APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

RA'MCHANDRA PA'NDURANG NA'IK, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MA'DHAV PURUSHOTTAM NA'IK, (ORIGINAL DEFENDANT), RESPONDENT.*

1891. *January* 27.

Appeal—Dismissal of an appeal for default—Pleader unprepared to proceed with a case—Civil Procedure Code (Act XIV of 1882), *Secs.* 36 *and* 556—*Practice—Procedure.*

On the day fixed for the hearing of an appeal in the lower appellate Court, the appellant appeared by a duly appointed pleader. The pleader applied to the Court for an adjournment, on the ground that he had not time to fully prepare himself in the case. The Court refused to grant any adjournment, and dismissed the appeal for default.

Held, that the order of dismissal was bad. The mere fact that the appellant's pleader was not prepared to proceed with the case would not enable the Court to deal with the case as if there was no appearance at all for the appellant, and to dismiss the appeal for default.

Per BIRDWOOD, J.—An order dismissing an appeal for default is one falling within the definition of a "decree" contained in section 2 of the Code of Civil Procedure (Act XIV of 1882), and is, therefore, appealable.

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Kánara, in Appeal No. 157 of 1887 of the District File.

The plaintiff sued to recover his share of certain property by partition. The suit was dismissed by the Court of first instance. The plaintiff thereupon appealed to the District Court.

On the day fixed for the hearing of the appeal the plaintiff's pleader applied to the Court for an adjournment, on the ground that he had not time to fully prepare himself in the case.

The District Judge refused to grant any adjournment, and on the appellant's pleader stating his inability to proceed with the case, dismissed the appeal as for default.

Against this order of dismissal the plaintiff appealed to the High Court.

Ghanashám Nilkanth for appellant:—The order dismissing our appeal for default is wrong. There was really no default. Our pleader was present at the hearing of the appeal, but he was not

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prepared to argue the case. That cannot be treated as if there was no appearance at all on our part.

Náráyan Ganesh Chandávarkar for respondent:—It is not sufficient for a pleader merely to attend at the hearing of a case. He must be ready to answer all questions put to him, and conduct the case on his client's behalf. If he cannot do this, his appearance is not an appearance within the meaning of section 36 of the Code of Civil Procedure (Act XIV of 1882)—*Shibendra Nerain Chowdhuri* v. *Kinoo Rám Dáss* (1); *Bhimácharya* v. *Fakirápá* (2); *Buldev Misser* v. *Syud Ahmed Hossein* (3).

BIRDWOOD, J.:—The lower appellate Court dismissed the appeal presented to it for default. It did so because the appellant's pleader was unprepared to argue the case when it was called on for hearing. The appellant's former pleader had been appointed a Subordinate Judge, and the pleader who succeeded him was only appointed to act on the day preceding the hearing, and was unable, as he said, to argue the case on such short notice, as it was a heavy one. We think that the District Judge was in error in treating the pleader's unpreparedness to proceed with the case as equivalent to his absence. Section 556 of the Code of Civil Procedure authorizes an appellate Court to dismiss an appeal for default, if the appellant does not attend in person or by pleader. There can be an appearance by a pleader under section 36 of the Code if the pleader has been duly appointed to act on behalf of a party. In the present case, the pleader was so appointed. If he had said that he had received no instructions, the Court could, no doubt, have held that there was no proper appearance. But that was not the case. The pleader asked for an adjournment for certain reasons. If the Court thought that those reasons were insufficient, it could have refused the adjournment. In that case, it ought to have proceeded with the hearing, and if the pleader then failed to make out a good case, the Judge could have made such decree as he deemed to be just, but it was not open to him to deal with the case as if there had been no appearance at all for the appellant.

(1) I. L. R., 12 Calc., 605. (2) 4 Bom. H. C. Rep., 206, (A. C. J.).
(3) 15 Calc. W. R. Civ. Rul., 143.

