Chetti v. Nadaraja Pillai* (1). In that case there was an application to rehear and it was refused; but it was not there decided that such application to rehear was necessary before presenting an appeal. The special appeal was admitted from the decree *ex parte*, the Court holding that the provisions of Section 119 did not apply to a decree *ex parte* in appeal. The Court also held that as the section under which the dismissal (for default) of the appeal took place (Section 346) contained no clause prohibiting an appeal, therefore a special appeal was not prohibited. That decision in principle applies to this case. Chapter 42 in Section 587 provides that Chapter 41 shall apply, as far as may be, to appeals. Section 560 is in Chapter 41, and, if it was intended that there should be no appeal from Appellate Courts' *ex parte* decrees, exception would most probably have been made for such a state of circumstances in Section 584.

Under the new code either an appellant whose appeal is dismissed for default, or a respondent against whom there is an *ex parte* decree, may have a second appeal without resorting to a rehearing under Section 560.

The plaintiff did not appear.

The Court delivered the following judgments :—

**KERNAN, J.**—The right of appeal to the High Court from all decrees of the Lower Appellate Court is given in Chapter 42, Section 584, without any exception or restriction as to the parties to the record or to the circumstances under which the appeal has been heard.

There is no prohibition, express or implied, in the new code against an appeal (on the grounds contemplated by Section 584) by a defendant, as to whom the Lower Appellate Court made a decree *ex parte* under Section 556. Chapter 42, Section 587, provides that Chapter 41 shall apply, as far as may be, to appeals under Section 584.

Section 560 in Chapter 41 is clearly not inconsistent in any way with Section 584. That section (560) provides that a defendant, who has been prevented from attending the appeal in the Lower Appellate Court by proved sufficient cause, may apply to that Court to have the case reheard, and that Court

is authorized to rehear it on terms or otherwise as the Court thinks fit. 1878.

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Such application is treated by the code, and rightly so, of such importance that an appeal against a refusal to rehear is given by Section 588, cl. v.

The importance of a rehearing is obvious if the facts are in dispute, inasmuch as, upon a hearing or rehearing in the Lower Appellate Court, the evidence as to the facts, and the true result of that evidence, is open to discussion and adjudication. Upon a second appeal the weight of the evidence, or the true result, in fact, of that evidence, is not open to discussion, and the finding of the Lower Appellate Court is, except perhaps under very extraordinary circumstances, binding as to the facts found by the Lower Appellate Court.

When facts are in dispute, it is therefore clear that a rehearing under Section 560 may be essential to a defendant against whom an *ex parte* decree in appeal has been passed. But the provisions of Section 560 may be unnecessary to be resorted to by a defendant *ex parte*, when the question in dispute is not one of fact, but of law, on admitted facts or on documents. It may be that the case is one upon which, from the amount involved, each or either party may resolve to have the opinion of the High Court, or it may be that one of the parties has confidence in the judgment already given in favor of a party respondent in the appeal, and may not think it desirable or convenient to attend in the Court of Appeal. In such cases, and others that might be mentioned, the application to rehear would be utterly useless and could not properly or legally be made or complied with; as the party should not have been prevented by any sufficient cause from attending the hearing of the appeal.

Here then would be cases in which, if there was not a second appeal, there would be no appeal against a decree of the Lower Appellate Court even though there might be very sufficient grounds under Section 584 for such appeal. The result would manifestly be inconsistent with Section 584 and with Section 560. Giving therefore Section 560 its full effect, it does not provide for the circumstances under which some cases may be heard *ex parte*. It is limited to particular cases. In the present case the first defendant does not appear to require a rehearing

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on the facts. He does not offer any reason for not attending the appeal. In point of fact his case does not come within Section 560, but does come within Section 584 in point of law.

There may, perhaps, be some inconvenience caused by the High Court hearing and determining the case on arguments and views not presented to the Lower Appellate Court, but in construing the code we must look to the provisions of it and not to reasons outside it.

We will admit the memorandum of appeal.

MUTTUSÁMI ÁYYAR, J.—I am also of the same opinion.

Section 584 allows a second appeal from all decrees passed in appeal unless otherwise provided in the code or by any other law. Though Section 587 declares that Chapter 41 shall apply to second appeals as far as it may be applied, there is no prohibition in that chapter of a first or second appeal. It may be a question whether an appeal does not lie even from an *ex parte* judgment, the restriction contained in Section 119, Act VIII of 1859, being omitted in the corresponding section of the present code (108), but it is not now necessary for us to decide that question. It is true that Section 560 enables a respondent to move for a rehearing when the appeal is heard *ex parte*, provided that he can satisfactorily account for his omission to appear at the hearing; but this section is permissive and not mandatory. It is also true that an appeal is allowed from an order refusing a rehearing, but this may be, because the first Court of Appeal is also the final Appellate Court in questions of fact. The provisions of the present code seem to leave it to the party concerned to decide whether he ought to seek a rehearing or prefer a second appeal.

I would allow Mr. Shephard's application and admit the second appeal.

*Appeal admitted.*

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