they are not parties to the suit; nor was it urged by the defendant that there is any defect of parties in consequence of the omission.

Plaintiff's ancestors and those of defendant were respectively two annas sharers of certain collections called *birt*, those who paid and are willing to pay on demand will do so, or otherwise as they please, notwithstanding any order that may now be passed.

The precedents cited by the special appellant, of 13th June 1850. and 13th May 1852, do not apply to this case, in both of them the rights of *purohits* to demand and recover from *jujmans* was the point at issue, and the court declared that no *purohit* could exercise such right without the consent of the *jujmans*.

In this case we would follow the decision of the court at page 405, Reports Sudder Dewanny Adawlut for 1852, on admission of a special appeal in the case of Sheonarain, petitioner.

That suit was not brought by a *purohit* in assertion of his rights, but by a claimant to a share in the incidents and profits of a *birt* tenure against the party in possession, a member of his own family; [4] and it was ruled that there was no reason why in such a suit for settlement of the right of the plaintiffs, as co-sharers in the *birtdaree* tenure or office, should not be adjudicated by the courts.

The case before us involves a similar right, the plaintiff sues a co-sharer, and the judgment as between them must rest on their rights as heirs to Ajnassee Koer. The points raised on the admission of the appeal do not apply. We dismiss the appeal with costs.

Mr. B. J. COLVIN.—I consider that the suit in this case was virtually to allot the houses of certain *jujmans* to the plaintiff instead of to the defendant. I think, therefore, that the decisions of the lower courts in favor of plaintiff militate against the principle of the court's decision of 13th May 1852, upholding the decision of 13th June 1850, which ruled that no *purohit* can, as of right, claim a share in the fees paid, either from the *jujmans* or payers, or from the *purohit* who received the fees. The judgments of the lower courts should, therefore, in my opinion, be reversed.

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*The 3rd January*, 1855.

PRESENT: SIR R. BARLOW, BART., AND H. T. RAIKES AND J. B. COLVIN, ESQRS., *Judges*.

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CASE NO. 15 OF 1854.

Special Appeal from the decision of Mr. W. Luke, Judge of Midnapore, dated 11th July 1853, reversing a decree of Russicklal Bose, Moonsiff of Nemal, dated 17th August 1852.

GUNGAHURREE JANA (*Plaintiff*), *Appellant v.* RAMDHUR DOSS (*Defendant*), *Respondent*.

[*Limitation—Appeal—Discretionary power to extend period of appeal—Regulation XXIII of* 1814, *section* 46—*Regulation VII of* 1832.]

*Held*, that Regulation VII of 1832 supersedes section 46, Regulation XXIII of 1814, giving discretionary power to judges to extend the period of appeal.

*Vakeel of Appellant*—Baboo Jugdanund Mookerjea.

*Vakeel of Respondent*—Moulvee Murhamut Hossein.

THIS case was admitted to special appeal on the 16th January 1854, under the following certificates recorded by Sir R. Barlow and Mr. H. T. Raikes:

Mr. H. T. RAIKES.—"The judge of Midnapore admitted an appeal from the moonsiff's decision, after the period of appeal had expired, after a summary inquiry into the appellant's allegation that the decision had been passed *ex parte* without due service of notice on the (plaintiff) appellant; the judge quotes the Construction No. 1048, in support of his proceedings.

[5] "The special appeal is asked for on the plea that the Construction No. 1048 is illegal. The power of the judge under clause 6, section 45, Regulation XXIII of 1814, to direct a party to appeal in consequence of any irregularity or error in the moonsiff's decision having been superseded by the more recent enactments of Acts V of 1831 and VII of 1832, he cannot now extend the period beyond the 30 days allowed by those laws.

"I am of opinion that the Construction No. 1048 is not warranted by any law now existing. The law which permits a judge to receive a petition of appeal after the period of appeal has expired is section 46, Regulation XXIII of 1814; that law allows a discretionary power to judges if the appellant shows cause why he was unable to appeal within the proper time; the law I believe only contemplated such circumstances as were beyond the control of the appellant, such as absence from the locality, &c., but did not intend to authorise the judge to adjudicate upon matters, which he could only legally determine after the appeal had been admitted. This he appears to me to have done in the present case, in deciding on the propriety of the moonsiff's *ex-parte* decree; I therefore admit the special appeal to try this point."

