

the representatives of the judgment-debtor does not meet the above requirements of the law. The omission to ask for execution in it against the appellant as one of the representatives of the judgment-debtor does not affect its legality. The appellant can only succeed in his contention, if it can be held that the application for execution made against one legal representative of a sole judgment-debtor, although it may meet the requirements of the law, shall not take effect for the purpose of saving limitation against another representative of the judgment-debtor who is only liable for the property in his possession. But the law makes no such provision, and its omission to do so is significant, for Explanation I to art. 179 provides that "where the decree has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against." Had it been intended that the legal representatives of a sole judgment-debtor or of jointly liable judgment-debtors should have the benefit of a similar provision on the analogous grounds that they are only liable to the extent of the property in their possession, it is reasonable to suppose that the Legislature would have extended the provision to them. The position, however, of several representatives of a sole judgment-debtor is very different *quoad* the decree-holder from that of several judgment-debtors with separate liabilities found by the decree. We dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Spankie and Mr. Justice Straight.*

KANAHI LAL AND OTHERS (DEFENDANTS) v. NAUBAT RAI (PLAINTIFF).\*

*Dismissal of appeal on the merits in the absence of appellant—Act X of 1877 (Civil Procedure Code), ss. 556, 558—Second appeal.*

An appellate Court, the appellant not attending in person or by his pleader, instead of dismissing the appeal for default, as provided by s. 556 of Act X of 1877, proceeded, in contravention of the provisions of that law, to dispose of the appeal on the merits, and dismissed it. The appellant preferred a second appeal to the High Court, contending that the appellate Court had acted contrary to law. *Held*

\* Second Appeal, No. 873 of 1880, from a decree of W. Young, Esq., Judge of Bareilly, dated the 11th May, 1880, affirming a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 28th February, 1880.

581  
 E  
 U. I. L. A. L.  
 V.  
 S. A. T. R. A. I.

that the appellate Court had so acted, and its decision could only be treated as a dismissal for default, and that, so treating it, the proper and only course open to the appellant was to have applied under s. 558 for the re-admission of his appeal, and under these circumstances the second appeal would not lie. *Nand Ram v. Muhammad Baksh* (1) followed.

THE defendants in this case appealed from the decree of the Court of first instance. When the appeal was called on for hearing the pleader for the defendants was not present. The lower appellate Court proceeded to consider the appeal in the absence of the pleader for the defendants; and, "after perusing the proceedings of the lower Court and the grounds of appeal, and after hearing counsel for the respondent," came to the opinion that the decree of the Court of first instance was right and should be affirmed; and dismissed the appeal.

The defendants appealed to the High Court, contending that the lower appellate Court had acted contrary to law in deciding the appeal preferred to it on the merits in the absence of the pleader for the appellants.

Mr. C. Dillon and Munshi Hanuman Prasad, for the appellants.

Mr. Conlan and Pandit Ajulhia Nath, for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—The first plea urged in appeal has force and must prevail. It was not competent for the Judge to act directly in contravention of the provisions of s. 556 of the Civil Procedure Code, by proceeding to dispose of the appeal upon the merits in the absence of the appellant and his pleader. To such extent, therefore, as he did so, he acted "*ultra vires*," and his decision can only be treated as a "dismissal" for default. But the appellant scarcely seems to have apprehended that the practical result of the objection he urges must be that no second appeal will lie. For the Judge, being taken to have dealt with the appeal under s. 556, the proper and only course open to the appellant was to have applied under s. 558 for re-admission of his appeal, and had his application been refused the order rejecting it would have been

appealable under s. 588.—*Nand Ram v. Muhammad Bakhsh* (1). Under these circumstances it is obvious that the present special appeal to this Court will not lie, and it must therefore be dismissed with costs.

1881

KANAHI L  
v.  
NAUBAT R

*Appeal dismissed.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield*

1881  
*February*

SUKHDAIK MISR AND OTHERS (PLAINTIFFS) v. KARIM CHAUDHRI AND ANOTHER (DEFENDANTS)\*

*Determination of title by Revenue Court—Res judicata—Act XVIII of 1873 (N.-W.P. Rent Act), ss. 36, 39—Act X of 1877 (Civil Procedure Code), s. 13—Jurisdiction of Civil Court.*

S caused a notice of ejectment to be served upon K in respect of certain land, alleging that he held the same by virtue of a lease which had expired. K contested his liability to be ejected under s. 39, denying that he held the land by virtue of such lease and alleging that he held it under a right of occupancy. The Revenue Court decided that K held the land under a right of occupancy and not under such lease. S thereupon sued K in the Civil Court, claiming possession of such land, on the allegation that K was a trespasser wrongfully retaining possession thereof after the expiration of his lease. Held that the suit was cognizable in the Civil Courts, and the decision of the Revenue Court did not render the matter in issue *res judicata*. The provisions of s. 13 of Act X of 1877 do not apply to applications such as those under s. 39 of Act XVIII of 1873.

THE plaintiffs in this suit claimed possession of certain land. They alleged that the defendant acquired such land under a lease of a two-anna eight-pie share of the village in which such land was situate, and that as such lease had expired the defendant was holding such land as a trespasser. The defendant set up as a defence to the suit that he had not acquired such land under the lease, but was holding it under a right of occupancy; and that it had already been decided by the Revenue Court as between him and the plaintiffs that he was so holding it, and such decision was a bar to a fresh adjudication as to the title under which he was holding it. It appeared that the plaintiffs had caused a notice of ejectment to be served upon the defendant in respect of such land under the provisions of ss. 36 and 37 of Act XVIII of 1873, alleging that he held it under such lease and the same had expired. The defendant had contested his

\* Second Appeal, No. 843 of 1836, from a decree of Hakim Rohat Ali, Subordinate Judge of Gorakhpur, dated the 10th May, 1836, affirming a decree of Munivi Nesar Ali, Munsif of Bansi, dated the 13th December, 1839.