APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

DAKSHINAMOORTHY PILLAI (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL OF TRICHINOPOLY (DEFENDANT), RESPONDENT.*

1907 October 28, 29 November 8.

Civil Procedure Code, Act XIV of 1882, ss. 2, 103, 556, 558, 584 588 (27)— Order dismissing suit or appeal for default under section 102 or 556 respectively not a 'decree' and not appealable under section 584.

A decision dismissing a suit or appeal for default of plaintiff's or appellant's appearance under sections 102 and 556 of the Code of Civil Procedure respectively is not a 'decree' within the meaning of the definition in section 2 of the Code; and such decision in a suit or appeal is not appealable under the general provisions of section 540 or 584 of the Code.

Radha Nath Singh v. *Chandi Charan Singh*, I. L. R., 30 Calc., 650, dissented from.

Ablakh v. *Bhagirathi* (I.L.R., 9 All., 427), dissented from.

The plaintiff or appellant has ample remedies provided in such cases by sections 103 and 588, and the Legislature could not have intended that appellants should, in addition, have the power of appealing under section 584 of the Code.

THE facts are fully set forth in the judgment.

T. Natesa Ayyar for appellant.

The Hon. Sir *V. C. Desikachariar* for respondent.

JUDGMENT.—The appellant's appeal was dismissed by the District Judge for default of appearance under section 556 of the Code of Civil Procedure. He applied to the District Judge for readmission of the appeal under section 558 and his application was dismissed. He now appeals to this Court under section 588 (clause 27), against the order dismissing his application to restore, and he also appeals against the same order under the general provisions of section 584 on the ground that the order amounts to a "decree" as defined by section 2 of the Code. First, as regards the appeal against the order under section 588 (clause 27).

* Second Appeal No. 1339 of 1904, presented against the decree of G. Hewetson, Esq., District Judge of Trichinopoly, in A. S. No. 4 of 1904, presented against the decree of M. R. Ry. S. Doraiswami Ayyar, District Munsif of Trichinopoly, in O.S. No. 215 of 1902.

Civil Miscellaneous appeal No. 212 of 1904, presented against the order of the District Court of Trichinopoly in Interlocutory application No. 414 of 1904.

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Accepting the statements in the affidavits filed in support of the application to readmit the appeal as true, it would appear from the affidavits, and the order of the learned Judge, that the facts were as follows :—

The grounds of appeal were drawn by a vakil, Mr. Sanjiva Row, and the appeal was filed before the recess. An order was made before the recess adjourning the case to June 22nd to fix the date of hearing. The Court reopened on June 20th. Before the recess, in consequence of Mr. Sanjiva Row's absence, the appellant gave vakalats to two other vakils. On the reopening of the Court, the appellant took back the records in the suit from the vakil with whom he had left them (apparently with the intention of withdrawing his vakalats from both the vakils) and saw Mr. Sanjiva Row's clerk who told him that, as many appeals of 1903 were pending, the appeals of 1904 would not be taken up for hearing, and that Mr. Sanjiva Row would take a vakalat as soon as the date of hearing was fixed. The appellant went to Court on June 21st and inspected the notice board. The appeal was not posted on that day, but in pursuance of the order made before the recess, it was posted on June 22nd. It would appear from the observation of the learned Judge in his order, "it is impossible always to take up appeals in the exact order they are filed, and that appellants must be prepared for their cases being taken up out of their turn," that the appellant's appeal was taken up before appeals which had been filed later. The appellant did not see the notice which was posted on June 22nd. On the 22nd the case was adjourned to the 28th, and on the 28th it was adjourned to July 1st. On July 1st the appeal was called on. The appellant was not in attendance either in person or by pleader, and the appeal was dismissed for default. The application to restore the appeal was made on July 4th.

