# APPELLATE CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.*

1884 *March* 24.

KA'MAT (ORIGINAL PLAINTIFF), APPELLANT, *v.* KA'MAT AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Practice—Procedure—Appeal—Costs—Notice of objections—Civil Procedure Code Act XIV of* 1882, *Secs.* 561, 204—*Finding of fact unaccompanied by reasons for such finding not conclusive in Court of second appeal.*

The Court of first instance found for the defendants on the merits, and passed a decree in their favour without costs. The defendants appealed against that part of the decree which disallowed them their costs. The plaintiff filed a notice of objections to the decree on the merits as required by section 561 of the Code of Civil Procedure (XIV of 1882). The lower Court of Appeal varied the decree by allowing the defendants their costs of suit, and held that the plaintiff was not entitled to file any objections.

*Held* that the Court of Appeal was in error in holding that the plaintiff's objections could not be entertained. Section 561 of the Code gives the respondent the power of taking any objection to the decree at the hearing of an appeal which he could have taken by way of appeal, provided he has filed a notice of his objections not less than seven days before the date fixed for the hearing of the appeal; and this power is independent of whether an appeal lies on a mere question of costs.

*Held*, also, that a finding, unaccompanied by the reasons for it, as required by section 204 of the Code, is not a conclusive finding of fact binding on a Court of second appeal.

THIS was a second appeal from the decision of K. B. Mánekji Nánávati, Subordinate Judge (First Class) at Thána, amending the decree of the Subordinate Judge of Alíbág, Ráv Sáheb Náráyan B. Bhisé.

The plaintiff alleged that he had purchased the house described in the plaint, about ten years before the date of suit, from one Báloji; that a deed of sale in regard thereto had been executed to him in the regular way, but the second defendant had abstracted it, and that he was, therefore, unable to produce it; that the second defendant, who lived in the house with the plaintiff's permission, in collusion with the first defendant began to obstruct him in February, 1879, in the quiet enjoyment of the house, and complained against him of trespass. The plaintiff prayed for a declaration that he was the owner of the house, and also to obtain possession of it with costs of the suit.

* Second Appeal, No. 69 of 1883.

The first defendant answered that he was a mortgagee of the house and other property under a mortgage-deed dated 24th September, 1878, and that the second defendant, and not the plaintiff, was the owner of it.

The second defendant answered that the house belonged to her, and that she had mortgaged it to the first defendant.

The Subordinate Judge of Alíbág rejected the claim, ordering each party to bear his own costs.

The defendants appealed, and claimed their costs.

During the pendency of the appeal the plaintiff under section 561 of the Code of Civil Procedure filed objections against the decree on the merits.

The Subordinate Judge (First Class) came to the conclusion that the plaintiff was not entitled to file his objections, and he, therefore, considered it unnecessary to go into the question of the ownership of the house raised by the memorandum of objections. On the point of costs he was of opinion that the defendants were entitled to recover them from the plaintiff, and he accordingly amended the decree of the Court of first instance to that extent.

*Yashvant Vásudev Athalye* for the appellant.—The lower Court has erred in holding that the appellant was precluded from urging his objections, simply because the opponents could not appeal on the mere question of costs. Such an appeal does lie; but even if it did not, the objections could properly be urged. There is no finding on the merits, and they should be inquired into. A finding without reasons is inconclusive.

*Ghanashám Nilkanth Nádkarni* for the respondents.—The order for costs is a mere appendage to a decree, and does not properly form part of it—section 2 of the Code of Civil Procedure. But even if it were, a person against whom a suit has been wholly decided, except that he has not been made to pay his adversary's costs, cannot, after the lapse of the statutory period for appealing against the decree passed against him, take any objection to the decree under section 561 of this Code—

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*Gangáprasád* v. *Gajádharprasád* (1). The lower Appellate Court has recorded a finding on the merits, though it has given no reasons for it.