Sir R. BARLOW.—"I concur in the view, which Mr. Raikes with myself takes of the Construction No. 1048; but it appears to me that by clause 1, section 46, Regulation XXIII of 1814, had the judge relied upon that law, he could have, under the discretionary powers vested in him, admitted the appeal, though not presented within the prescribed period, having first determined as he did that satisfactory cause for the petition not having been presented within the prescribed period, 30 days as laid down in the section and clause quoted, had been shown. A summary inquiry as to the service of notice was necessary in the first place, this having been made, an appeal was admitted and the case was tried and decided before both parties.

"This point, I think, arises out of the record and might be adjudicated by the court on this admission."

*Murhamut Hossein*, for respondent.—This application was admitted before passing of Act IX of 1854. The judge under clause 1, section 46, Regulation XXIII of 1814, tried the case on its merits, any reference to Construction No. 1048, on which he relies, is of no force in the face of the law which warranted his disposing of it.

*Baboo Jugdanund Mookerjea contra.*—Act IX of 1854 bars the hearing. My client's interests would have been and are affected by the judge having heard the case, though he had no power to try it.

We got an *ex-parte* decree in the moonsiff's court against which no appeal was preferred for 5½ months; had the judge not received the appeal wrongly, we should have held our own rights.

[6] In reply to the above, the respondent's pleader urges the applicability of Act IX of 1854.

The court determine that the case shall proceed, the objection raised by the appellant to the judge's decision is no technical objection, but substantial, materially affecting petitioner's rights, a decision which has forced him to special appeal.

*Argument continued.*—The provisions of section 46, Regulation XXIII of 1814, applied to moonsiffs under the old *regime*. After Regulation V of 1831, and the enactment of Act VII of 1832, and section 9, Act XXV of

1837, no more than 30 days are allowed for appeals from moonsiffs, deducting period allowed by clause 10, section 8, Regulation XXVI of 1814.

The Construction No. 1048 was passed in no case or argument, while clause 4, section 2, Regulation VII of 1832, most strictly prohibits any enlargement of the 30 days laid down for appeal.

JUDGMENT.

We are of opinion that the Construction No. 1048 must not be allowed to be of any force in this case; first, because it was not passed by the court on argument, but on a reference, and again because it was passed in 1836, after the promulgation of Regulation VII of 1832, to which it is opposed, inasmuch as that law supersedes the discretionary power given to judges by section 46, Regulation XXIII of 1814, to extend the period of appeal. For the above reasons we reverse the judge's decision and confirm the *ex-parte* decision of the moonsiff with costs.

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*The 3rd January*, 1855.

PRESENT: SIR R. BARLOW, BART., AND H. T. RAIKES AND B. J. COLVIN., ESQRS., *Judges*.

CASE NO. 16 OF 1854.

Special Appeal from the decision of Mr. W. Luke, Judge of Midnapore, dated 11th July 1853, reversing a decree of Russicklal Bose, Moonsiff of Nemal, dated 17th August 1852.

CHUNDEECHURN JANA (*Plaintiff*), *Appellant v.* RAMHURREE DOSS (*Defendant*), *Respondent*.

See above. [11 S.D.A.R. 4, *supra*.]

*Vakeel of Appellant*—Baboo Jugdanund Mookerjea.

*Vakeel of Respondent*—Moulvee Murhamut Hossein.

THIS case was admitted to special appeal on the 16th January 1854, on the same grounds as in case No. 15, recorded by Sir R. Barlow and Mr. H. T. Raikes.

[7] JUDGMENT.

For the decision in this case, see that passed in No. 15, by the court this day.

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*The 8th January*, 1855.

PRESENT: SIR R. BARLOW, BART., AND B. J. COLVIN, ESQ., *Judges*.

PETITION NO. 554 OF 1854.

[*Special appeal—Mistakes of fact—Remand—Co-sharers in undivided estate—Non-joinder of parties—Irregularity.*]

Order of remand as per certificate.

*Vakeel of Petitioners*—Baboo Ramapersaud Roy.

*Vakeel of the Opposite Party*—Mr. J. G. Waller.