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upon, or within a reasonable time after, the occurrence of the vacancy which it supplied. Their Lordships cannot discover any ground for the objection. Under the High Courts Act the Lieutenant-Governor of the North-Western Provinces has power to appoint an acting Judge upon the happening of a vacancy among the puisne Judges of the Court. No limit of time is mentioned within which the appointment shall be made. That is left to the discretion of the Lieutenant-Governor, and it is not competent to a Court of Law to invent a restriction not contemplated by the Legislature.

The result is that the appeals fail on all points, and their Lordships will humbly advise Her Majesty to dismiss them. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: *Messrs. Pyke and Parrott.*

Solicitors for the respondent: *Messrs. Ranken, Ford, Ford and Chester.*

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February 3.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Banerji.

CHIRANJI LAL (PLAINTIFF) v. KUNDAN LAL AND OTHERS
(DEFENDANTS).*

Civil Procedure Code, sections 556, 558—Appeal—Dismissal of appeal—Default of appearance.

Where, on an appeal being called on for hearing the vakil who held the brief for the appellant stated that he was unable to argue the case, the fact being that the brief had come into his hands too late for him to prepare himself in the case, and the appeal was in consequence dismissed, it was held that this was not a dismissal for default of appearance, *Sankar Das Dube v. Radha Krishna* (1) distinguished. *Ram Chandra Pandurang Naik v. Madhav Purushottam Naik* (2) referred to. *Rakhal Chandra Rai Chowdhuri v. The Secretary of State for India in Council* (3) dissented from.

THIS was an appeal under section 10 of the Letters Patent from an order dismissing an application for the restoration to the

* Appeal No. 3 of 1897 under section 10 of the Letters Patent Act.

(1) I. L. R. 20 All. 195. (2) I. L. R., 16 Bom., 23.

(3) I. L. R., 12 Calc., 603.

file of pending appeals of an appeal which had been dismissed. The appeal was a second appeal, which under the Rules of the Court came for hearing before a single Judge. The circumstances under which it was dismissed are indicated by the following order:—"This appeal is not supported. The pleader for the appellant has made over his brief to another gentleman when the appeal was called on for the second time. The latter says he is unable to argue the case. I dismiss the appeal with costs." The appellant applied to the Judge who passed the above order for restoration of the appeal as an appeal dismissed for default. This application was rejected by the following order:—"This case cannot be reinstated. It was not dismissed for default. Rejected." The appellant thereupon appealed under section 1Q of the Letters Patent.

Mr. *B. E. O'Connor* and Pandit *Moti Lal*, for the appellant.

Mr. *Roshan Lal*, for the respondent.

KNOX and BANERJI, J.J.—Upon a second appeal being called on for hearing the vakil who appeared for the appellant told the Court that he was unable to argue the case; the appeal was accordingly dismissed. An application was then presented to the learned Judge who heard and decided the case praying that the appeal might be restored to its original number and heard in the ordinary course. The order passed was:—"This case cannot be reinstated: it was not dismissed for default." It is contended before us to-day that under the circumstances the case is one which was practically dismissed for default and should have been so treated. In support of this contention the case of *Shankar Dat Dube v. Raaika Krishna* (1) was cited.

The circumstances, however, of that case differ materially from the circumstances in the appeal before us. In that case the pleader who had been retained by the defendant came before the Court and stated that no one had ever come near him on the part of his client, and he had no instructions of any kind. His case was rightly treated as one in which the pleader engaged had retired

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from the case. In the appeal before us there was no retirement. The learned vakil who was engaged came forward with instructions in his hand and said he was unable to argue the case. From an affidavit which was filed along with the application for reinstatement the cause of inability is stated to be that the brief had come to the hands of the vakil so late that he could not prepare himself to argue the case. That, as pointed out in the case of *Ram Chandra Pandurang Naik v. Madhav Purushottam Naik* (1), was a good reason to pray for an adjournment, but it was not a retirement from the case, and not a default of appearance. We were also referred to *Rakhal Chandra Rai Chowdhuri v. The Secretary of State for India in Council* (2). That case no doubt supports the contention of the appellant, but we find ourselves unable to follow it. We prefer to follow the ruling of the Bombay Court, with which we are in accord. We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

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February 3.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burdett.

DEBI SINGH (PLAINTIFF) v. MUHAMMAD ISMAIL KHAN
(DEFENDANT).*

Jurisdiction—Civil and Revenue Courts—Suit against an evicted tenant for damages for use and occupation—Landholder and tenant.

If a landholder wishes to get rent from a tenant of his agricultural land he must, during the continuance of the tenancy, either come to an agreement with the tenant as to the rent to be paid or get the rent fixed by means of an application under Act No. XII of 1881. If no rent has been fixed, the landholder cannot, after the determination of the tenancy, sue his *quondam* tenant in a Civil Court for damages for the use and occupation of the land. *Ram Prasad v. Dina Kuar* (3), *Radha Prasad Singh v. Jugal Das* (4) and *Debi Singh v. Jhanno Kuar* (5) referred to. *Brijbawan Singh v. Mehdi Ali* (6) and *Ranjit Singh v. Diwan Singh* (7) overruled.

* Civil Revision No. 26 of 1897.

(1) I. L. R., 16 Bom., 23.

(4) I. L. R., 9 All., 185.

(2) I. L. R., 12 Calc., 603.

(5) I. L. R., 16 All., 209.

(3) I. L. R., 4 All., 515.

(6) Weekly Notes, 1887, p. 140.

(7) Weekly Notes, 1889, p. 175.