APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

KRISHNA VITHAL POOLE (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANESH BHASKAR TILAK (ORIGINAL DEFENDANT), RESPONDENT.* 1901. *October* 1.

Costs—Appeal from order as to costs—Dismissal of suit for non-appearance—Restoration of suit to file on application of plaintiff—Order that plaintiff should pay the general costs of suit—Civil Procedure Code (Act XIV of 1882), section 99—Practice.

A Judge, when restoring a suit to the file under section 99 of the Civil Procedure Code (Act XIV of 1882), has no jurisdiction to pass at that time any order as to the general costs of the suit.

SECOND appeal from an order dismissing an appeal under section 551 of the Civil Procedure Code (XIV of 1882), passed by Ráo Bahádur Nagardas Narotamdas Nanavati, First Class Subordinate Judge, A. P., at Thána, against a decree passed by Ráo Sáheb R. B. Chitale, Subordinate Judge of Pen.

This was a suit brought by plaintiff to recover possession of certain lands from the defendant with mesne profits.

The hearing of the case was fixed for the 13th June, 1900; but on that date neither party appearing, the Subordinate Judge "dismissed the suit for default with costs."

On the 3rd September, 1900, the plaintiff having shown sufficient cause for his absence on the 13th June, 1900, the suit was restored to the file. In so doing, the Subordinate Judge passed the following order:

Under the circumstances, I think it equitable only to set aside the dismissal order and to order the plaint to be restored to the original file, though throwing all the costs in the suit and of this application on the plaintiff.

The case was then proceeded with and the Subordinate Judge passed a decree in the plaintiff's favour, but ordered him to pay defendant's costs.

An appeal was made against this decree, but it was dismissed under section 551 of the Civil Procedure Code (Act XIV of 1882).

* Second Appeal No. 258 of 1901.

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The plaintiff preferred a second appeal, contending (*inter alia*) that the lower Courts failed to observe the general principle as to costs, that a successful party is entitled to his costs.

G. K. Dandekar for the appellant (plaintiff) :—The lower Courts were wrong in principle in the award of costs. The general principle is to give a successful party his costs of the suit. The reason given for deviating from that general principle here is the order passed when restoring the suit. The procedure then to be followed was that provided for in section 99 of the Civil Procedure Code (XIV of 1882). The Court having found that the plaintiff was prevented by sufficient cause from appearing in Court, the dismissal order should have been set aside without any order as to costs. Section 99 does not give jurisdiction to the Court to decide the question of costs of the suit.

V. N. Manohar for the respondent (defendant) :—The order as to costs is not appealable. It is an interlocutory order. Under section 591 of the Civil Procedure Code no appeal lies from an order except the orders referred to in section 588 of the Code. The order in question does not affect the decision of the case. The awarding of costs being discretionary, and the lower Courts having exercised their discretion, the High Court should not interfere with that discretion. See also *Chintamony Dassi* v. *Raghoonath Sahoo*.[1]

FULTON, J. :—We think that, as the Subordinate Judge was satisfied that the plaintiff had sufficient excuse for his non-appearance on the day of hearing, he was bound, under the provisions of section 99 of the Civil Procedure Code (XIV of 1882), to restore the suit to the file, and had no jurisdiction at that time to pass any order as to the general costs of the suit. This section, unlike section 103, does not empower the Court to make terms as to costs. In these circumstances, we are of opinion that when finally determining this suit, the Subordinate Judge ought to have followed the general rule of giving costs to the successful party. There was no reason whatever for requiring the plaintiff to pay the costs of the defendant, who himself was absent when

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the suit was dismissed on 13th June, 1900, under section 98. On appeal the First Class Subordinate Judge ought, we think, to have passed the right order as to costs. He has given no reason for not doing so. His remark, that the lower Court as regards costs has stuck to the order passed when restoring the suit to file, does not explain his reason for not interfering. Mr. Manohar suggested that we could not interfere as the matter was decided by an interlocutory order, and he referred to *Chintamony Dassi* v. *Raghoonath Sahoo*[1] to support his argument that that order did not come within the provisions of section 591 as it did not affect the decision of the case. We think, however, that it clearly did affect the decision, as it obliged the Subordinate Judge, in order to be consistent, to pass a wrong order as to costs. This view is in no way inconsistent with the decision above referred to, which deals with an interlocutory order not affecting the decision.

We now amend the decree of the Subordinate Judge by directing that defendant do pay all costs throughout.

Decree amended.

(1) (1895) 22 Cal. 981.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

1901.

October 4.

BAI FULL (ORIGINAL PLAINTIFF), APPELLANT, *v.* ADESANG PAHADSANG AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 3, 4 AND 6), RESPONDENTS.*

Practice—Procedure—Abatement—Civil Procedure Code (Act XIV of 1882), sections 368, 582—Appeal—Death of some of the respondents—Legal representatives not brought on the record—Abatement of appeal as against them—Appeal continuing against the remaining respondents.

The plaintiff filed an appeal in a District Court. It was admitted and then adjourned *sine die*. At the hearing, which took place nearly two years afterwards, it appeared that two of the respondents had died in the meanwhile, and their legal representatives had not been brought on the record. The lower Appellate Court thereupon ordered the appeal to abate as against all the respondents.

Held, that the appeal should abate only as against the respondents who had died; but as against the remaining respondents it should proceed.

* Appeal No. 22 of 1901.