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As regards the question whether an appeal lies from the District Judge's order, I am of opinion that the order must be regarded as falling within the definition of a "decree" contained in section 2 of the Code of Civil Procedure, for it is an adjudication adverse to the appellant's right to have his appeal heard, and it decides the appeal. An order dismissing an appeal as barred by limitation has been held to be a decree within the meaning of the section—*Raghunáth Gopál* v. *Nilu Náthájí*[1]; *Gulab Rai* v. *Mangli Lal*[2]. An order directing a suit or appeal to abate is also a decree—*Bhikáji Rámchandra* v. *Purshotam*[3]. An order rejecting a plaint as insufficiently stamped is also a decree—*Ajoodhya Pershad* v. *Gunga Pershad*[4]. In *Nand Rám* v. *Muhammad Bakhsh*[5] and *Kanahi Lál* v. *Naubat Rái*[6] it was held that an order dismissing an appeal for default is not appealable. But in a later case an order dismissing a suit for default has been held by the Allahabad High Court to be appealable —*Ablakh* v. *Bhágirathi*[7]. I am of opinion that an order dismissing an appeal for default must also be held to be a decree from which an appeal lies under section 540 of the Code of Civil Procedure.

We reverse the order of the lower appellate Court, dismissing the appeal before it for default, and direct it to proceed with the hearing according to law. Costs to abide the result.

PARSONS, J.:—The appellant attended the Court on the day fixed for the hearing by a pleader duly appointed to act on his behalf. It is true that that pleader said that he had not had time to fully prepare himself in the case, and asked for an adjournment; but that fact alone would not enable the Judge to treat the appearance as no appearance, and to dismiss the appeal for default. Section 36 of the Code of Civil Procedure requires only that an appearance shall be made by a pleader who is duly appointed to act. Its language thus differs from that of section 41 of the Act VIII of 1859, under which the decision in *Bhimá-*

(1) I. L. R., 9 Bom., 452.
(2) I. L. R., 7 All., 42.
(3) I. L. R., 10 Bom., 220.
(4) I. L. R., 6 Calc., 249.
(5) I. L. R., 2 All., 616.
(6) I. L. R., 3 All., 519.
(7) I. L. R., 9 All., 427.

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chárya v. *Fakirápp*a[1] was passed. A bench of the Calcutta High Court is reported to have held that an appeal could be dismissed under section 556, when a pleader, though present, was not prepared to go on with the case—*Shibendra Nárain Chowdhurí* v. *Kinoo Rám Dáss*[2]. I am unable to agree with this decision. The ruling in the case of *Buldeo Misser* v. *Syud Ahmed Hossein*[3] is said to be followed. That case, however, was passed when the old Act was in force, and there was, moreover, in it a refusal on the part of the pleader to argue the case. The decision in *Dhan Bhagut* v. *Ramessur Dutt Singh*[4] is not alluded to, though the facts were more in accord.

Since in the present case there was an appearance by the appellant in the lower appellate Court on the day fixed for the hearing—an appearance which satisfied all the requirements of the law—I am of opinion that the order dismissing the appeal for default under section 556 is illegal and one that the District Judge had no jurisdiction to make. The Judge should have proceeded to hear the appeal, and should have called on the pleader to argue it if he considered that an adjournment ought not to have been granted. I concur in reversing the order.

I desire to record no opinion as to whether there is an appeal from such an order. The Allahabad High Court have held that there is none—*Kanahi Lál* v. *Naubat Rai*[5]. I have not had time to consider the point, and it is unnecessary for me to delay the disposal of the case, since the order can be reversed under our revisional jurisdiction if no appeal lies from the order.

Order reversed.

(1) 4 Bom. H. C. Rep., 206, A. C. J.
(2) I. L. R., 12 Calc., 605.
(3) 15 Calc. W. R. Civ. Rul., 143.
(4) 20 Calc. W. R. Civ. Rul., 53.
(5) I. L. R., 3 All., 519.