Before Mr. Justice Phear and Mr Justice Hobhouse.

KALIKRISHNA CHANDRA *v.* HARIHAR CHUCKERBUTTY.* 1869 *July* 15.

Appeal—Talabana—Failure to Deposit—Act XXIII. of 1861, *ss.* 5, 6, 7, *&* 37.

See also 12 B. L R. 269.

A filed a memorandum of appeal, but failed to deposit the sum required to defray the cost of issuing the usual notice on the respondent. When the case came on for hearing, it was found that, in consequence of A's failure to deposit, no notice had been served on the respondent; and the Judge dismissed the appeal under section 6 of Act XXIII. of 1861. Within 30 days after this, A. presented a petition explaining the reasons of his default, and praying that, on payment of the Talabana, the appeal might be restored to its place; but the Judge, without considering the reasons which A. had given in his petition, disallowed his prayer. *Held*, that no appeal lay from the order of the judge rejecting A's petition, which was of the nature of an application for a review of judgment. *Held* also, that section 37 of Act XXIII. of 1861 does not apply to cases were the subject which is being dealt with by the Court, is not the actual appeal itself, and cannot therefore, be rightly treated as standing in an analogous position to that of the original suit itself; and further that the same section has not the effect of making section 7 of the same Act applicable to cases where the Appellate Court has passed an order under sections 5 and 6, dismissing the appeal.

Semble.—The word "powers" in section 37 of Act XXIII. of 1861 is not synonymous with, and does not comprehend, "jurisdiction."

THIS was an appeal from an order passed by the Judge of the 24-Pergunnas, rejecting a petition of Kalikrishna Chandra and Najibullah Mandal, who were appellants in a case which had been struck off the file on the ground that the appellants had not deposited the Talabana fees, and, consequently, no notice had been served on the respondent. In that case the appeal was preferred by two of the defendants in an original suit, against the decree of the Court of first instance, and the memorandum of regular appeal was duly filed in the Judge's Court on the 15th of January 1868. The 7th of February was fixed for the hearing of the appeal, and proper orders were given for the service of notice upon the respondent within the provisions of section 345 of Act VIII. of 1859.

When the case came on for hearing on the 17th of February, it was discovered that the appellants had failed to deposit the

* Miscellaneous Appeal No. 233 of 1868, from a decree of the Judge of the 24-Pergunnas.

1838

KALIKRISHNA CHANDRA v. HARIHAR CHUCKERBUTTY.

requisite sum of money for the expenses of the service of notice, and, consequently, no notice had ever been served; therefore, the Judge, exercising the "power given to him by sections 5 and 6 of Act XXIII. of 1861, struck off the appeal." On the 12th of March 1868, the appellants presented a petition to the Judge, explaining the reasons of their default, and praying that, upon payment of the necessary expenses, the appeal might be restored to its place and proceeded with. But the Judge disallowed the prayer of the petitioners, on the ground that the petition had been "presented after a long lapse of time."

Against the decision of the Judge rejecting this petition of the appellants, an appeal was now preferred to the High Court, on the grounds, 1*st*, that the petition having been presented within thirty days from the date on which the appeal was dismissed, the Judge was wrong in holding that the petition came too late; 2*nd*, that he was wrong in having omitted to consider whether there was good and sufficient cause for the appellants not having deposited the Talabana within the time allowed.

Baboo *Maheśwara Lal Mitter* for appellants.

Baboo *Kalikrishna Sen* for respondent.

PHEAR, J. (After stating the facts).—The first question which arises is, whether an appeal lies or not. The vakeel for the appellate has argued, that an appeal does lie on the following grounds: first, he says that the application to the Judge for the restoration of the appeal was regular, because it was made in conformity with the provisions of section 7, Act XXIII. of 1861, and because this section was, by the operation of section 37 of the same Act, made applicable to "cases of appeal," within which category, it is clear that the Judge's order dismissing the appeal falls. Then he says, it has been decided that an appeal lies against an order passed under the provisions of section 7 and section 5 of Act XXIII. of 1861, in the same manner that it does against an order

refusing re-admission of an appeal, made under section 347 of Act VIII. of 1859; and in support of this, he refers to the case of *Dinabandhu Chatterag* v. *Behari Lal Mookerjee* (1); therefore by parity of reasoning, it must be against an order of rejection passed under sections 7, 6, and 5 of the Act. And, thirdly, as an authority for maintaining that an appeal lies against a decision refusing re-admission of an appeal, under section 347 of Act VIII. of 1859, he cites the case of *Ramyad Jemadar* v. *Bisweswar Bhattacharji* (2); acquiesced in by the Judges in another case, *Harachandra Das Chowdhry* v. *Ram kumar Chowdhry* (3). In this way, he very logically makes out that an appeal does lie to this Court in this case.