The judgment of the Court was delivered by

SARGENT, C. J.—In this case the Court of first instance found for the defendants on the merits of the case, and passed a decree in their favour, but without costs. The defendants appealed against that part of the decree which disallowed them their costs. The plaintiff filed a notice of objections to the decree on the merits, as required by section 561 of the Code of Civil Procedure. The lower Court of Appeal varied the decree by allowing the defendants their costs of suit, and held that the plaintiff was not entitled to file any objections. We think the Court was wrong in holding that the plaintiff's objections could not be entertained. Section 561 gives the respondent the power of taking any objection to the decree at the hearing of an appeal which he could have taken by way of appeal, provided he has filed a notice of his objections not less than seven days before the date fixed for the hearing of the appeal. A Calcutta Full Bench has decided that an appeal lies on a mere question of costs—*Gridhari Lal Roy* v. *Sundarbibi* (2); but whether the appeal would, in law, lie or not, there was, as a matter of fact, an appeal to be heard, and at such hearing the respondent was entitled by section 561 to have his objections to the decree heard and determined. The circumstances of the Allahabad case referred to by the Court —*Gangáprasád* v. *Gajádharprasád* (3)—were very peculiar, and the decision, as to the soundness of which it is not necessary to express any opinion, has no bearing on the present case. We must, therefore, hold that the plaintiff was entitled, as a matter of right, to have his objections decided.

In dealing with the second issue, which raised the question as to the merits of the plaintiff's title, the Court says: "It is unnecessary, therefore, to record any finding on the second issue. But, if necessary, I would hold it clearly proved, by the evidence recorded in the case, that the house does not belong to the

(1) I. L. R., 2 All., p. 651.

(2) Beng. L. R., F. B. R., 496.

(3) I. L. R., 2 All., p. 651.

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respondent, and that Párvatibái was entitled to mortgage it." So far as this can be regarded as a finding, it is incomplete, being unaccompanied by the reasons for it, as required by section 204 of the Code, and one which we do not think we ought to accept as a conclusive finding on fact. See *Raghobur Sahai* v. *Chuttraput*(1) ; *Mussamut Rajoo* v. *Rajkoomár Singh*,(2) where the findings were treated as not binding on the High Court in special appeal on similar grounds. We must, therefore, direct the Court below to find on the second issue, and transmit its finding to this Court within three months.

*Order accordingly.*

(1) 2 Agra, F. B., 73. (2) Calc. 7 W. R., 137.

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## APPELLATE CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.*

KRISHNARA'V YASHVANT AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VASUDEV APA'JI GHOTIKAR, DECEASED (ORIGINAL PLAINTIFF), BY HIS HEIRS SHIVRA'M, GOVIND AND GOPA'L, RESPONDENTS.*

*April* 24.

*Ejectment—Possession—Title—Lease—Registration.*

The plaintiff, a lessee in perpetuity of a piece of land from the *inámdár* of the village in which it was situated, sued the defendant, who had dispossessed him more than six months before the date of suit, to eject him from the land. The defendant set up a lease from the same *inámdár*, but it was held to have been granted without any authority. Both the leases required to be registered under Act XX of 1866, but were not registered.

*Held* that the plaintiff, although suing more than six months after the date of dispossession and without resorting to a possessory suit (Act XIV of 1859, sec. 15 ; Act I of 1877, sec. 9) was entitled to rely on the possession previous to his dispossession as against a person who has no title.

*Pemráj Bhavánirám* v. *Náráyan Shivrám*(1) concurred in.
*Dádábhái Narsidás* v. *The Sub-Collector of Broach*(2) dissented from.
*Wise* v. *Ameerunissa Khatoon*(3) explained.

THIS was a second appeal against the decision of R. F. Mactier, Judge of Sátára, confirming the decree of the Subordinate Judge of Tásgaon.

* Second Appeal, No. 629 of 1882.

(1) I. L. R., 6 Bom., 215. (2) 7 Bom. H. C. Rep., A. C. J., 82.
(3) L. R., 7 I. A., 73.