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redeem, against the will of the mortgagee, the share of Badipan another shareholder. I would therefore decree the appeal and reverse the decision of the lower appellate Court in so far as it relates to the share of Badipan, and I would modify the decree accordingly with costs in proportion to decree and dismissal.

OLDFIELD, J.—I concur in the order proposed by Mr. Justice Spankie. The right of one mortgagor to redeem the whole mortgage rests on the joint character of the mortgage, and when that has been broken, the right ceases, and he cannot redeem more than his share against the will of the mortgagee.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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December

RAMJAS (DEFENDANT) *v.* BAIJ NATH (PLAINTIFF).*

Hearing of appeal ex parte—Refusal to re-hear appeal—Appeal from Appellate Decree—Act X of 1877 (Civil Procedure Code), ss. 560,584, 588 (v).

An appeal was heard *ex parte* in the absence of the respondent (defendant), and judgment was given against him. He applied to the Appellate Court to re-hear the appeal, and the Appellate Court refused to re-hear it. He then appealed, not from the order refusing to re-hear the appeal, but from the decree of the Appellate Court. *Held* that he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the Appellate Court.

The facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondent.

The judgments of the High Court, so far as they are material for the purposes of this report, were as follows :

STUART, C. J.—This is a second appeal in a suit brought to recover Rs. 2,926-15-6, principal and interest, from the defendant's person and property under a bond, or rather two bonds dated respectively the 28th November, 1870, and the 8th March, 1876. The

* Second Appeal, No 1083 of 1878, from a decree of C. Dendell, Esq., Judge of Gorakhpur, dated the 17th June, 1878, reversing a decree of Maulvi Sultan Hussain, Subordinate Judge of Gorakhpur, dated the 22nd January, 1877.

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reasons of appeal are exclusively on the legal merits of the case, and there is not in them the slightest allusion to any peculiarity of procedure before any of the Courts below. It is, however, now objected on behalf of the respondent that the present appeal does not lie, inasmuch as the last order by the Judge was one refusing to re-hear the appeal before him under s. 560 of the Code of Civil Procedure, against which order the appellant might have appealed to this Court, and not having done so, he cannot now prefer a second appeal from the decree of the Judge on the merits of the case. What actually occurred was this :—The Subordinate Judge, by a decision dated the 22nd December, 1877, dismissed the suit, and the case then went on appeal to the Judge, the defendant not appearing in that appeal. The Judge, nevertheless, heard the appeal *ex parte* on the merits, and by a judgment dated the 17th June, 1878, reversed the decision of the Subordinate Judge, remarking at the end of his judgment that "the respondent had the ordinary notice served on him of the appeal having been made, but he has failed to defend it." Instead of at once appealing to this Court, as he might have done under s. 584 of the Code, against the Judge's order, the defendant applied to the Judge for a re-hearing of the appeal to him, under s. 560, and the Judge, for reasons which do not appear, excepting that the defendant had not attended to the notice of appeal served upon him, refused to re-hear the appeal, and it is argued that by this procedure the plaintiff is prevented from falling back on the Judge's first judgment on the merits of the case and preferring the present second appeal to this Court.

I am, however, clearly of opinion that such an objection is untenable. S. 560 of the Code of Procedure is not mandatory, but permissive and discretionary. It provides that "when an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him (exactly as happened here), he may apply to the Appellate Court to re-hear the appeal." The proceeding indeed evidently contemplated by this section is merely an additional privilege or facility given to respondents, who may or may not avail themselves of it, but it in no way interferes with respondents in other respects, nor could it have been intended to deprive them of any other rights of procedure to which under the Code they are entitled, such as their right of second appeal under s. 584 of the Code; and

there certainly is not the slightest indication in s. 560 of any such intention. The objection therefore altogether fails. I may add that I have the less hesitation in coming to such a conclusion in the present case, since after a very careful examination of the record I cannot find that the requirements of s. 560 were duly observed by the Judge when he refused to re-hear the appeal to him. There is a proceeding before the Judge dated the 19th August, 1878, reciting the application for a re-hearing, and it does not appear from this proceeding that the respondent was allowed the opportunity provided by s. 560 of proving that he was prevented by sufficient cause from attending when the appeal was called on for hearing, all that the Judge's order states being that he was "satisfied that notice was duly served and that the respondent had received full information regarding the appeal," without a word relating to the important question whether sufficient cause had not been shown by the respondent for not attending when the appeal was called on for hearing. The reason assigned by the Judge was clearly not enough, for although notice had been served and the respondent was fully aware that the appeal was coming on, he yet might have been able to show sufficient cause for his absence, and if so he had a clear right to have the appeal re-heard. It is satisfactory, therefore, in the interests of justice, that the present appeal has been preferred, and of its competency I have not the least doubt.

SPANKIE, J.—Pandit Bishambhar Nath, for respondent, took a preliminary objection to the hearing of this appeal. It appears that the case was decided originally *ex parte* on the 17th June, 1878, by the Appellate Court. Ramjas, defendant (now appellant), petitioned the Court for a re-hearing of the appeal. But the Court held that notice had been duly served upon him, and that he had had full information that the appeal had been filed. The Judge, therefore, refused to re-hear the case. It is urged that the defendant should have adopted the course provided by cl. (*v*), s. 588, Act X of 1877, that is to say, he should have appealed to this Court from the order of the Judge refusing under s. 560 of the Act to re-hear the appeal: as he did not follow this course defendant cannot appeal from the Judge's decision of the 17th June, 1878.

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The terms of s. 560 of Act X of 1877 are permissive When an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him, he may apply for a re-hearing, and if it be proved that the respondent was prevented by sufficient cause from attending when the appeal was called on, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him. From any order refusing to re-hear an appeal there is an appeal under s. 588, cl. *v*, but the appeal is not from the decree passed in appeal, but from the order of refusal to re-hear it, if a petition to that effect has been filed and rejected. The decree in appeal remains in force. I do not find it anywhere laid down in the Code that there shall be no appeal from a decree passed in appeal *ex parte*. By not appealing from the order rejecting his application for a re-hearing, respondent might have lost the opportunity of getting his case more completely heard by the Appellate Court, and thereby he may have placed himself in an unfavourable position before this Court, if he desired to appeal from the lower appellate Court's decree on the appeal, still I do not see that he is debarred from instituting a second appeal, provided he undertakes to show that the decree is open to objection on any of the grounds mentioned in s. 584 of Act X of 1877. I would therefore reject the preliminary objection.

CRIMINAL JURISDICTION.

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October 31.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v* BHUP SINGH AND ANOTHER.

Act X of 1872 (*Criminal Procedure Code*), *ss.* 44,296—*Discharge of accused persons under s.* 215—*Revival of Proceedings at the instance of the Court of Session*—*Commitment of accused persons.*

Certain persons were charged under s. 417 of the Indian Penal Code, and were discharged by the Magistrate inquiring into the offence, under s. 215 of Act X of 1872. The Court of Session, considering that the accused persons had been improperly discharged, forwarded the record to the Magistrate of the District, suggesting to him to make the case over to a Subordinate Magistrate, with directions to inquire into any offence, other than the offence in respect of which the accused persons had been discharged, which the evidence on the record showed to have been committed. The Subordinate Magistrate to whom the case was made over made an inquiry, and committed the accused persons for trial before the Court of Session