APPELLATE JURISDICTION *(a)*

Special Appeal No. 188 *of* 1863.

KISARA RUKKUMMA RAU and another .....*Appellants.*

CRIPATI VIYANNA DIKSHATULU.....*Respondent.*

The rule under Reg. XIV of 1816, Sec. 30, that each of two vakils appointed by a party to a suit shall be entitled to a moiety of the fee payable, applies only to cases where they are appointed by the same vakálatnáma.

In the absence of a demand in writing, interest up to the date of suit cannot be awarded upon sums, not payable under a written instrument, of which the payment has been illegally delayed.

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THIS was a Special Appeal from the decision of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Appeal Suit No. 138 of 1860, affirming the judgment of the Principal Sadr Amin of Masulipatam, in Original Suit No. 6 of 1860.

The plaintiff sued for rupees 595-2-11, being fees, with interest, payable to him by the defendant for work done by the plaintiff as the vakil of the defendant in certain suits which were compromised at the close of the pleadings.

The Principal Sadr Amin and, on appeal, the Civil Judge awarded three-fourths of the fees which would have been payable if the suits had respectively terminated by a decree. And though, there was no allegation of a demand in writing, the Sadr Amin and Civil Judge awarded interest upto the date of suit.

Mayne, for the special appellant, the 1st defendant.

First. Under Regulation XIV of 1816, Section 30, the plaintiff, being only one of two vakils appointed by the defendant was entitled to only one-half of the fee. That section enacts, first, that "the parties in a suit are respectively permitted to entertain two or more pleaders, who shall either divide the authorized fee between them, in an equal, or in any other proportion which may have been previously agreed upon between them and their constituent, or shall each be entitled to receive the full established fee, *as may be specified in the vakalatnama ; but all stipulations to this effect shall be distinctly stated in the vakalatnama, which shall otherwise be construed to entitle the whole of the vakils ap-*

(a) Present : Scotland, C. J. and Holloway, J.

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pointed by it to an equal division of the established fee and no more. (*a*) Second. It shall be sufficient in such cases for the party employing two or more vakils in the same suit, to file a single vakálatnáma ; *but the party shall be required to deposit in Court the whloe amount of the fees payable to his pleaders, under the rules contained in Section XXIII of this Regulation.* (*b*) "Third. If the party shall agree to pay to each of the vakils employed by him the full amount of the authorized fee, the opposite party in the suit shall in no case be required to make good more than the fee of one of those pleaders, on such part of that fee as may be adjudged against him by the Court. The fees of the other pleader are to be considered as a separate expense, to be defrayed exclusively by the party entertaining him, and for which he is not to be reimbursed in any case whatever."

Secondly. One-half, and not three-fourth's of the fee should have been awarded. Section 31 of Regulation XIV of 1816 enacts, first, that "if a suit shall be withdrawn or dismissed on default without a determination upon the merits of the case before all the requisite pleadings shall have been filed in Court, the respective pleaders of the plaintiff and defendant, or of the appellant and respondent, shall each be entitled to only one-fourth of the established fee, which they would have received had the suit been brought to a regular decision by the Court. If a suit shall be withdrawn or dismissed on default after all the requisite pleadings shall have been filed in Court, the respective pleaders are to be entitled to one-half the fees which they would have received if judgment had been given in the cause. The fees in both of the above-mentioned cases are to be charged to the plaintiff or appellant withdrawing the suit, or suffering it to be dismissed on default, together with all the admitted costs incurred

(*a*) The passages in italics have been virtually repealed by Act I of 1846.

(*b*) This Act, which extends to India the provisions of 3 and 4 W. 4, c. 42, s 28, enacts that upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment ; provided that interest shall be payable in all cases in which it is now payable by law.

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by the defendant or respondent. "Second. The same rules shall be considered applicable to cases adjusted by razinama except that the fees of the pleaders and all other costs of the suit, shall be paid by the parties in such manner and proportions as may have been agreed upon, and inserted in the rázináma."

Thirdly. As there was no allegation of a demand in writing, interest should not have been awarded up to the date of suit. Act XXXII of 1839.

The Court delivered the following

JUDGMENT :—The first point made for the appellant was that under section XXX, Regulation XIV of 1816, the present plaintiff, being only one of two vakils appointed by the defendant, is entitled only to one-half of the fee payable. We are of opinion, however, that this rule applies only to cases in which two or more pleaders are appointed by the same vakálatanáma. If it were otherwise it is manifest that the practitioner's remuneration might without his knowledge be reduced to a sum for which he would wholly have declined to undertake the duty.

On the second point that one-half and not three-fourths of the fee should have been awarded, we are of opinion that the decree is wrong and must be modified. Section XXXI of Regulation XIV of 1816 is the enactment upon which the question depends, and it is there distinctly provided that one-half of the established fee only is to be paid if the case is determined by agreement at the close of the pleadings. After they have been filed we are unable to find any provision for the award of three-fourths of the fees, and can only suppose that the result has been attained by adding one-fourth of the fee payable if the suit goes off before the close of the pleadings to the one-half payable if it is determined at their close. The decree must be modified by the allowance of one-half instead of three-fourths.

The question of interest depends upon the true construction of Act XXXII of 1839, and judgement on this point was not given at the hearing to enable us to consider the effect of the words "Provided that interest shall be payable in all cases in which it is now payable by law." If

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the practice which has unquestionably prevailed in the Mofussil Courts for a long series of years of awarding interest upon all demands of which the payment has been illegally delayed, was shown to be based upon any existing regulation or positive rule of law by which interest would at the time the Act passed have been payable in respect of this debt, unquestionably it would still be payable notwithstanding the enactment. We are unable, however, to find any such provision, and it necessarily follows that, there being no allegation of a demand in writing, the award of interest up to the date of suit must be disallowed. The appellant is entitled to the costs of this appeal.

Appeal allowed.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 369 *of* 1863.

ILATA SHAVATRI and another.....*Appellants.*

ILATA NÁRAYANAN MAMBUDIRI.....*Respondent.*

A Hindu adulteress living apart from her husband cannot recover maintenance from him so long as the adultery is uncondoned.

A daughter living apart from her father for no sufficient cause cannot sue him for maintenance.

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THIS was a Special Appeal from the decree of Wm. Holloway, Civil Judge of Tellicherry, in Appeal Suit No. 442 of 1861, reversing the decree of J. M. D'Rozario, the District Munsif of Calicut, in Original Suit No. 450 of 1858. This suit was brought by the wife and daughter of the first defendant to recover certain ancestral property in his possession, out of which they alleged themselves to be entitled to maintenance. It appeared that the first plaintiff had committed adultery, that she had consequently been expelled from her caste, and that she and her daughter had left the first defendant's house and were then living apart from him. The Munsif, however, fancying that Act XXI of

(*a*) Present : Phillips and Frere, JJ.