I am of opinion, however, that each one of the three links in the chain of his reasoning, is faulty. In the first place, I do not think that section 7 is made applicable to cases in which the appellate Court has dismissed the appeal under tho provisions of section 6, Act XXIII. of 1861. The words of section 37 are: "Unless otherwise provided, the Appellate Court shall have the same powers in cases of appeals which are vested in the Courts of original jurisdiction in respect of original suits." I have some difficulty in satisfying myself as to what the legislature precisely meant when they used the word "powers" in this section, but be the meaning of that word what it may, assuming only, as I believe I am justified in doing, that it is not synonymous with "jurisdiction," I think that the following words, "in cases of appeal," do not comprehend that stage of proceedings which succeeds upon an order being made under sections 6 and 5. It appears to me that those words apply solely to cases where the actual subject of appeal is before the Court and being dealt with. Now, in the present case, the appeal itself was entirely at an end. The Judge had dismissed it. He had passed a final order between the parties under the extraordinary powers given him by section 6 and section 5 of Act XXIII. of 1861. I say extraordinary powers, because, strictly speaking, at the time that he passed the order under those sections, there was no

(1) 3 W. R., (M R.), 23.
(2) 2 W. R., (M R.), 23.
(3) 2 W. R, 254.

1868

KALIKRISHNA CHANDRA v. HARIHAR CHUCKERBUTTY.

appeal before him. There was only a memorandum of appeal filed. No respondent had been brought before the Court, and had it not been for the express words of the sections to which I am now alluding, the utmost that the Court could have done would have been to dismiss the memorandum or petition of appeal. It could not have passed an order which would be of final effect between the parties. However, the words of the section empower the Court, as it seems to me, actually to pass a final order between the parties as if an appeal were regularly before the Court, and there were both an appellant and a respondent, who could be affected by the order of the Court. The section empowers him to dismiss the appeal, and, accordingly, the appeal was dismissed. The subsequent application for the re-admission or re-hearing of the appeal, whatever be the foundation of the jurisdiction of the Judge to entertain it, was not an application in the original appeal. It was an application subsequent to it. It was an application of the nature of an application for review, and we have already had a ruling of a Full Bench of this Court, pronounting a decision of a Court which rejects an application for review to be no judgment in appeal (1). I am of opinion then, that the petition of the appellant to have his appeal re-admitted, although it had been finally disposed of, and the decision of the Judge refusing to grant his application, constitute matter *dehors* the appeal, although it may well be that it was matter disposed of by the Court in the exercise of its appeal jurisdiction.

Turning, now, with these views to the words of section 37, I consider that the giving the Appellate Court the same powers *in cases of appeal* as are vested in Courts of original jurisdiction, in respect of original suits, does not apply to cases where the subject, which is being dealt with by the Court, is not the actual appeal itself; and cannot, therefore, be rightly treated as standing in an analogous position to that of the original suit itself.

As I am further disposed to think, on like grounds, that the power given by section 11 of Act XXIII. to Courts of original jurisdiction, upon the contingency in the section mentioned, "to order a fresh summons to issue upon the plaint already filed,"

(1) *Raja Syud Enzet Hossien* v. *Rani Roushan Jehan*, 1 F. B. R., 1.

does not strictly come under the designation given in section 37, namely a " power vested in a Court of Original Jurisdiction in respect of original suit."

Having arrived at the foregoing conclusions, I am of opinion that that section does not have the effect of making section 7 of the same Act applicable to cases where the Appellate Court has passed an order under section 5 and section 6, dismissing the appeal.

It would seem, therefore, that the application to the Judge seeking to have the appeal re-heard, against which the appeal to us is now made, was essentially an application for a review of judgment; and, as such, the decision of the Judge rejecting it, was final.

If this view be correct, I think it entirely disposes of this case. At any rate. it renders it unnecessary for me to go into the further argument of the appellant, which was directed to demonstrating that an appeal lay against an order made under section 7 of Act XXIII. of 1861. But, if it had been necessary to have gone further, I should have felt myself at liberty to disregard, in this case, the decision to which the appellant referred us, *Dinabandhu Chatterag* v. *Beharilal Mookerjee* (1), because the judgment there given, couched as it is in very concise terms, does not necessarily appear to have been pronounced upon a case similar to the present. So far as the learned Judges who decided that case judicially interpreted any of the sections of Act XXIII. of 1861, and Act VIII. of 1859, they seem, from the words used by them, to have confined their attention to sections 5 and 6 of Act XXIII. of 1861, and orders made under them. They appear not to have had in contemplation a further and subsequent order supposed to be passed under section 7. No doubt, this limitation of their decision to these two sections only makes the reference to section 347 of Act VIII. somewhat obscure, and is, in some degree, inconsistent with what appears in the latter part of their judgment, where the Judges give their opinion upon the merits of the case. But I think it probable that the attention of those

(1) 3 W. R., (M. R.), 23.

