

*res integra*, while the dicta in some of the cases differ from the opinion I have formed, I think the parties should bear their own costs, respectively, but with liberty to Sorabji Edulji Warden and the Bank of Bengal to add their costs of this Judge's summons as costs in execution of their respective decrees.

Attorneys for the parties:—Messrs. *Wadia and Ghandy*; Messrs. *Craigie, Lynch and Owen* and Messrs. *Ardesir, Hormusji and Dinsha*.

1891.  
 SORABJI  
 EDULJI  
 WARDEN  
 v.  
 GOVIND  
 RAMJI, F. N.  
 WADIA  
 AND AN-  
 OTHER.

## APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

MA'RUTI VALAD UMA'JI AND ANOTHER (ORIGINAL PLAINTIFF), APPELLANT,  
 v. VITHU AND ANOTHER (ORIGINAL DEFENDANT), RESPONDENT.\*

1891.  
 March 16.

*Civil Procedure Code (Act XIV of 1882), Secs. 79, 80, 82—Service of Notice of appeal—Respondent's refusal to sign acknowledgment of service—Ex parte decree against Respondent—Appeal from such decree.*

Where a respondent refused to sign the acknowledgment of service endorsed on the original notice of the appeal, and the serving officer, instead of affixing a copy of the notice on the outer door of the house in which the respondent was residing, returned the notice to the Court with an affidavit stating the respondent's refusal to sign the acknowledgment, and the Court passed an *ex parte* decree against the respondent,

*Held* that under the circumstances there was no due service of the notice, and that the appeal was wrongly decided *ex parte*.

*Held* also that a second appeal lies from an *ex parte* decree of a lower appellate Court.

SECOND appeal from the decision of M. B. Baker, District Judge of Nasik, in appeal No. 220 of 1887 of the District File.

The plaintiff sued to recover possession of certain land together with the rent which had fallen in arrears.

The Subordinate Judge decreed the plaintiff's claim.

The defendants appealed to the District Court.

Notice of the appeal was sent to the Court of Small Causes at Bombay for service. When the bailiff went to effect service, and tendered a copy of the notice to the respondent, he refused to sign the acknowledgment of service endorsed on the original

\* Second Appeal, No. 175 of 1890.

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notice. Thereupon the bailiff, instead of affixing a copy of the notice on the outer door of the respondent's house, returned the original notice with an affidavit stating the respondent's refusal to sign the acknowledgment of service. The Court of Small Causes, without making any further inquiry, forwarded the notice together with the affidavit to the District Court.

The respondent did not attend at the hearing of the appeal, and an *ex parte* decree was passed against him by the District Court.

Against this decision a second appeal was preferred to the High Court.

*Ganesh K. Deshmukh* for appellants.—The notice of the appeal was not duly served. The provisions of sections 79 and 80 of the Code of Civil Procedure were not complied with. If the respondent refused to sign the acknowledgment of service, a copy of the notice ought to have been affixed on the door of the respondent's house. Refers to *Patlu v. Kusáji*.<sup>(1)</sup>

*Dáji Abúji Khare* for respondent.—The serving officer tendered to the respondent a copy of the notice. His refusal to sign the acknowledgment of service will not invalidate the service. A second appeal does not lie against an *ex parte* decree of a lower appellate Court.

*Ganesh K. Deshmukh* in reply.—A second appeal does lie from such a decree. Section 584 of the Code of Civil Procedure, as added to by section 54 of Act VII of 1888, expressly provides for it.

BIRDWOOD, J. :—The appellants, who were the respondents in the lower appellate Court, did not attend at the hearing of the appeal in that Court and an *ex parte* decree was passed against them. A second appeal lies against that decree under the last paragraph of section 584 of the Code of Civil Procedure, as amended by Act VII of 1888, and we are of opinion that the decree must be reversed on the ground contemplated in clause (c) of that section, because from the record it is apparent that no sufficient proof was given of service of the notice of the appeal

<sup>1)</sup> Printed Judgments for 1890, p. 76.

on the respondent. The notice was sent to the Court of Small Causes at Bombay for service and was returned with the joint affidavit of the person who pointed out the respondent to the bailiff and of the bailiff to the effect that the respondent had refused to sign an acknowledgment of service endorsed on the original notice when a copy was tendered to him under section 79 of the Code. The respondent having refused to sign the acknowledgment, it was the bailiff's duty under section 80 to affix a copy of the notice on the outer door of the house in which the respondent ordinarily resides and then return the original to the Court of Small Causes, with a return endorsed thereon or annexed thereto stating that he had so affixed the copy and the circumstances under which he had done so. No such return was made by the bailiff. Nor did the Court of Small Causes make any enquiry or declaration under section 82. It simply returned the affidavit and notice to the lower appellate Court without stating whether there had been service or not. There was, therefore, no due service. (Cf. *Nusur Mahomed v. Kazbhi*<sup>(1)</sup>; and *Patlu v. Kusáji*<sup>(2)</sup>).

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We reverse the decree of the lower appellate Court and remand the appeal for a rehearing. Costs to abide the result.

*Decree reversed and case remanded.*

(1) I. L. R., 10 Bom., 202.

(2) Printed Judgments for 1890, p. 76.

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## APPELLATE CIVIL.

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*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

FAKIRA'PA (ORIGINAL PLAINTIFF), APPELLANT v. RUDRÁ'PA  
(ORIGINAL DEFENDANT), RESPONDENT.\*

1891.

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March 17

*Civil Procedure Code (Act XIV of 1882), Secs. 26, 31, 34—Joinder of Plaintiff—Persons jointly interested in a suit—Objection for misjoinder of parties not taken in the first Court—Practice.*

The plaintiffs were the widow and an alleged adopted son of one Irápa, who was the uncle of the defendant Rudrápa. In execution of a decree against Rudrápa the property in dispute was attached. The plaintiffs intervened and objected to the attachment on the ground that the property belonged to Irápa and not to Rudrápa, the judgment-debtor. This objection was disallowed.

\* Appeal No. 36 of 1890.