It is clear that the appellant was not misled by anything that was done by the Court. Assuming the appeal was taken up at an earlier date than it would have been in the ordinary course, there was ample notice given. The order fixing June 22nd as the day on which the date of hearing would be fixed was made before the recess. He would appear to have been aware that some such order was made since he inspected the notice board on June 21st, and, finding his case was not posted, he took no further steps to ascertain when his case would come on, but was content to rely

on the assurance of Mr. Sanjiva Row's clerk that it would not come on for some time. In these circumstances we are not prepared to say that the District Judge exercised his discretion wrongly in declining to hold that the appellant was prevented by any sufficient cause from attending, when his appeal was called on. We accordingly dismiss this appeal with costs.

Secondly, as to the appeal from the appellate "decree" under section 584.

The first question for consideration is—is a decision dismissing a suit under section 102 for default of appearance of the plaintiff or dismissing an appeal under section 556 for default of appearance by the appellant a decree within the meaning of the definition in section 2 of the Code? We are of opinion that it is not. In such a case we do not think there is any "formal expression of an adjudication upon any right claimed or defence set up." When there is an *ex parte* "decree" in favour of the plaintiff or an *ex parte* decree in favour of the appellant, in our opinion, it is otherwise. In both these cases there is an adjudication on a right claimed or a defence set up, since the plaintiff has to prove his case (if it is not admitted), and the appellant has to show that the decree he appeals against is wrong. Any doubts which there may at one time have been with regard to *ex parte* decrees have been set at rest by the Legislature, since section 540 provides that, an appeal may lie from an original decree passed *ex parte*, and section 584 provides that an appeal may lie from an appellate decree passed *ex parte*.

The question whether a decision under section 102 dismissing a suit in default of appearance of the plaintiff was an "order" or a "decree" was considered in *Gilkinson and another* v. *Subramania Ayyar* (1). And it was held to be an "order", and that no appeal lay. We think this decision was right, and we do not think any distinction can be drawn between a decision dismissing a suit under section 102 and a decision dismissing an appeal under section 556. With great respect we are unable to agree with the decision of the Full Bench of the Calcutta High Court in *Radha Nath Singh* v. *Chandi Charan Singh* (2), or with the dictum of Birdwood, J. in *Ramchandra Pandurang Naick* v. *Madhav Purushottam Naick* (3) or with the decision of the Allahabad High Court

(1) I.L.R., 22 Mad., 221. (2) I.L.R., 30 Calc., 660.
(3) I.L.R., 16 Bom., 23.

in *Ablakh and another* v. *Bhagirathi* (1). In *ex parte Modalatha* (2) the decree was given in default of appearance by the respondent, and this was also the case in the Full Bench decision of the Allahabad High Court in *Ajudhia Prasad* v. *Balmukand* (3). Such a decision would, in our opinion, be a "decree," but, as we have stated, this question has now been settled by Legislature.

It is material to observe that, when the law was amended for the purpose of removing the doubts which had arisen by reason of conflicting decision in cases where a decree was given in the absence of the other side, express provision was made in the cases of *ex parte decrees* in original suits and on appeal. No provision was made giving a right of appeal in cases of "decrees" in default of appearance by the plaintiff or the appellant. The fact that no right of appeal was given in these cases seems to indicate the intention of the Legislature that there should only be a right of appeal in the cases specifically mentioned. It was suggested in the course of the argument that a "decree passed *ex parte*" included a decree passed on default of appearance by the plaintiff or the appellant, but this contention seems to us to be altogether untenable.

The plaintiff or the appellant, who is prevented from appearing by a sufficient cause when his case is called on, is fully protected by section 103 and section 588, and the right of appeal given by section 588 (8) and (27) against an order refusing to restore, and we do not think the Legislature intended that in addition to the right of appeal given him by the special provisions of section 588, he should have a further right of appeal under the general provisions of section 584.

We accordingly dismiss the appeal against the appellate "decree" on the ground that no appeal lies. The appeal is dismissed with costs.

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(1) I.L.R., 9 All., 427. (2) I.L.R., 2 Mad., 75.
(3) I.L.R., 8 All., 354.