1868

KALIKRISHNA CHANDRA v. HARIHAR CHUCKERBUTTY.

learned Judges was, in fact, directed more to the merits of the case, which, in truth, was made the foundation for their dismissing the appeal, than to the legal question which is apparently so lightly passed over by them; and this is my chief reason for thinking that we ought not to feel ourselves bound to treat this decision as a binding authority with regard to the law point upon which it may seem to bear. But apart from any possible inference which may be drawn from this decision, I see no sort of reason, why orders rejecting an application for re-hearing in the cases contemplated by sections 5, 6, and 7 of Act XXIII. should, in the absence of express legislation on the point, be considered necessarily to be in the same position relative to appeal, as like orders under section 347 of Act VIII. of 1859. In the one set of cases there is no respondent before the Court, and in the other there is. And this distinction alone is sufficient to destroy the supposed analogy, or, at any rate, to prevent it being strong enough to give any appeal where the legislature has not said that there shall be an appeal.

And I may add that, whether or not there is an appeal against orders passed under section 347, is a matter which at present rests solely on the second authority quoted by the special appellant, namely the decision of a Bench of this Court in *Harachandra Das Chowdhry* v. *Ramkumar Chowdhry* (1), and which lays down that an appeal lies from a decision given under the provisions of section 347 of Act VIII. of 1859; and this has, in effect, been over-ruled by the ruling of a Full Bench, which I have already quoted. For the Full Bench, in express terms, decided that an order made as an order under section 347 must necessarily be made *after* the appeal has been disposed of, is not an order made in appeal; and it was on the basis of an order under section 347, being an order made in regular appeal, that the Judges who decided the case of *Harachandra Das Chowdhry* v. *Ramkumar Chowdhry*, placed their judgment.

I desire further to say, that, had I not taken the view which I have taken of the meaning of the words "in cases of appeal," which appear in section 37 of Act XXIII. of 1861, I should

(1) 2 W. R., (M. R.), 23.

still have had very great difficulty in coming to the conclusion that section 37 had the effect of applying section 7 to cases within the Appellate Jurisdiction of a Court, in addition to cases of Original Jurisdiction, to which it seems to be limited by its own words. For it is observable that section 6, which comes between sections 5 and 7, expressly makes the provisions of section 5 applicable to appeals. The inference from this section, taking into consideration its relative position to the preceding and succeeding sections, in my mind, is this, that the legislature, when framing this section, did distinguish between "appeals" "and appellate jurisdiction," and did purposely abstain from enacting that section 7 should be applicable to appeals, which in my view, would have involved an absurdity. If, however, they had intended to use "appeals" in the sense of "appellate jurisdiction," and also to apply section 7 to cases of the latter, I should have expected that the words of section 6, instead of coming where they do, would have followed section 7, instead of the applicability of section 7 being left to depend upon the operation of the latter section 37, while that of section 5 was cared for by section 6. And, moreover, it is obvious that if section 37 operates to apply the provisions of section 7, in the way contended for, it must also apply section 5 to appeals; and, consequently, there was no need of having section 6 at all, because all that is done by section 6 is done equally well by section 37. I cannot, therefore, think that the legislature really intended section 7 to have the effect which is attributed to it, and I should further be rather disposed, if it was necessary to say, that the powers vested in Courts of original jurisdiction, spoken of in section 37, mean powers vested otherwise than by the words of the Act. No doubt, even with this limitation, an opening is afforded to the special appellant in this case, for argument, leading to a result which would apparently be favorable to him, namely, that even supposing section 37 of Act XXIII. of 1861 does not render section 7 applicable, it still will, by the interpretation which I have just mentioned, make section 119 of Act VIII. of 1859 applicable; and that latter section, after giving the opportunity to the plaintiff, against whom a decree by default has passed, to apply to the Court, within

1868

KALIKRISHNA CHANDRA v. HARIHAR CHUCKER-BUTTY.

30 days from the date of the judgment, for an order to set it aside, says, that, "in all appealable cases in which the Court shall reject his application, an appeal should lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable." And the appellant in this case might say that, as he has the benefit, by virtue of the interpretation of section 37, which I have just mentioned, he thereby gets the benefit of section 119 of Act VIII. of 1859, in its entirety; and, consequently, if the Judge, upon his application made under this section, rejects it, he has a right under the same section to appeal to this Court.

