

*Before Mr. Justice Blair and Mr. Justice Burkitt.*

JAWAHIR SINGH AND ANOTHER (APPLICANTS) v. DEBI SINGH AND OTHERS - December 11.  
 (OPPOSITE PARTIES).

*Civil Procedure Code, sections 556, 558, 588, 622—Dismissal of appeal "for default of prosecution," appellant and his pleaders being present—Refusal to reinstate appeal—Remedy of appellant—Revision.*

A Civil appeal was being heard before a Subordinate Judge, the appellant and two pleaders on his behalf being present. During the argument one of the pleaders was called away to another Court and remained absent, and as neither the other pleader nor the appellant was in a position to continue the argument, the Subordinate Judge passed an order, purporting to be under section 556 of the Code of Civil Procedure, dismissing the appeal "for default of prosecution." An application under section 588 to reinstate the appeal was rejected. The appellant appealed under section 588 to the High Court against the order under section 558. *Held* that no such appeal lay, as the order in question could not have been made under section 556. But the appellant was allowed to apply in revision under section 622 against the order under section 556, and upon that application it was *held* that the Court below had acted illegally and with material irregularity in dismissing the appeal for default under section 556.

THE facts of this case are as follows:—

The applicant here was appellant in an appeal pending before the Subordinate Judge of Meerut. When the appeal came on for hearing the appellant himself and two pleaders on his behalf were present in the Court of the Subordinate Judge. One of the pleaders opened the case, but in a short time was called away to attend to a case before the District Judge. He went to the Judge's Court and asked the Judge to postpone the case pending before him, but the Judge declined to do so. The Subordinate Judge meanwhile, after waiting some little time for the pleader to return, called up the other pleader for the appellant, or the appellant in person, to support the appeal, and, when each of them declared his inability to do so, dismissed the appeal for the default of prosecution.

The appellant applied to the Subordinate Judge for restoration of the appeal to the list of pending appeals. The Subordinate Judge, however, dismissed the application, holding that, upon the facts as stated above, there was not sufficient cause shown for restoration of the appeal.

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Application in connection with First Appeal No. 37 of 1895 from an order of Maulvi Siraj-ud-din, Subordinate Judge of Meerut, dated the 5th January 1895.

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Against this order the appellant appealed to the High Court. When this appeal was called on the Court dismissed it holding that the appeal in the lower Court had not been dismissed for default; but the appellant was permitted to file an application for revision of the Subordinate Judge's order dismissing his appeal.

Pandit *Moti Lal* for the appellants.

Mr. *T. Conlan*, Pandit *Bishambar Nath* and Pandit *Sundar Lal* for the respondents.

BLAIR and BURKITT, JJ.—This case came before us at first as an appeal under section 588 of the Code of Civil Procedure from an order passed under section 558 refusing to readmit an appeal which had been dismissed under section 556. At the hearing, however, it became immediately evident that the appeal could not be supported, as it was shown that the appellant and his pleaders were present when the appeal was called on for hearing in the lower Court. We therefore dismissed the appeal, and at the same time we allowed an application to be put in by the appellant under section 622 of the Code for revision of the order below by which his appeal had been dismissed. That application having been admitted has now been heard, and we are of opinion that it must be allowed. It was contended for the opposite party that the appeal was dismissed on its merits. That, however, clearly was not so. From the terms of the order of the Court below on the application for readmission of the appeal, and from the proceedings which then took place, it is evident that the Subordinate Judge intended to pass, and did pass, and believed he was passing, an order under section 556 by which he dismissed the appeal for default. The words he used were—"for default of prosecution,"—but, as the appellant and his pleaders were present, and as one of the pleaders had addressed the Court, though, no doubt, he went to another Court soon after the commencement of his argument and did not return, and the other pleader refused to address the Court, we are of opinion that the Court below was wrong and acted

illegally and with material irregularity in dismissing the appeal for default under section 556.

We therefore allow this application, and, setting aside the order of the lower Court dismissing the appeal for default, we direct the record to be returned to the Court below with instructions to pass a legal order, namely, one simply dismissing the appeal without adding the words "for default" or "for default of prosecution." We make no order as to costs.

*Application allowed.*

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Barkitt.*

BHAWANI PRASAD AND ANOTHER (PLAINTIFFS) v. GHULAM MUHAMMAD AND OTHERS (DEFENDANTS).\*

*Act No. VII of 1881 (N.-W. P. Rent Act), section 7—Eproprietary tenant—Eproprietary tenancy arising on sale of part of the zamindár's share.*

In order that the provisions of section 7 of Act No. XII of 1881 may come into operation, it is not necessary that the zamindár should lose or part with his proprietary rights in respect of the whole of his interest in the *mahál*.

In this case the plaintiffs-appellants purchased 14 annas out of a 16-anna mahál from the predecessor in title of the defendants-respondents, who retained the remaining 2 annas in his possession. The plaintiffs subsequently sued the representatives of their vendor in the court of a Munsif for joint proprietary possession of a certain grove belonging to the mahál in question and for damages on account of fruit appropriated by the defendants-respondents. The defendants pleaded that the land in suit was their *sér* and that the suit was not cognizable by a Civil Court.

The Court of first instance (Munsif of Allahabad) found that the land was *sér* of the defendants of which they had become ex-proprietary tenants, and that consequently the suit was not within his jurisdiction; and he dismissed it.

On appeal by the plaintiffs, the lower appellate Court (District Judge of Allahabad) dismissed the appeal, on the finding

\* Second appeal No. 1261 of 1893, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 26th September 1893, confirming a decree of Nand Lal Dinerji, Esq., Munsif of Allahabad, dated the 12th July 1893.

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