However, it seems to me that the use of the word "powers" in section 37, has the effect of rendering this argument nugatory. The utmost that section 37 by the use of that word can mean, is to give powers of action to the Appeal Court such as the Court of Original Jurisdiction enjoys, under the first portion of section 119 of Act VIII. of 1859; for it seems to me that it can have no applicability to the latter portion of that section. The latter portion of section 119 does not give powers to the Court of first instance trying and dealing with an original suit. It gives powers, if at all, to an Appellate Court, and section 37 only purports to give powers to an Appellate Court, such as are vested in a Court of first instance. It does not give powers to an Appellate Court in one class of cases, which are vested in an Appellate Court in another class of cases. And so even giving the appellant the advantage of the interpretation of section 37, which I have last mentioned, and which I by no means think, is the proper interpretation of the section, he does not in my opinion, obtain thereby the right to say that the latter part of section 119 of Act VIII. of 1859 is applicable to his case.

On the whole, then, it seems to me for every reason that the decision of the Judge in this case is one which we cannot touch upon appeal. I think that no appeal from it lies to the Court. It is not necessary for me now to say, whether the Judge had any jurisdiction to entertain the appellant's application, or if he had, whether he has properly entertained it, and exercised due judicial discretion with regard to it. I think that this

1868

KALIKRISHNA CHANDRA v. HARIHAR CHUCKER BUTTY.

appeal should be dismissed with costs, on the ground that we have no jurisdiction to entertain it.

HOBHOUSE, J.—I agree in the judgment delivered by Mr. Justice Phear in this case. It seems to me that the first question is to see whether the Judge who heard this case in appeal had jurisdiction to hear it; because, if he had jurisdiction, so have we; and if he had not jurisdiction, so have not we jurisdiction,—jurisdiction of course I mean within the provisions of section 7 of Act XXIII of 1861. The case before him was simply this. He dismissed an appeal under section 6 of Act XXIII. of 1861, for default of the appellant to pay any money for service of process. Having done this, the appellant appeared before him within 30 days after the order of dismissal, and under section 7 of that Act, asked him to entertain the question, whether he was satisfied that there was some sufficient cause for not having made the deposit required within the proper time. The Judge did so, and held, that the appellant had not shown sufficient cause for his failure, and, therefore, he dismissed the application; and it is with reference to this order that the special appeal is made before us.

It seems to me that, reading section 7 and section 37 of Act XXIII. together, there was no jurisdiction in the lower Court under these sections; neither is there jurisdiction in this Court to entertain the appeal. The question seems to me to turn entirely upon the use of the word "powers" in section 37. If the word "powers" comprehended the word "jurisdiction," then I think we should be in a position to entertain the special appeal. But it seems to me that the word "powers," especially with reference to the use of that word in other parts of the Act, and in Act VIII. of 1859, does not comprehend "jurisdiction." The word "powers," as used in section 358 of Act VIII. of 1859 is, used in regard to powers for granting time, for adjournment of hearing, for examination of parties and pleaders, for awarding costs, &c., but the word is not used in the sense of jurisdiction. For instance, it seems to me, and that has been ruled by a decision of this Court, that the word powers" in section 37 would comprehend the power to grant an appellant the liberty to

1868

KAL KRISHNA CHANDRA v. HARIHAR CHUCKERBUTTY.

bring a fresh suit; but it does not, in my judgment, comprehend jurisdiction. I hold, then, upon the reading of section 7 and section 37 of Act XXIII. of 1861 together, that we have no jurisdiction to entertain this appeal, and I agree in dismissing it with costs.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

1863
July 24.

SHIU GOLAM SING *v* BARAN SING.*

Joint-family Property—Onus probandi—Legal Presumption.

See also 12 B.L.R. 340.

The normal condition of a Hindu family being joint, it must be presumed to remain joint, unless some proof of a subsequent separation is given, and where property is shown to have been once joint-family property, it is presumed to remain joint, until the contrary is shown; but the mere fact of a family being joint is not enough to raise a presumption in law, that property acquired by one member of that family is joint property.

Where A. as purchaser claimed a share in property as being joint-family property, *Held*, A. was not only bound to show that the family was joint, but that the property in question became joint-property when acquired, or that at some period since its acquisition, it had been enjoyed jointly by the family.

THIS was a suit instituted in the Court of the Sudder Ameen of Sarun, to recover possession, with mesne profits, of a certain share of Mouza Pananpur, which the plaintiff alleged that he had purchased at an auction-sale in 1861. The plaintiff further alleged that the land, which was the subject of the suit, was the joint-family property of three brothers, and that, by purchase, he was entitled to the undivided share of one of the three brothers. The defendants denied that the land belonged to the brothers jointly; and, on the contrary, alleged that it was the self-acquired property of the elder brother, who was not the vendor of the plaintiff.

The Sudder Ameen decreed the claim of the plaintiff, but on appeal, the Principal Sudder Ameen reversed the decision of the lower Court, on the ground that the plaintiff had failed to make out that the property in dispute was the joint family property of the three brothers.

The plaintiff now appealed to the High Court on the ground, that the lower appellate Court had wrongly thrown on the

* Special Appeal, No. 769 from a decreee of the Principal Sudder Ameen of Sarun, reversing a decree of the Sudder Ameen ofthat district.